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**Good Company – The Role of Corporations in a Just Society**

Interfaith Center on Corporate Responsibility  
Thursday, September 29, 2022  
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The Prince George Ballroom  
15 East 27th Street  
New York, NY 10016

**A Form of 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.<sup>1</sup>**

Followed by:

A Conversation with  
Alison Taylor  
Executive Director at Ethical Systems

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## **I. Introduction**

Today, I am going to wade into shark-infested waters and venture some thoughts on this key question: are there principled, non-ideological methods by which corporate leaders — and essential to this audience — institutional investors can approach the still controversial topic of whether and to what extent for-profit corporate boards may consider interests other than stockholder welfare in running their companies? And these 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 the corporation's treasury funds to fund political candidates and social causes or to exert similar pressure on society? Put more simply, is there a conception of good corporate citizenship that we can all get behind?

For an Interfaith group of investors, these topics are important for reasons the very name of your group suggests. Not everyone shares the same religious faith or political beliefs.<sup>2</sup> The freedom for us as Americans to have this diversity

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<sup>2</sup> The reality is that 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 J. EUR. POL. RES. 333 (2018) (concluding, based on a cross-national

of beliefs and values is one that most of us cherish, and the fact that we work for a large corporation — as approximately 37 million Americans do<sup>3</sup> — or give over our money to institutional investors to buy corporate stock to save for college for our kids, and retirement for ourselves,<sup>4</sup> does not mean that we are implicitly consenting to the religious or political beliefs of the corporate board of our employer, or to the use of our entrusted capital for political purposes by the corporations into which these institutional investors invest our savings.<sup>5</sup>

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empirical analysis, that party identification is even stronger than attachments to other social groups, including religious ones).

<sup>3</sup> See Frederik P. Schlingemann & René M. Stulz, *Have Exchange-Listed Firms Become Less Important for the Economy?* 2 (2020) available at <http://www.nber.org/papers/w27942>; U.S. BUREAU OF LABOR STATISTICS, TABLE B-1, EMPLOYEES ON NONFARM PAYROLLS BY INDUSTRY SECTOR AND SELECTED INDUSTRY DETAIL, (2019) (In 2019, 29% 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 CEO's*, 11 J. LEGAL ANALYSIS 1-45 (2019), available at <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 as of 2010, 31.3% of private sector employment).

<sup>4</sup> U.S. BUREAU OF LABOR STATISTICS. NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN THE UNITED STATES 191 (Mar. 2021), available at <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% of private-sector workers have access to one, whereas 65% of such workers have access to a defined-contribution plan.).

<sup>5</sup> Investors affiliated with faith communities understand they have to confront these realities. E.g., U.S. CONFERENCE OF CATHOLIC BISHOPS, *Socially Responsible Investment Guidelines for the United States Conference of Catholic Bishops* (Nov. 2021); Ana Casilda Apascible & William Cowper, *Seeking Impact: New Catholic Investing Guidelines Break the Mold*, ISS INSIGHTS (Feb. 2022).

How do we balance those realities with others? Don't most of us want to have corporations that make money the "right" way — companies that seek to generate profits in a way that does not harm their workers, their creditors, their communities of operation, their consumers, or the environment? Don't we want companies that have high ethical standards, that when in doubt of whether their actions might be unethical, err on the side of high-minded, other-regarding conduct? And precisely because large corporations are such leading players in our society, don't we want them to speak up if their leaders perceive injustice is going on in the communities and societies in which they operate?

But do we want companies to take stands when they disagree with us? Or, to go to work, and feel that by believing something different than the CEO, you are putting your family's future at risk if you dare to voice your contrary view? And are we comfortable that corporate executives and directors, who come predominately from a narrow and privileged sliver of our nation's populace, get to use resources that are not theirs to advance their views on controversial issues on which their company's investors and workforce have views as diverse as the American public's? Doesn't that risk turning our nation's premises upside down, and risks the many being subjected to too much power by the few, and power that comes from managing other people's money?

These are not easy topics to address in a principled, non-ideological, non-faith specific way.<sup>6</sup> Doing so requires facing one's own biases, and admitting that there is no answer in which you get to have everything you want. And in discussing these issues, I will try to be candid about my own biases and not deceive you or myself about my prior's.

Thus, my goal is to try 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 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. Being candid, I do so with an admitted bias toward not encouraging companies to become Republican or Democratic corporations, or Catholic or evangelical companies, or Muslim or atheist companies. I do not favor a polarized

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<sup>6</sup> Reading the 2022 version of the Edelman Trust Barometer reveals these tensions. *See* EDELMAN TRUST BAROMETER (2022) *passim*. 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 themselves in societal discussions about subjects of legitimate disagreement.

dystopia in which workers and consumers are compelled to, on one hand, hew to or submit complacently during the bulk of their waking hours, to a stated company belief system, or, on the other hand, quit their job and expose their family to economic harm. That is a Hobson's choice that involves a substantial constriction of American freedom. I therefore admittedly prefer that business entities granted the secular privilege of having the important rights and advantages of corporate status<sup>7</sup> be ones where Americans, in their full range of religious and political

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<sup>7</sup> 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 thus 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. (3 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 equally essential to recognize that corporations are not human beings and that they only have the rights that society gives to them,

diversity, can work together, so long as they tolerate and respect each other, and labor together productively to help the company succeed.

Likewise, I do not think Americans should have to fear that their economically required investments in the stock market will fund political or social spending that they cannot be deemed to have implicitly approved. And that is especially the case if, as some advocate, corporations should focus solely on stockholder profits as the 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 stakeholder protections, they will tend to diminish those protections.<sup>8</sup> Thus,

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and that any extension of constitutional standing to them must be sensitive to the dangers that empowering corporations may undermine the rights of those for whom our polity exists — its human citizens.

