

THE NEW CORPORATE POLITICAL GOVERNANCE

TOM C.W. LIN

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Abstract: Governance matters. The governance of our business and political institutions impacts all aspects of our lives. Our education, relationships, wealth, safety, dignity, health, and happiness are all affected by business and political governance decisions. Increasingly, corporate governance and political governance are evolving and intersecting, as corporations engage in some of the most contentious and important social challenges of our time with their voice, capital, and actions.

This Article provides one of the first comprehensive examinations of this new convergence of corporate and political governance and its wide-ranging effects on law, politics, business, and society. It begins by contextualizing the changing corporate political governance landscape. It investigates how new corporate social activism, the growth in ESG investments, the reemergence of retail investors, and a changing political calculus for businesses have all fostered this evolving landscape. Next, it discusses practical and legal fault lines in this landscape. In particular, it highlights how these tensions complicate larger debates about shareholders and stakeholders, meanings and metrics in management, as well as the limitations of private and public power. Finally, moving from causes and complications to consequences and correctives, this Article identifies implications of the new corporate political governance dynamic and recommends pragmatic next steps for scholars, executives, and policymakers. Specifically, it proposes a new corporate overstory for analyzing corporate sociopolitical engagements, offers new guiding principles to help firms focus their social efforts, and recommends workable models for policymakers engaging in business regulation and investment management. Ultimately, this Article aims to serve as an original, early roadmap and working compass for understanding and navigating the changing corporate political governance landscape.

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INTRODUCTION

Corporate governance and political governance are converging in America.¹ The days when business executives focused solely on revenues and profits while public officials focused on social and political issues are in the past.² Today, businesses and its executives are entrenched and engaged in some of the most pressing and challenging issues of society and politics.³

Through investments, divestments, pronouncements, and policies, businesses have seemingly supplanted a too often dysfunctional government with its direct involvement and action on issues like climate change, racial justice, reproductive freedom, voting rights, gun violence, affirmative action, gender equity, and international conflicts.⁴ Corporate boardrooms have become critical forums for fights about social and political change, serving as an alternative to courtrooms and legislatures that seem unwilling to reflect the popular will in many instances.⁵ And this new corporate social and political activism has drawn much attention, praise, criticism, reward, and retribution.⁶

¹ See MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD 6 (2003) (discussing how “conventional boundaries” of business and government are shifting and blurring); Richard A. Epstein, *Executive Power in Political and Corporate Contexts*, 12 U. PA. J. CONST. L. 277, 281 (2010) (“It is a commonplace observation that there is much overlap between public and private systems of governance.”).

² For the purposes of this Article, the terms “corporation,” “company,” and “business” generally refer to large business entities and public corporations. The Model Business Corporation Act defines a public corporation as “a corporation that has shares listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national securities association.” MODEL BUS. CORP. ACT § 1.40(18A) (AM. BAR ASS’N, rev. 4th ed. Supp. 2013). This Article recognizes that many businesses are organized as non-corporate entities such as general partnerships, limited partnerships, and limited liability companies in conducting their operations.

³ See, e.g., C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77, 139 (2002) (“Corporations remain today, as they were in the 1920s, the most powerful nongovernmental institutions in America. In innumerable ways they shape the nation’s politics and culture, and the lives of their employees and consumers.”).

⁴ See, e.g., Gabriel Rauterberg, *The Corporation’s Place in Society*, 114 MICH. L. REV. 913, 913 (2016) (“The vast majority of economic activity is now organized through corporations. The public corporation is usurping the state’s role as the most important institution of wealthy capitalist societies.”); Kishanthi Parella, *Corporate Foreign Policy in War*, 64 B.C. L. REV. 1981, 1983–84 (2023) (discussing “corporate foreign policy, a concept referring to business policies and practices directed towards a national government that are intended to influence or change that government’s conduct towards another government or international organization”).