<sup>8</sup> It is not difficult to find examples of corporations lobbying against laws that protect workers, consumers, or the environment. For some recent examples, *see e.g.*, Jeffrey Dastin, Chris Kirkham, & Aditya Kalra, *Amazon wages secret war on Americans' privacy, documents show*, A Reuters Special Report (Nov. 19, 2021) (reporting on Amazon Inc.'s legislative fight against consumer data privacy regulations), <https://www.reuters.com/investigates/special-report/amazon-privacy-lobbying/>; Jennifer Liberto, *Companies ramp up fight against \$10.10 wage*, CNN BUS. (May 6, 2014) (reporting on Applebee's, IHOP, Dairy Queen, and other U.S. businesses' resistance to the raising of federal minimum wage), <https://money.cnn.com/2014/05/06/news/economy/companies-against-minimum-wage/>; Marc Rod, *Business groups slam House for passing \$15 minimum wage bill*, CNBC (July 19, 2019) (reporting on businesses within the restaurant and retail industry in disagreement of minimum wage bill), <https://www.cnbc.com/2019/07/18/business-groups-slam-house-for-passing-15-minimum-wage-bill.html>; Oliver Milman, *Apple and Disney among companies backing groups against US climate bill*, The Guardian (Oct. 1, 2021) (reporting on Apple, Disney, Microsoft, and other large U.S. corporations' opposition to U.S. climate bill), <https://www.theguardian.com/us-news/2021/oct/01/apple-amazon-microsoft-disney-lobby-groups-climate-bill-analysis>; Sandra Laville, *Top oil firms spending millions lobbying to block climate change policies, says report*,

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

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The Guardian (Mar. 21, 2019) (reporting on funds spent by oil and gas companies like Chevron, BP, and Exxon to promote political campaigns against the passing of climate-change laws), <https://www.theguardian.com/business/2019/mar/22/top-oil-firms-spending-millions-lobbying-to-block-climate-change-policies-says-report>. 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*, 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 50 sources of lobbying spending in 2016 spent \$716 million, and one of them, the Association of Retired Persons — was not 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%) of the \$1.1 billion they gave in 2010 to [federal] lobbying. They spent a further \$112 million (10%) on state level candidates, parties and ballot initiatives and \$31 million (3%) 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 *Influence & Lobbying*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/industries/slist.php> [<https://perma.cc/D5TH-7HMP>] (follow hyperlinks for each sector; then follow hyperlink to “Total”). Business interests also vastly outspend labor. “[T]he 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. FOR RESPONSIVE POL., <https://www.opensecrets.org/elections-overview/business-labor-ideology-split>. These trends hold to the day, and the current data show that business and industry lobby expenditures are large multiples over labor, environmental, and consumer interests. See *Influence & Lobbying*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/industries/slist.php> [<https://perma.cc/D5TH-7HMP>] (follow hyperlinks for each sector; then follow hyperlink to “Total”).

undermine those protections using the entrusted capital of investors with diverse political beliefs without their express permission. In fact, was that not the basic original position of Milton Friedman and his followers, which is that if the corporation has extra cash for politics or causes it does not need for business, it should return those funds to stockholders and allow them to use the funds in accord with their own diverse beliefs and desires?<sup>9</sup>

Similarly, it is not without some cognitive dissonance to call on — or even publicly 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 it is unlikely there is any 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,

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<sup>9</sup> See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM*, at 135 (40<sup>th</sup> 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.").

of course. But until the world is comprised solely of people and thus corporations exactly like you,<sup>10</sup> it does not provide a principled path forward either.

To frame my argument that there is principled way to reconcile these concerns and come up with a concept of good corporate citizenship that most Americans, regardless of political, religious, or social values 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 basic 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 nonetheless persists within corporate law about the permissible ends of for profit corporate governance, by 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, but involve corresponding trade-offs that are important, including

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<sup>10</sup> How boring!

confronting the reality that expanding the ability of for-profit corporations to pursue religious or social values not only will have an effect on society as a whole, but a particular, 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. That path involves concentrating on how corporations' own conduct affects the best interests of their workers, their communities of operation, their consumers, taxpayers, and the environment, and encouraging them to make money the right way, by seeking profit without externalizing their costs to others, and supporting the basic institutions of the society upon which the corporations themselves depend. As to debatable issues of policy and faith, corporations should largely leave them to their human investors, workers, and consumers to decide for themselves, and show respect for the freedom of belief of these diverse stakeholders by not misusing entrusted capital or corporate influence to impose the beliefs of corporate management on any stakeholder group. And when corporations do get involved in these issues, I suggest guardrails involving traditional tools of corporate law like requirements for board or stockholder approval that will better ensure that when corporations speak on issues, they do so with the support of the most legitimate sources of authority under corporate law

and with greater likelihood of embodying a consensus view of their investors, and not as a result of just personally driven decisions by CEOs. 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**

As we seek to isolate what in fact the real issues are in the debate over the ends of for profit corporate governance, two substantive corporate law issues that sometimes gets 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 in any way controversial among 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 much dust has been kicked up over the subject of corporate purpose, and however much the United States Supreme Court's understandably shaky grasp of corporate law<sup>11</sup> has created uncertainty about it,<sup>12</sup> the basic question of who gets to decide what corporate policy is toward social or religious issues does not really vary at all in any of the American states.

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<sup>11</sup> 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.

<sup>12</sup> 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*, 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.*

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>13</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 specifically set forth in the

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*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.

<sup>13</sup> Del Code Ann. tit., § 141; Revised Model Business Corporation Act (RMBCA) §8.01; *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*, ch. 8 at 165 (Micah Schwartzman, Chad Flanders & Zoë Robinson 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.”).

charter.<sup>14</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>15</sup> Over time, however, corporate law statutes became broadly enabling, with broad flexibility existing for corporations to change business lines and directions so long as they 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>16</sup>

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<sup>14</sup> Pollman, Elizabeth, *The History and Revival of the Corporate Purpose Clause* (2021), 99 TEX. L. REV. 1423, 1426, available at <https://texaslawreview.org/the-history-and-revival-of-the-corporate-purpose-clause/> (“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.”).

<sup>15</sup> *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”).

<sup>16</sup> Del Code Ann. tit. 8, § 101 (“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); RMBCA § 3.01 (“Every corporation incorporated under this Act has the purpose of engaging in 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).

Not only that, these broadly enabling statutes provide the board with huge discretion to take action, 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>17</sup> — with fiduciary duty review having teeth typically only when a corporate decision involved a conflict of interest.<sup>18</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>19</sup> The weakness of this constraint

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<sup>17</sup> 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).

<sup>18</sup> *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 (2001) (“ . . . duty of loyalty claims—has 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. . .”).

<sup>19</sup> *See Shlensky v. Wrigley*, 95 Ill. App. 2d 173, 237 N.E.2d 776 (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).

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>20</sup> over the best interests of stockholders.<sup>21</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 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>22</sup>

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<sup>20</sup> *Id.*

<sup>21</sup> 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) (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). And in one of those cases, the iconic case involving Henry Ford, his view that workers should be paid more, of course, could easily be seen as one that would create millions more consumers of his expensive new product. See *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919).

<sup>22</sup> *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 people in view when they believe that doing so is rationally related to shareholder value, as it generally will be); 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

The reason I raise the two subjects I have is that idea sometimes surfaces that it is more legitimate — as a matter of corporate law itself 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>23</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>24</sup>

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balance stakeholder interests, even in Delaware); 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, 773 (2015) (“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”).

<sup>23</sup> 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> (“it’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*, HARV. BUS. L. REV. , 5 (2), 173, 177 (“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”).

<sup>24</sup> 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*

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>25</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 — with those who invest in companies with a controlling stockholder accepting that as a practical matter, their influence over the direction of the company will be even more limited

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*Voluntariness in Corporate Political Speech*, 119 YALE L.J. ONLINE 53, 58 (2009), available at [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, *Rational Debate, The Modern Corporation and Social Responsibility*, Am. Enter. Inst. for Pub. Poly Rsch., at 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.”).

<sup>25</sup> Lynn A. Stout, *Bad and Not-so-Bad Argument for Shareholder Primacy*, 75 U.S.C. 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*, Harcourt, Brace & World, Inc., ch. 2, at 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 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.”).

As a matter of strictly statutory corporate law as it now stands as opposed to larger considerations of republican democracy, that is, there is no less legitimacy for the board of General Electric, Alphabet, or Disney to take positions on religious or social matter than for the board of Hobby Lobby.<sup>26</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 there is the likelihood that the stockholder base generally 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, as a first blush reaction without much thought, 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

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<sup>26</sup> 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 N.W. 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 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.*

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 also of the rise of index investing, it is not easily possible for ordinary investors to “select out” of companies, be they controlled or not controlled, on the basis of particular policies.<sup>27</sup>

For present purposes, though, I just want to be clear about two things corporate law says. 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

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<sup>27</sup> 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 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. L. REV. 497, 535-36 (2010) (noting the reality that 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 [*Citizen 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.”)

directors.<sup>28</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>29</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>30</sup> Rather, the question on which they

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<sup>28</sup> 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 A. Skeel, Jr., *The Corporation as Trinity*, <https://ssrn.com/abstract=4154720>, will be forthcoming in *Seattle L. Rev.* Berle (2022). 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 31.

<sup>29</sup> Lucian Bebchuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain*, 94 *SO. CAL. L. REV.* 1467, 1489, SSRN: <https://ssrn.com/abstract=3677155> (finding thirty-three states with constituency statutes in force during the period from 2000 to 2019).

<sup>30</sup> 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 constrains 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, 1050 (1931) (“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

have long divided is whether that 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.

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both, are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears. . . where 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 Adolf A. Berle, Jr., *Corporate Powers As Powers in Trust*, 45 HARV. L. REV. 1365, 1367 (“you can not 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).

### **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>31</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 are those who argue 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 and statutes to protect them.<sup>32</sup> They justify that view for a few reasons. First, they argue that corporate law is designed as a broadly enabling contract law largely between corporate managers and stockholders, and that the managers will be too unconstrained if they do not have to at least justify all

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<sup>31</sup> William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261 (1992).

<sup>32</sup> One of the leading proponents of this viewpoint has been Lucian Bebchuk. See Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 168 (2020) (acceptance of stakeholderism “could well have an additional direct negative effect on stakeholder interests that would likely make them overall worse off. [And] by raising illusory expectations about its ability to remedy corporate externalities, stakeholderism would impede, limit, or delay policy reforms that could offer effective protection to stakeholders.”); Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 730-31 (2007) (directors are even less likely to share common interests with corporate stakeholders than with corporate stockholders, and that reducing director accountability to stockholders “does not make them more accountable to stakeholders at the expense of accountability to shareholders. Rather, such insulation makes boards accountable to no one.”).

their actions in terms of advancing the best interests of stockholders.<sup>33</sup> Second, they argue that other interests, such as workers, are protected by other 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 repaid 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 that expanding pie will also give the firm more pie to share with its contractual stakeholders and pay more in taxes to society for it 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 very 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

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direction pursuing stockholder welfare, and to view the respectful treatment of key stakeholders as important to the company's ability to generate profits.<sup>34</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 — and its board and CEO uses 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>35</sup> often argued that if companies have spare cash for politics or causes, they could return it to their stockholders and allow them to choose how and whether to spend it for those purposes.<sup>36</sup> In support of

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<sup>34</sup> 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 VAN. L. REV. 83, at 129-30 (2004); Lucian Bebchuk, Kobi Kastiel & Roberto Tallarita, *Does Enlightened Shareholder Value Add Value?*, 77 BUS. LAW. 731, at 735-36, 751-52 (2022); David S. Ruder, *Public Obligations of Private Corporations*, 114 U. PA. L. REV. at 222-23 (1965).

<sup>35</sup> In an interesting article, Professor Bainbridge takes nuanced issue that Milton Friedman was a conservative, or that Hayek was. Stephen M. Bainbridge, *Corporate Social Responsibility in the Night-Watchman State*, 115 COL. 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 left, who find them a wellspring of wisdom, and 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 reality, 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 quite distinct from the form of economic liberalism that Friedman and others espoused.

<sup>36</sup> *See supra* note [5].

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>37</sup>

The other school took a broader view of corporate purpose, but one that has historically been only incrementally different. This other school held that stockholders are just one of the corporation's stakeholders, and that their superior power position under corporate law does not mean that the board itself must subordinate other stakeholders' welfare to that of the stockholders. Rather, this school holds 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

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<sup>37</sup> See sources *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.”).

equal end of for-profit governance.<sup>38</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>39</sup> Under this view, the board is not required to contort itself in order to justify other-regarding behavior toward the workers. It could straightforwardly say that we seek to make profit but in a way that is fair to our stakeholders, and that sometimes stockholders must accept less profit for us to do business in the way we think is right. Put simply, 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

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<sup>38</sup> Allen, *supra* n. 31, 14 CARDOZO L. REV. 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.”).

<sup>39</sup> 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 focus on stockholders versus stakeholders, as opposed to larger issues of political engagement by corporations. See Bebchuk, *supra* note [18]; see also Lucian A. Bebchuk, *The Mythical Benefits of the Shareholder Control*, 93 VA. L. REV. 790 (2007); Martin Lipton & William Savitt, *The Many Myths of Lucian Bebchuk*, 93 VA. L. REV. 733 (2007).

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>40</sup>

What is notable in the vast literature about these schools is how narrow the differences between them can seem in terms of the current debate.<sup>41</sup> The historical debate reignited in the last part of the 20th 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>42</sup>

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<sup>40</sup> 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”).

<sup>41</sup> 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. Conference of Catholic Bishops (USCCB) Statement, *Socially Responsible Investment Guidelines for the United States Conference of Catholic Bishops* (Nov. 2021).

<sup>42</sup> Allen, *supra* note [31], 14 CARDOZO L. REV. at 274-75

But, little to nothing in this debate in the late 20<sup>th</sup> century turned on some of the questions arising today.<sup>43</sup> From a debate about whether stockholders were primary among other corporate stakeholders has now enlarged 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>44</sup> To boycott a state that adopts public policies that do

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<sup>43</sup> 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*, Westview Press (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*, CALIFORNIA MANAGEMENT REVIEW, Vol. 40, n. 2, 8 (1998). 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.”