⁵ In recent years, the fights for social and political change have concluded in landmark Supreme Court decisions and subsequent legislative and corporate responses. See, e.g., *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 231 (2023) (restricting the use of race-based considerations in college admissions); *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 229–31 (2022) (overturning *Roe v. Wade*, 410 U.S. 113 (1973), which had established a constitutionally protected right to abortion); *Trump v. Hawaii*, 585 U.S. 667, 683–84 (2018) (holding that the President has wide discretion over the entry of aliens into the United States); *Friedrichs v. Cal.*

In the last few years alone, there have been numerous prominent examples of this new corporate-political fusion. In 2018, after a horrific school shooting in Parkland, Florida, many major businesses changed company policies to help curb the scourge of gun violence.⁷ In the aftermath of the killing of George Floyd in 2020, American businesses rededicated resources and attention to long-lagging efforts for racial justice.⁸ In early 2022, major businesses in the United States and Europe collectively withdrew from Russia to protest

Tchrs. Ass'n, 578 U.S. 1, 3 (2016) (per curiam) (affirming certain collective bargaining practices of unions by a divided court); *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (legalizing same-sex marriage); *Michigan v. EPA*, 576 U.S. 743, 759 (2015) (requiring the EPA to consider costs in exercising its powers under the Clean Air Act); *Schuette v. Coal. to Def. Affirmative Action, Integration & Immigr. Rts. & Fight for Equal. by Any Means Necessary*, 572 U.S. 291, 314 (2014) (plurality opinion) (upholding a state ban on affirmative action); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 735–36 (2014) (recognizing protections of religious liberties for closely held corporations); *Shelby County v. Holder*, 570 U.S. 529, 556–57 (2013) (limiting federal enforcement powers under the Voting Rights Act of 1965).

⁶ See, e.g., David F. Larcker, Stephen A. Miles, Brian Tayan & Kim Wright-Violich, *The Double-Edged Sword of CEO Activism*, STAN. CLOSER LOOK SERIES, Nov. 8, 2018, at 1; *CEO Activism in America Is Risky Business*, THE ECONOMIST (Apr. 14, 2021), <https://www.economist.com/business/2021/04/14/ceo-activism-in-america-is-risky-business> [<https://perma.cc/WTG6-YTNG>] (describing the backlash that companies can face from consumers if its CEO takes a stand on a highly charged political issue); Aaron K. Chatterji & Michael W. Toffel, *The New CEO Activists: A Playbook for Polarized Political Times*, HARV. BUS. REV., Jan.–Feb. 2018, at 78, 80, <https://hbr.org/2018/01/the-new-ceo-activists> [<https://perma.cc/AL9E-KYTP>]; Mary-Hunter McDonnell & Timothy Werner, *Blacklisted Businesses: Social Activists' Challenges and the Disruption of Corporate Political Activity*, 61 ADMIN. SCI. Q. 584, 611–13 (2016) (discussing the political effects of social activism and protests against firms); David Gelles, *How Environmentally Conscious Investing Became a Target of Conservatives*, N.Y. TIMES, <https://www.nytimes.com/2023/02/28/climate/esg-climate-backlash.html> [<https://perma.cc/FV6R-RGRF>] (Mar. 1, 2023).

⁷ See Audra D.S. Burch & Patricia Mazzei, *Death Toll Is at 17 and Could Rise in Florida School Shooting*, N.Y. TIMES (Feb. 14, 2018), <https://www.nytimes.com/2018/02/14/us/parkland-school-shooting.html> [<https://perma.cc/E75S-JPAC>] (reporting on the school shooting in Parkland, Florida); Julie Creswell & Michael Corkery, *Walmart and Dick's Raise Minimum Age for Gun Buyers to 21*, N.Y. TIMES (Feb. 28, 2018), <https://www.nytimes.com/2018/02/28/business/walmart-and-dicks-major-gun-retailers-will-tighten-rules-on-guns-they-sell.html> [<https://perma.cc/MZ4T-84ZB>] (reporting that various stores elected to not sell any items that resemble assault rifles); Tiffany Hsu, *Citigroup Sets Restrictions on Gun Sales by Business Partners*, N.Y. TIMES (Mar. 22, 2018), <https://www.nytimes.com/2018/03/22/business/citigroup-gun-control-policy.html> [<https://perma.cc/H2EB-CS9Y>] (explaining that Citigroup refuses sales of firearms if the customer fails to pass a background check).