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.

<sup>44</sup> I acknowledge that it is possible that corporations do not have the purpose or intend, say in the way that the Model Penal Code would use words of that kind, Model Penal Code, § 202, 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,” *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 and Democrats and independents, <https://www.pewresearch.org/politics/2019/03/14/political-independents-who-they-arewhat-they-think/> (“Among the public overall, 38% describe themselves as independents, while 31% are

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 — for example, about abortion or reproductive choice? about religious observance? about sexuality? — and impose the board's view on its 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 1950's and 1960's, which were less about harm to stockholders, and more that the massive wealth and influence of corporations might be deployed to influence society toward liberal ends that they opposed.<sup>45</sup> It

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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. *Conflicted Consequences: A Graphic Study on How Public Company Political Money Has Reshaped State and National Politics From 2010 to Today*, 5, 8-27 Center For Political Accountability (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 administration 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.

<sup>45</sup> 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 the cloak of social responsibility,

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, and 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.

In 2022, these concerns are now voiced by not just the right, but the left, and there is growing debate over the wisdom and legitimacy of having corporate leaders use their corporation’s clout to advance public policy ends that have no direct connection to the corporation or its relationship to its stakeholders.

Although some of the debate still involves the more prosaic questions of the late 20th 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. When I say general, I mean that, issues of general social and political policy that would exist regardless of whether the corporation or its industry did,

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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.”).

and that have no intrinsically close link to the corporation's own basic 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?**

The problem with the current debate, however, is that much of it does little to advance a principled approach to addressing the extent and manner in which corporations can pursue social or political ends, and more about the natural tendency of people to like corporate conduct that accords with their personal values, and to argue that corporate conduct discordant with their personal values is wrong.

Let's start from the side of the political spectrum on which I reside: the left. The left has applauded 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>46</sup> such as the so-called

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<sup>46</sup> 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> (announcing that “more than 200 major companies” signed a statement “opposing the 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

North Carolina “bathroom bill”; support laws protecting the right to have an abortion;<sup>47</sup> restrict the types of and circumstances under which guns can be purchased and carried;<sup>48</sup> reform policing and voting procedures they consider

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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).

<sup>47</sup> 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/>.

<sup>48</sup> Examples of corporate action in the wake of public sentiment after mass shootings include companies stopping the sale of certain types of weapons. *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 (listing corporations that have taken meaningful action on gun control). *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.”).

harmful to black people;<sup>49</sup> and oppose President Trump’s refugee ban.<sup>50</sup> At the same time, however, the political left has largely bemoaned the decision in *Hobby Lobby*<sup>51</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 with those views.<sup>52</sup> Likewise, although the political left has encouraged

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<sup>49</sup> 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).

<sup>50</sup> See e.g., Kate Taylor, *Starbucks has become a target of Trump-loving conservatives — and that’s great news for the brand*, Business 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 announces that they plan to hire over 10,000 refugees in response to former president Trump’s refugee ban).

<sup>51</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

<sup>52</sup> 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

corporations to use the huge clubs of boycotts, threats to relocate or downsize operations, or to take out ads targeting opponents of policy it opposes,<sup>53</sup> it has more or less uniformly taken the position that corporate political spending is illegitimate and ought to be prohibited.<sup>54</sup>

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(June 30, 2014), <https://www.mediaite.com/online/i-feel-sick-liberal-pundits-react-to-scotus-hobby-lobby-ruling> (noting that “[w]hile conservatives celebrated, liberal pundits were outraged and thunderstruck”); Carmel Martin & Joshua Field, *Re-Establishing Religious Liberty Post-Hobby Lobby*, CTR. FOR 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.”).

<sup>53</sup> *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 Inc., where CEO Robert Unanue expressly supported Donald Trump’s presidency over social media, which sparked much controversy between the right and left calling for boycotts of the Hispanic food distributor but also support from other notable politicians like U.S. Senator Ted Cruz who replied, “[a]nd 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*, National Review (July 10, 2020).

<sup>54</sup> 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*.”); 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.”).

The right side of the spectrum is in no more principled a place. Just this year, there has been a wave of bills and speeches decrying “woke capitalism” and arguing that business leaders have no proper basis to talk about issues like climate change, reproductive choice, voting rights, or equality.<sup>55</sup> Decisions by large

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<sup>55</sup> 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, *New Rubio Bill Helps Shareholders Fight Back Against Woke Corporations*, U.S. Senate Gov. Rubio Press Releases (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’ 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 US Senators to Hon. Karen Gibson, Re: Citibank’s and abortion, United States Senate (Apr. 28, 2021), available at <https://www.rubio.senate.gov/public/cache/files/0ac7b738-da22-4ba6-ae6b-2cf1d975e7eb/3C29DFAC26DF0F372034DC96F5CABB6C.4.28.22-daines-rubio-letter-to-saa-citigroup.pdf> (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*, National Review (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

financial institutions to reduce and phase out their funding of climate-harming investment projects have been met with excommunications by right-wing state treasurers.<sup>56</sup> These actions might be more easy 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>57</sup> And these same voices adamantly oppose restrictions on corporate political spending,<sup>58</sup> and are

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they become a vehicle for far-left mobs to hijack our country from outside the constitutional order’).

<sup>56</sup>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).

<sup>57</sup> Kyle Cheney, *GOP govts: 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.”).

<sup>58</sup> 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->

voracious devourers of corporate political spending.<sup>59</sup> Indeed, about one thing there can be no rational debate: it is candidates and the party of the right who receive the biggest benefit from corporate political spending and that therefore oppose any efforts to constrain it.<sup>60</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

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[campaign-finance-effort/](#) (same Senate Majority 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'*, The Heritage Foundation (June 22, 2012), <https://www.heritage.org/commentary/senator-mcconnell-the-perils-campaign-finance-reform> (reporting on Senate Minority Leader Mitch McConnell (R-Ky.) speech at the American Enterprise Institute last Friday giving a “stirring defense of political 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).

<sup>59</sup> Open Secrets, *Marco Rubio’s Top 20 Contributors to Campaign Committee from 2017-2022*, <https://www.opensecrets.org/members-of-congress/marco-rubio/contributors?cid=N00030612&cycle=2022> (last updated July 20, 2022) (corporate and business sources predominate in top 20 contributors to campaign committee and the senator’s political action committee).

<sup>60</sup> *See evidence to this point cited supra* note []. 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.’”)

after the founding — that the First Amendment extends to for-profit corporations an unlimited right to make expenditures to influence our political system,<sup>61</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. Both activities have an important — and because of corporate wealth, outsized — influence on our political system.