⁸ See, e.g., Tracy Jan, Jena McGregor & Meghan Hoyer, *Corporate America's \$50 Billion Promise*, WASH. POST, <https://www.washingtonpost.com/business/interactive/2021/george-floyd-corporate-america-racial-justice/> [<https://perma.cc/FMG8-4Y3P>] (Aug. 24, 2021) (describing the efforts major American companies took to address racial inequality in the aftermath of the murder of George Floyd); Chauncey Alcorn, *George Floyd's Death Was a Wake-up Call for Corporate America. Here's What Has—and Hasn't—Changed*, CNN BUS., <https://www.cnn.com/2021/05/25/business/corporate-america-anti-racism-spending/index.html> [<https://perma.cc/7PHP-3PVY>] (Oct. 7, 2021) (reporting that the number of diverse members on boards of directors in corporate America has increased slowly since George Floyd's murder).

its invasion of Ukraine.⁹ Later in 2022, in response to a Supreme Court decision to overturn *Roe v. Wade*, businesses offered private solutions to the suddenly limited and burdened access to reproductive healthcare for many Americans.¹⁰

Although many welcomed the voice and resources of corporate America on these timely issues, numerous leaders in business, law, and politics pushed back on these corporate social engagements.¹¹ Critics argue that these corporate social and political engagements are ruining business, polarizing our politics, and hurting our democracy.¹² Elected officials have punished businesses for engaging in what they deemed “woke” or conservative politics, depending on their political persuasions.¹³ For example, Florida changed longstanding

⁹ See, e.g., *Here Are the Companies Pulling Back from Russia*, CNN BUS., <https://www.cnn.com/2022/03/02/business/companies-pulling-back-russia-ukraine-intl-hnk/index.html> [https://perma.cc/XJ7Z-VE66] (Apr. 5, 2022) (listing companies, by industry, that have ceased or cut back operations in Russia); Peter Stiff, *From Apple to McDonald's, What Companies Have Pulled Back From Russia?*, WALL ST. J., <https://www.wsj.com/articles/what-companies-have-pulled-back-from-russia-11646425481> [https://perma.cc/8DEM-5M39] (Mar. 23, 2022) (same).

¹⁰ See, e.g., Kif Leswing, *Apple Responds to Roe v. Wade Rollback, Company Benefits Cover Out-of-State Travel for Reproductive Care*, CNBC (June 24, 2022), <https://www.cnbc.com/2022/06/24/apple-responds-to-roe-v-wade-rollback.html> [https://perma.cc/VY5C-LP9R] (quoting an Apple spokesperson); Emma Goldberg, *These Companies Will Cover Travel Expenses for Employee Abortions*, N.Y. TIMES (Aug. 19, 2022), <https://www.nytimes.com/article/abortion-companies-travel-expenses.html> [https://perma.cc/57RV-39KG] (naming companies, including Amazon, Microsoft, and Netflix, that implemented policies covering expenses related to travel for employees seeking abortions in states where is the procedure is legal).

¹¹ See, e.g., Harvey Golub, Opinion, *Politics Is Risky Business for CEOs*, WALL ST. J. (Apr. 12, 2021), <https://www.wsj.com/articles/politics-is-risky-business-for-ceos-11618265960> [https://perma.cc/5XUU-6V26] (arguing that company executives should not express opinions on policy issues unrelated to their business); Joanna Wuest, *The Dead End of Corporate Activism*, BOS. REV. (May 18, 2022), <https://www.bostonreview.net/articles/the-dead-end-of-corporate-activism/> [https://perma.cc/C6ZL-86QW] (explaining that some Republican politicians have attempted to limit the social activism of corporations); Molly Ball, *How Big Business Got Woke and Dumped Trump*, TIME (Nov. 1, 2021), <https://time.com/6111845/woke-big-business-dumps-trump/> [https://perma.cc/BQP3-ET53] (reporting that politicians on both the left and right, as well as the public, do not fully trust CEOs to be accountable to any groups outside of shareholders).

¹² See, e.g., VIVEK RAMASWAMY, *Woke, Inc.: INSIDE CORPORATE AMERICA'S SOCIAL JUSTICE SCAM* 3 (2021) (arguing that corporations feign interest in political issues to earn profits).