Liking corporate influence when you like what it’s used for is understandable. And if you accept then that you will not always like what certain corporations do, but that is the price of freedom and pluralism, you have arrived at a principled position, but one that involves giving little weight to certain realities of how our system of corporate governance and retirement and college savings

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<sup>61</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010). For my own thoughts on *Citizens United*, see e.g., 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).

works.<sup>62</sup> It involves accepting that there will be a range of corporate approaches, and that given the realities 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-leading, 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 republican and democratic voters or voters of any kind who do not have college degrees.<sup>63</sup> It

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<sup>62</sup> 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 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 A. Skeel, Jr., *The Corporation as Trinity*, <https://ssrn.com/abstract=4154720>, at 37, will be forthcoming in Seattle L. Rev. Berle (2022) (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).

<sup>63</sup> 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 e.g., Alma Cohen, Moshe Hazan, Roberto Tallarita, & David Weiss, *The Politics of CEO’s*, 11 J. LEGAL ANALYSIS 1-45 (2019); J. Yo-Jud Cheng & Boris Groysberg, *7 Charts Show How Political Affiliations Shapes 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).

is also a position that tends to ignore or give very little weight to the historical problems in corporate governance that scholars of both the left and right actually tend to 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 in general there is no reason to believe that investors hold monolithic political or social beliefs or that many of them invest as a way of expressing those beliefs.<sup>64</sup> But this commitment to letting the red and blue corporate flowers bloom is a principled position, and one that recognizes that there

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<sup>64</sup> 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 [ ]; 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*, 101GEO. 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. 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 Comm. on Corporate Laws, *Other Constituencies Statutes: Potential for Confusion*, 45 BUS. LAW. 2253 (August 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.”); Business Roundtable, *Statement on Corporate Governance* (Sept., 1997), available at <http://www.ralphgomory.com/wp-content/uploads/2018/05/Business-Roundtable-1997.pdf>. For a thoughtful article by a respected conservative corporate scholar to this effect, see Robert T. Miller, *How Would Directors Make Business Decisions Under a Stakeholder Model*, 77 BUS. LAW. 773 (2022).

are other, less wealthy, but important countervailing forces in society who help to check corporate power and to balance out its influence.

What is less helpful in helping you think clearly about your role and responsibilities as investors are 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 beliefs, 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 thus 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 the right, but grounded in a centrist understanding of for-profit corporate governance, its realities, and one that goes beyond just accepting pluralism as we now experience it toward a channeling and more legitimizing approach to corporate conduct, that is in the best interests of all? A direction that

might benefit all stakeholders of corporations and society, and actually expand in reality the freedom of all human Americans?

I now will attempt to cut out a trail of that kind, that moves in a direction supported by principles that are widely shared by thinkers of all political and social persuasions where that is possible. As it turns out, that is in the main, largely the case.

## V. **Toward a Principled, Non-Ideological, Non-Partisan Vision of the Good Corporate Citizen**

To begin our route-planning in this way, I reiterate a foundational subject on which conservative and liberal legal and economic thinkers agree: statutory corporate law was not designed for the purpose of constraining corporate leaders from engaging in social or political activity.<sup>65</sup> The main concern of corporate law constraints is on making sure that corporate leaders do not engage in self-dealing at the expense of other stockholders,<sup>66</sup> and that there is an ability for stockholders to

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<sup>65</sup> 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*, ch. 8 at 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, at 29-30 (1979) available at [https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/stflr32&id=48&men\\_tab=srchresults](https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/stflr32&id=48&men_tab=srchresults) (“corporate management as now structured lacks both the legitimacy and ability to help choose among social priorities”).

<sup>66</sup> *See* Del. Code Ann. tit. 8, §144 (“No contract or transaction between a corporation and 1 or more of its directors or officers, or between a corporation and any other corporation . . . in which 1 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

have a say on who governed the company and on big transactions.<sup>67</sup> Likewise, the whole idea of the business judgment rule was that when decisions by impartial boards were made, it was unwise to have courts second-guess because although boards would make mistakes, when they were motivated to make the corporation succeed, it was better to encourage responsible risk-taking, as that would fuel profits for investors, and usually growth of the company would mean good things for the company’s workers and communities of operation too.<sup>68</sup> This intuition was,

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directors be less than a quorum”); William T. Allen, Jack B. Jacobs, and Leo E. Strine, Jr., *Function Over Form Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287 (2001) (“ . . . duty of loyalty claims—has 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. . .”).

<sup>67</sup> RMBCA §11.01, §12.01 (requiring votes on certain mergers and large sales of assets); Del Code Ann. tit. 8, §251, §271 (same).

<sup>68</sup> See e.g., *In re Citigroup Inc. Shareholder Derivative Litigation*, 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 – CORPORATE GOVERNANCE (AM. LAW INST. 2022) (“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

importantly, premised on a convergence between the corporate leaders' interests and those of the stockholders, and that assumed convergence was based solely on an assumption that both wanted the business to be profitable and deliver a good return. When, rather than making a decision based on profit, a board used the corporation's resources to advance a social or a political cause, conservative thinkers balked, believing there to be no rational 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>69</sup> On purely corporate law grounds, these thinkers viewed corporate leaders as lacking legitimacy and that they should hew 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,

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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, 931-932 (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).<sup>69</sup> "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 place 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, at 133-34. See also David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1, at 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, *Rational Debate, The Modern Corporation and Social Responsibility*, Am. Enterprise Institute for Public Policy Research (1972) (exploring the meaning of corporate social responsibility and implications for public policy).

that should be returned to the stockholders in the form of a dividend, and let them make their own decision.<sup>70</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, many companies and 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>71</sup> It is one thing to think these intermediaries can monitor corporate boards for their ability to deliver good 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>72</sup> Moreover, the left must recognize, just as conservative thinkers have, that corporate leaders

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<sup>70</sup> See *supra* note [5].

<sup>71</sup> See *supra* note [26].

<sup>72</sup> 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.”).

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>73</sup> As concerning, a person of the left will realize that precisely because corporations are a primary tool for wealth creation, they have the accumulated capital of many and if they can use it to act on society, then they will have resources that often far outstrip those of human beings, because much of human wealth is in fact entrapped in corporations and institutional investors and out of the direct control of human investors. For all these reasons, many of the same concerns that conservatives like Milton Friedman had about corporations acting to advance social and political causes also motivate left wing opposition to corporate political spending. And with good reason, because they are legitimate concerns.