¹³ See, e.g., Ross Douthat, Opinion, *The Rise of Woke Capital*, N.Y. TIMES (Feb. 28, 2018), <https://www.nytimes.com/2018/02/28/opinion/corporate-america-activism.html> [https://perma.cc/L7LM-H62G] (discussing how politics have infiltrated business); Ted Cruz ‘Fed Up’ with ‘Woke’ Corporations, Pledges to No Longer Accept Their PAC Donations, FOX BUS. (Apr. 30, 2021), <https://www.foxbusiness.com/politics/ted-cruz-no-longer-accepts-corporate-pac-donations> [https://perma.cc/WV62-LLA9] (quoting Senator Ted Cruz); Gabby Orr & Meridith McGraw, *Republicans Want to Make ‘Woke’ Corporations Pay—Literally*, POLITICO (Apr. 5, 2021), <https://www.politico.com/news/2021/04/05/republicans-corporations-pay-479110> [https://perma.cc/VL6J-XENJ] (reporting that Republican politicians are calling for boycotts of companies that take a stand on political issues); Andrew Solender, ‘Get Woke. Go Broke.’: GOP Calls Grow to Punish ‘Woke’ Businesses with Legislation, FORBES (Apr. 26, 2021), <https://www.forbes.com/sites/andrewsolender/2021/04/26/get-woke-go-broke-gop-calls-grow-to-punish-woke-businesses-with-legislation/?sh=1a7f76231fac> [https://perma.cc/2JGE-572M] (quoting Republican politicians that have criticized corporations for engaging in “woke” politics).

laws that benefited one of the state's most prominent companies, Disney, after the company publicly denounced the state's recent law that discriminated against the LGBTQ+ community.¹⁴ And Florida Governor Ron DeSantis made attacking Disney and other corporations he considered "woke" a centerpiece of his 2024 presidential campaign.¹⁵ On the other side of the partisan divide, in 2023, California Governor Gavin Newsom announced that the state would not do business with Walgreens because the company would not distribute an abortion pill even in states where it was legal.¹⁶ Furthermore, in recent years, numerous states moved to limit billions of dollars of state pensions from being invested with firms that actively engage in social issues like climate change and diversity.¹⁷

In the current hyper-partisan sociopolitical context, a firm's corporate social and political engagements have become akin to a Rorschach test for the

¹⁴ See, e.g., Felipe Marques & Michael Smith, *DeSantis Expects More Control of Disney's 'Corporate Kingdom'*, BLOOMBERG (Jan. 12, 2023), <https://www.bloomberg.com/news/articles/2023-01-12/florida-seeks-to-give-desantis-more-oversight-of-disney-district> [<https://perma.cc/2PGM-CE7K>] (reporting that Governor DeSantis proposed to remove the power of Reedy Creek Improvement District, which has given Disney government benefits for the last fifty years); *Florida's Governor Signs Law Revoking Disney Powers*, BBC (Apr. 22, 2022), <https://www.bbc.com/news/world-us-canada-61192982> [<https://perma.cc/QSG5-RSRL>] (noting that Disney was stripped of its special status in Florida as tension grew with the Governor over his proposed bill that bans instruction in school about gender identity for young children); Brooks Barnes, *DeSantis Declares Victory as Disney Is Stripped of Some 56-Year-Old Perks*, N.Y. TIMES (Feb. 10, 2023), <https://www.nytimes.com/2023/02/10/business/disney-world-florida-tax-board.html> [<https://perma.cc/9HK3-J242>] (reporting that Disney's special tax status was not revoked, but that it would no longer appoint members to the board of the tax district).

¹⁵ See, e.g., Jesus Jiménez & Brooks Barnes, *What We Know About the DeSantis-Disney Dispute*, N.Y. TIMES (May 19, 2023), <https://www.nytimes.com/article/disney-florida-desantis.html> [<https://perma.cc/G7ZU-PHWZ>] (noting that Governor DeSantis referenced his dispute with Disney in an email soliciting campaign donations); Michelle Goldberg, *Ron DeSantis vs. the 'Woke Mind Virus'*, N.Y. TIMES (May 25, 2023), <https://www.nytimes.com/2023/05/25/opinion/ron-desantis-woke-mind-virus.html> [<https://perma.cc/VD32-JELP>] (discussing Governor DeSantis's presidential campaign strategy of attacking companies that waded too far into politics).

¹⁶ Pam Belluck & Julie Creswell, *Walgreens Faces Blowback for Not Offering Abortion Pill in 21 States*, N.Y. TIMES (Mar. 7, 2023), <https://www.nytimes.com/2023/03/07/business/walgreens-abortion-pill.html> [<https://perma.cc/7MLV-46JZ>].

¹⁷ See, e.g., Ross Kerber, *Florida Pulls \$2 Bln from BlackRock in Largest Anti-ESG Divestment*, REUTERS, <https://www.reuters.com/business/finance/florida-pulls-2-bln-blackrock-largest-anti-esg-divestment-2022-12-01/> [<https://perma.cc/UDH9-YBN8>] (Dec. 1, 2022); Andrew Ross Sorkin et al., *DeSantis Claims Win in Campaign Against E.S.G.*, N.Y. TIMES, <https://www.nytimes.com/2022/08/24/business/dealbook/desantis-florida-esg-investing.html> [<https://perma.cc/KMG4-S78Q>] (Aug. 25, 2022) (reporting that Florida banned the consideration of environmental, social, and governance (ESG) factors when investing the pension fund of the state); Maxine Joselow & Vanessa Montalbano, *Bills in Red States Punish Climate-Conscious Businesses*, WASH. POST (June 1, 2022), <https://www.washingtonpost.com/politics/2022/06/01/bills-red-states-punish-climate-conscious-businesses/> [<https://perma.cc/8G73-2CGH>] (noting that Texas adopted a law that mandates the state's pension fund to divest from companies that are boycotting fossil fuel businesses).

business itself. Businesses are deemed “good” or “bad” based on their engagements. A firm’s business success and failure end up being linked to its social and political engagements despite a myriad of more meaningful factors. For instance, when Silicon Valley Bank failed in early 2023, numerous critics suggested that the bank’s progressive social and political engagement efforts on issues like diversity, inclusion, and climate change were a leading cause of its demise without any meaningful evidence.¹⁸

Regardless of the issue or motivation, the convergence of the corporate and political spheres of modern life is undeniable.¹⁹ Increasingly, corporate governance has become political governance, and political governance has become corporate governance.²⁰ More importantly, this ongoing convergence of corporate and political governance raises serious questions and implications for law, business, and society.

This Article is about this new corporate political governance and its consequences for our private businesses, public institutions, and daily lives. This Article offers an early, descriptive, and normative examination of the emerging corporate political landscape, its enabling structural forces, and its wide-ranging rippling effects. Additionally, it highlights critical and practical fault lines in this landscape and proposes pragmatic pathways for academic researchers, corporate executives, public policymakers, social activists, and ordinary citizens to navigate this new terrain.

Building and drawing on the author’s prior works and a rich, interdisciplinary literature spanning law, management, political science, and history, this Article seeks to make three contributions.²¹ First, this Article aims to provide

¹⁸ See, e.g., Julian Mark, *GOP Blames Silicon Valley Bank’s Collapse on ‘ESG’ Policies. Here’s What to Know.*, WASH. POST, <https://www.washingtonpost.com/business/2023/03/14/svb-esg-woke-investing/> [<https://perma.cc/E7PZ-KRUH>] (Mar. 20, 2023) (arguing that despite conservative politicians’ contrary opinion, no evidence exists that Silicon Valley Bank’s ESG initiatives caused its downfall); Jamelle Bouie, Opinion, *The Boys Who Cried ‘Woke!’*, N.Y. TIMES (Mar. 14, 2023), <https://www.nytimes.com/2023/03/14/opinion/silicon-valley-bank-republicans-woke.html> [<https://perma.cc/4FKL-CYMS>] (providing examples of conservative politicians blaming social activism as a cause of the demise of Silicon Valley Bank, despite the lack of evidence backing up the assertion).

¹⁹ See STEPHEN M. BAINBRIDGE, *THE PROFIT MOTIVE: DEFENDING SHAREHOLDER VALUE MAXIMIZATION* 3–5 (2023) (providing examples of how companies are making business decisions based on political views, such as major banks restricting loans given to gun manufacturers).