There is another important issue that cannot be forgotten. For many Americans, it is common to spend more waking time under the domain of an employer than in the company of family and friends. This should be, and has been,

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<sup>73</sup> 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); and Alma Cohen, et al., *The Politics of CEOs*, 11 *J. LEGAL ANALYSIS* 1-45 (2019) (finding that CEOs show a “substantial preference for Republican candidates”).

a concern of thinkers on both the left and the right. The cries right now about woke capitalism<sup>74</sup> in no small part draw on this reality, drawing 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. Will being free to be who you are have to give way if you want to keep your job? This right-wing concern is not in fact isolated to the right. In her important work, *Private Government*, Elizabeth Anderson<sup>75</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 give way. In important ways, Anderson was anticipated by the good Adolph . . . Adolph Berle . . . who argued nearly 70 years ago that unless large corporations honor the

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<sup>74</sup> 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 movement of a term that has its origins in concerns about the continuing effects of discrimination and being cognizant of that reality

<sup>75</sup> See generally Elizabeth Anderson, *Private Government: How Employers Rule Our Lives (And Why We Don't Talk About It)*, Princeton University Press (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*, Economic Policy Institute (Sept. 23, 2021).

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>76</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, there is no doubt that 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>77</sup> If the 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

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<sup>76</sup> See Adolf A. Berle, Jr., *The 20th Century Capitalist Revolution*, Harcourt, Brace, & World, Inc., ch. 3 (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 at 45 (“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.”).

<sup>77</sup> 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 everything the employees do. See Zephyr Teachout, *The Boss Will See You Now*, *The New York Review of Books*, at 28-31 (Aug. 18, 2022) (reviewing several books documenting this practice and the implications it has for worker freedom and well-being).

potential to divide the workforce grows, or for those high-end workers with mobility and economic choice, to look for companies that suit their preferred orthodoxy. And lest my friends on 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>78</sup> And what kinds of issues? Typically, social issues of specific interest to them, and notably, often having little to do with core issues of worker 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>79</sup> That is, social and political policies pushed by an elite

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<sup>78</sup> 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 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).

<sup>79</sup> 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 For Gun Safety Support Fund, <https://everytownsupportfund.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/>; Starbucks Stories & News, *Starbucks celebrates Pride and embraces all LGBTQIA2+ identities*, (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/>;

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>80</sup> It is doubtful that corporate belief systems will be pushed externally only, and have no effect on the workplace itself. Workers are, on average, likely to have constrained options for re-employment, most 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>81</sup> As a result, the advantages for workers of a system that facilitates corporate inculcation of certain political and social values seem unattractive, because it could make workers have to shop for red or blue companies, or just to endure working hours in an atmosphere that lacks the pluralism and freedoms that

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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>.

<sup>80</sup> 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*, Harvard University Press, ch. 9 (1971).

<sup>81</sup> It is worth remembering that the median family income in the United States. is only about \$71,000. U.S. Census Bureau (2022), Households by Total Money Income, Race, and Hispanic Origin of Householder: 1967 to 2021, at G23, available at <https://www2.census.gov/programs-surveys/cps/techdocs/cpsmar22.pdf>.

supposedly represents a key part of being an American. And 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 a recognition that for reasons it understands, the use of 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 are permitted to speak about public policy, so must their employees. It is difficult 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 work on the workforce's freedoms as Americans?

For the right, it requires facing the corresponding reality, which is that there is a tension between telling corporations to shut up about social and political issues, and then putting constant pressure on them to fill your 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>82</sup>

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<sup>82</sup> I acknowledge of course that corporations may argue that they are giving to the "Committee To Make State Y's Legislature A Chartreuse Party Majority" to curry favor for business ends. That of course 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 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 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).

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>83</sup>

But, you might ask, if that is true, 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? And 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

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And the empirical tilt of spending is so profound that more than profit would seem to be in 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.

<sup>83</sup> 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. U. Of Chicago, Kalven Committee, REPORT ON THE UNIVERSITY'S ROLE IN POLITICAL AND SOCIAL ACTION (Nov. 11, 1967),

<https://provost.uchicago.edu/reports/report-universitys-role-political-and-social-action>.

I thank Professor Edward Rock for this reminder of a historical analogy that has remaining resonance.

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>84</sup>

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

First, make no doubt, we intend to seek a solid profit for our investors and know that is our job and that we have to deliver that in a sustainable, long-term 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 will bear these costs, and if each company tends to operate that way, every company will be forced to do so.

We think that is wrong, and in pursuing profit, we intend to treat all our stakeholders with respect. We will pay a living wage, 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 focus on product safety so our products help our customers. We will try not to harm the environment or contribute to climate change that will hurt our entire economy and well-being.

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<sup>84</sup> 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), available at [https://scholarship.law.columbia.edu/faculty\\_scholarship/3799](https://scholarship.law.columbia.edu/faculty_scholarship/3799) For a more skeptical view on this subject, see Marcel Kahan & Edward B. Rock, *Systemic Stewardship with Tradeoffs* (NYU Law and Economics Research Paper No. 22-01 (Nov. 30, 2021), available at SSRN: <https://ssrn.com/abstract=3974697>).

We will try to be a fair employer, to provide equal opportunities to all who work for us, and to foster a spirit of genuine tolerance for diversity — including diversity of viewpoint — in the workplace. Put simply, we believe that by doing business the right way, all of our stakeholders will benefit.

Think about the two schools Chancellor Allen aptly described as the major strands in American corporate law. Neither of them, honestly, has much of a quibble with this corporation's policy. Sure, there may come times when there are trade-offs and when the stockholder-focused school leans more in one direction, but heck, Milton Friedman could and would not quibble with what this company's policies involve. And nor would Lynn Stout or others who believe that corporations have no obligation to put stockholders first.

And this lack of discord makes sense. There is much more consensus that businesses not only can, but should, do things the right way in terms of their own conduct in affecting the lives of others, than there is about whether businesses should influence general social or political policies. There is no blue-red divide that corporations are entitled to pay their workers fairly and provide them with a safe, tolerant workplace.<sup>85</sup> There is no blue-red divide that corporations can and should make their products safe and useful, and their services valuable and non-

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<sup>85</sup> 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 Key Findings From Just Capital's 2021 Survey*, The Harris Poll (Apr. 2021) (investors of all ideologies ranking issues about worker wellbeing above environmental concerns).

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

Put simply, most Americans embrace a Hippocrates-influenced approach to corporate profit seeking, whereby companies should do no harm in their pursuit of 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 displaying their commitment to being good corporate citizens by the respect they show in their own business operations.<sup>86</sup>

This consensus breaks down, however, when they perceive that businesses are seeking to tilt the social and political value system. Voting eligibility policies, reproductive rights, guns, policing procedures and tactics, criminal codes, and the

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<sup>86</sup> 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 signalled, social consensus.” David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1, at 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.*

like are the subject of passionate and legitimate disagreement in our society. When corporations seek to act on society so as to advance their views about issues of this kind, they cannot but generate discord because there is no shared consensus among their workers, consumers, or stockholders about them. 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 demand to speak out about another. An ad in *The New York Times* by the company about an issue that costs five figures turns out to pale in comparison to the millions of dollars the 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>87</sup> Neither seems that attractive.

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<sup>87</sup> *Conflicted Consequences: A Graphic Study on How Public Company Political Money Has Reshaped State and National Politics From 2010 to Today*, 5, 8-27 Center For Political Accountability (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, gerrymander, 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 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, 2022) (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

When scholars, politicians, and citizens of all political stripes have concerns 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, there might just be utility to deploying some of the traditional tools that corporate law has used when similar concerns exist. 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>88</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>89</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

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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 INFORMATION (July 11, 2022) (citing to large corporations who had denounced the Supreme Court's decision in *Dobbs*, but who had contributed large sums to the RGA 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 INFORMATION (June 2, 2022), <https://popular.info/p/lgbtq2022>.

<sup>88</sup> E.g., 8 Del. C. § 144; *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983).

<sup>89</sup> 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).

stockholders themselves,<sup>90</sup> and it is permissible also to require that more than a majority of stockholders approve.<sup>91</sup> By 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 act themselves and then subject their actions to scrutiny 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>92</sup> This process of accountability influences boards even when stockholder input is provided on a precatory basis, as the success of 14a-8 proposals in profoundly changing corporate governance policies such as the prevalence of classified boards has demonstrated.<sup>93</sup> For these reasons, there is a rational basis, and respected scholars

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<sup>90</sup> For this reason, charter changes, mergers, and substantial asset sales are subject to required votes. *E.g.*, 8 Del. C. §§ 242(b), 251, and 271.

<sup>91</sup> *E.g.*, 8 Del. C. § 215(c).

<sup>92</sup> 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).

<sup>93</sup> 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 SO. 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).

have thus argued, that these same legitimizing techniques could provide guardrails better ensuring that corporate involvement in social and political issues is representative of, at least, what a majority of their investors can support, or at the very least tolerate.<sup>94</sup>

For both companies and investors, a more promising option would seem to be to build on these realities by putting corporate conduct that is involved in the external advocacy of certain political and social views on a more genuinely legitimate footing that reduces the likelihood that corporations will misuse their influence for purposes not supported by a consensus of their investor base. 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>95</sup> they could help avoid the politicization of the corporate sector. Companies that wished to continue to influence the political process by

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<sup>94</sup> Professors Bebchuk and Jackson have taken this position in 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 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).  
<sup>95</sup> 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.”)

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 generally a good thing and that such entanglements were injurious for the corporate sector's reputation and effectiveness. And his approach of course allowed those corporations that could obtain consensus support to proceed on a much more legitimate basis. And 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>96</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, the use of guardrails of this kind will not eliminate the need for boards and management to make difficult judgments. And nor will it mean that the decisions that result are necessarily universally embraced by stockholders or other stakeholders. But the deliberative process these techniques facilitate, and the

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<sup>96</sup> 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.

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 and that the resulting decisions are more likely to be one that is supported by a strong and diverse base of the company's stakeholders. To most of us, the fact that something makes things better is enough to commend it, most of us know that human beings are not capable of perfection, and certainly not in the governance of complex institutions like for profit public corporations.

**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**

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

**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 the following basic components:

First, corporations should primarily focus on values and purposes that are intrinsically linked to their business operations, and how those operations affect their stockholders, workforce, customers, creditors, and communities of operation as a whole. Before corporations focus 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>97</sup>

Examples of policies to this effect would be:

- a. Commitments to paying a living wage and closing the wealth gap through savings help for employees;
- 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 orientation, and that the company is committed to serving 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 their access to benefits under their company-provided benefits and pay packages, for example, by facilitating as reproductive choice by providing subsidies for travel or other assistance necessary to ensure access if that is necessary to help them secure care, but being sure not to make corporate employees feel that they must embrace any particular view about reproductive choice or abortion;<sup>98</sup>

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<sup>97</sup> Sarah Murray, *When Should Businesses Take a Stand*, Financial Times (Mar. 8, 2022), at 7 (citing poll data showing that fewer than 40% of voters polled supporting “companies speaking out on social issues in American life” generally, but that 80% supported them speaking out if the issue was “directly related to the core business of the company”).

<sup>98</sup> 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? —

- 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>99</sup>
- 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 rightly believed were essential to civil society,<sup>100</sup> such as schools, the

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much less that our right to use our paycheck and benefits for lawful purposes can be constricted by our employer.

<sup>99</sup> One comment liberal friends of mine have given me on the 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 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 Key Findings From Just Capital's 2021 Survey, The Harris Poll (Apr. 2021)*, (investors of all ideologies ranking issues about worker wellbeing above environmental concerns ); *see also* Edelman Trust Barometer 2022 at 11 (85% of people worry about job loss, 75% worry about climate change). It would 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 tend to be keenly attentive to the value of good environmental practices, and the damage that bad ones can do to the natural world in which they pursue their passions. And polls of Americans who hunt and fish — a group that the right in this nation tends to claim as their own — show an understandable appreciation by them of the need to protect the environment — an appreciation that extends to acknowledging that human-influenced climate change is a genuine threat. *Key Findings From A Survey of Hunters and Anglers, NEW BRIDGE STRATEGY (Apr. 2022)* (finding that almost three quarters of sportsmen and sportswomen say that climate change is happening and conservation strategies such as restoring wetlands, forests, water conservation, 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 fuel production*, MILWAUKEE JOURNAL SENTINEL (Sept. 29, 2012) (reporting that American sportsmen view conservation as important as gun rights and favor protection of public lands over fossil fuel production).

<sup>100</sup> 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. (<https://www.uphs.upenn.edu/paharc/features/bfranklin.html>)

Red Cross, hospitals,<sup>101</sup> etc., in the company's communities of operations, 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>102</sup>

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(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."); <https://about.usps.com/who-we-are/postal-history/pmg-franklin.pdf> (discussing Benjamin Franklin's role as a postal pioneer); Yale College, *About Benjamin Franklin*, <https://benjaminfranklin.yalecollege.yale.edu/about-us/about-benjamin-franklin> ("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.")]

<sup>101</sup> 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.

<sup>102</sup> 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 supra* note [50]. That retaliation seems clearly problematic under the First Amendment, and a 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.

Second, to the extent that the company purports to take positions on external public policy, it should be clear that its positions are those of the board, not just the CEO,<sup>103</sup> and that no employee or customer is expected to share that belief and that so long as employees are respectful and tolerant of each other, and are productive, the diversity of viewpoints they hold will be fully respected. That is, it may be that the board has a view on a policy matter, but it should be clear that the company is not a red or blue company and that all people of good faith are welcome to work for and patronize the company. Not only that, the full board should have to weigh

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<sup>103</sup> It has long been a reasonable fear that corporate political spending and activism is 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 CEO’s*, 11 J. LEGAL ANALYSIS 1-45 (2019), (finding that that more than 57% of CEOs of S&P 1500 companies are Republicans, 19% 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.*, *Conflicted Consequences: A Graphic Study on How Public Company Political Money Has Reshaped State and National Politics From 2010 to Today*, Center For Political Accountability, 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); Center 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 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).

and bear responsibility for any corporate position, as that somewhat increases the likelihood that the position will be one more likely to accord with a broader consensus of company stockholders and workers.<sup>104</sup> As important, it increases accountability because the entire board must accept responsibility for the position taken.<sup>105</sup>

Third, corporate political spending should be, as an ideal, voluntarily eliminated, as a matter of corporate policy, leaving the company's human stockholders, workers, and customers to be the ones whose voices matter in the political process. In the alternative, any corporate political spending should only occur based on a plan approved by a supermajority of stockholders, and one that is expressly tailored to only allow for contributions to candidates and committees consistent with the company's stated values. If the company gives only through a

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<sup>104</sup> 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, then 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.

<sup>105</sup> 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 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.

PAC comprised of voluntary contributions by stockholders<sup>106</sup> and management, it could do so as long as a committee of independent directors oversees giving on the same basis.<sup>107</sup>

Fourth, corporate political spending to partisan committees of any kind would be eliminated, full stop. 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

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<sup>106</sup> Note that it was long 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 fear asking as they would be considered insane. Corporate PACs therefore mostly operate on “voluntary” contributions from top and middle management. I put voluntary in quotes for a reason.

<sup>107</sup> A respected source for corporations to consider in this regard is the CPA-Zicklin Model Code of Conduct for Corporate Political Spending, developed by the Center for Political Responsibility: <https://urldefense.com/v3/https://www.politicalaccountability.net/wp-content/uploads/2022/06/CPA-Zicklin-Model-Code-of-Conduct-for-Corporate-Political-Spending.pdf> ;!!JHVTxvw!nPPg8k28HgnuPQD0\_8ZRwYaRpPrD4mpmlR\_O73gW6JV8Wrk9UEXmoXrw1-vyh5Q50StJs-tS67Q8fNqUz9K-TCNEiC4\$; see also Center for Political Accountability, Practical Stake: Corporations, Political Spending & Democracy, ch. 3 (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., January–February 2022. It is worth observing here that my lack of attention to lobbying is not inadvertent. As Professor Lund and 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.

age of greater polarization, but is necessary for the corporation to try to do if it wishes to avoid legitimate criticism for being hypocritical. These constraints would not inhibit the corporation from engaging with elected officials of all stripes. To this point, 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 NGA, NCSL, and the NAAG that exist, that promote bipartisan cooperation in the public interest, and that provide forums to engage with these elected officials from all parties.

Fifth, to the extent that a company's board would seek to stop doing business in or with a particular American state, it would also only do so after seeking the supermajority stockholder approval.<sup>108</sup> To boycott an American state is as coercive and influential an act 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

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<sup>108</sup> 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 rare.

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 supermajority stockholders, just as they should with corporate political spending.<sup>109</sup>

**B. What Institutional Investors Can Do To Make This Concept of Good Corporate Citizenship A Reality**

Now, you might ask how this thinking translates into your own roles as institutional investors. It may be that given the name of your organization, some of you actually have the leeway to factor into specific issues of religious faith and value into your investing and stewardship strategies. But, given the name, it may be that many of you also invest funds on behalf of human beings with diverse religious and political beliefs, and that many of you are of the faiths of religious minorities or from Christian churches — such as the Catholic Church and Mormon church — who well remember and still experience discrimination on account of your faiths. That is, you may also just embrace the idea that recognizing

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<sup>109</sup> In this exploratory lecture, 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 likely already determined it can and wants to make money there, and a decision to boycott arises because of some other issue (or perhaps one, like apartheid) that the company earlier decided to ignore (or even support), until the political environment changed.

everyone's religious and political freedom is important, and that the entrusted capital of the many should not be used by the few — corporate management — to advance beliefs on which a large base of investors no doubt have very different views.

For institutional investors who do not have any faith-based mandate, but who simply have 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. Guardrails of the kind I am about to recommend are thus even more important for these institutions, as they provide a framework for making sure the investments they make on behalf of their human clients are not used for purposes that are not widely agreed upon by those clients.

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. If, as I think 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>110</sup> If, as I think is true, you invest in debt securities, you do not want a system where value is shifted to equity at the expense of bond holders. If, as I think is true, your investors need good jobs as their primary source of wealth, and their jobs are critical to the soundness of pension funds for retirees, you want companies to make money in a way that is also good for American workers. And if, as I think is true, your 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, you want companies to make money the right way, the fundamentally sustainable way, which involves focusing on growth net of externalities. That goal is not partisan, it is not ideological, it is a shared one of the investors you represent.

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<sup>110</sup> Oliver Hart & Luigi Zingales, *The New Corporate Governance*, U. CHI. BUS. L. REV. 1, at 3 (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 INVESTOR (Aug. 24, 2022) (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.).

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

- a. Identify the expectations you have for companies in which you invest to make money the right way, and the conduct you expect of them toward their workforce (including contracted workers), their communities of operation, their consumers, and the environment.
- b. Channel your 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.
- c. Use your voice and vote to constrain corporate involvement in the political process except on a basis that is legitimated by supermajority stockholder approval and that requires corporations to only give to candidates who independent directors assess based on their full policy views and the consistency of those views with stated company policies. Require that any similar attempts at political influence using corporate resources and clout, like boycotts of particular states, be subject to a similar supermajority stockholder vote.
- d. Use your voice and vote to constrain any corporate political spending given to any partisan committee.
- e. Make clear that you do not want to have red or blue, or right-wing or left-wing corporations that embrace orthodoxies to which their employees must conform, and that companies should respect the religious and political diversity of their employees and customers, and create an environment and culture that welcomes participation by all Americans of good faith, who tolerate others.
- f. Make sure that when corporate leaders speak for the company on external political and social issues that are not directly related to the company's own operations, they have secured the support of the board itself, and insist that the corporation ensure that in the workplace, there is no expected orthodoxy and diversity of religious and political belief is fully respected.

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The focus I am recommending is likely to have the most positive impact because it makes business leaders accountable for what they can control, for making a positive impact, and embracing that focus and the reasonable guardrails that I advocate will reduce their ability to use corporate resources for purposes that are not consistent with the shared interests of their stockholders, workers, and customers.

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