²⁰ See, e.g., Omari Scott Simmons, *Political Risk Management*, 64 WM. & MARY L. REV. 707, 712–13 (2023) (discussing the growing importance of “political risk” management for corporations).

²¹ See, e.g., TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63*, at 32–33, 395 (1989) (providing historical examples of boycotts of white-owned businesses, creating civil rights progress for African Americans in the 1960s); ALEX EDMANS, *GROW THE PIE: HOW GREAT COMPANIES DELIVER BOTH PURPOSE AND PROFIT* 4–6 (2020) (arguing that businesses can successfully focus on shareholders and other stakeholders without sacrificing profit); BAINBRIDGE, *supra* note 19, at 2–6; Cass R. Sunstein, *Social Norms and Social Rules*, 96 COLUM. L. REV. 903, 904–10 (1996) (providing examples from economic and other social science research to demonstrate

an original, preliminary narrative for explaining, understanding, and debating contemporary corporate political governance.²² Second, building upon this narrative, it aims to identify and analyze larger legal and practical tensions associated with corporate political governance that various stakeholders in this debate must acknowledge and address given the crosscutting concerns of profit, politics, law, and values. Third, it offers a set of pragmatic recommendations for public policymakers and corporate stakeholders working in this shifting business and political landscape.

In pursuit of these objectives, this Article is mindful that no singular elegant theoretical framework can fully encapsulate the crosscutting complexities of contemporary business and politics. Rather than attempting to offer a sophisticated, yet unrealistic framework, this Article endeavors to provide a workable, albeit rough roadmap and serviceable compass for navigating, conceptualizing, and managing critical issues in the new corporate political landscape.

This Article constructs this roadmap and compass in three phases. Part I charts the traveled and shifting terrain of the new corporate political governance landscape.²³ It examines four large, interrelated corporate and political forces that have enabled the formation of this new landscape. Specifically, it explains how a new dynamism of corporate social activism, the rise of environmental, social, and governance (ESG) investments, the reemergence of retail investors, and a changing political calculus have all helped create and foster a new corporate political governance landscape for business, law, and society.

that human behavior is not always logical or rational, and arguing that lawmakers who wish to promote certain norms should utilize this reality); Joseph Luders, *The Economics of Movement Success: Business Responses to Civil Rights Mobilization*, 111 AM. J. SOCIO. 963, 965–70 (2006) (analyzing, through an economic lens, the costs and benefits of accommodating or resisting demands of a social movement); Hillary A. Sale, *Public Governance*, 81 GEO. WASH. L. REV. 1012, 1034 (2013) (discussing public governance through an analysis of federal statutes that affect corporations and their constituents); R. Edward Freeman, *The New Story of Business: Towards a More Responsible Capitalism*, 122 BUS. & SOC'Y REV. 449, 450–55 (2017) (arguing against the neoclassical idea that the sole purpose of a business is to maximize profits); Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1544–45 (2018) (describing how technology has changed the ways social activists promote their cause); Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 124–26 (2020) (describing the media's strong reaction to a statement by the Business Roundtable, an association of various corporate CEOs, that committed to creating value for all stakeholders, not just shareholders); Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2565 (2021) (discussing the debate regarding for whom a corporation is managed); Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1309, 1309–11 (2021) (discussing for whom corporations should serve to benefit); Lisa M. Fairfax, *Stakeholderism, Corporate Purpose, and Credible Commitment*, 108 VA. L. REV. 1163, 1165–66 (2022) (describing a trend in recent years that many CEOs believe that a business should be accountable to people beyond its shareholders).

²² For an in-depth “descriptive account” of the formation of contemporary corporate governance in America, see generally Lund & Pollman, *supra* note 21, at 2565.

²³ See *infra* notes 29–106 and accompanying text.

Part II spotlights bedrock tensions present in this emerging topography.²⁴ It investigates how the convergence of corporate and political governance complicates foundational business understandings of constituencies, accountability, and purpose. In particular, it reveals how a new corporate political governance informs critical debates relating to shareholders and stakeholders, meanings and metrics in management, as well as the limitations of private and public power.²⁵

Transitioning from mapping the past and the present towards navigating the future, Part III offers an early working compass for moving forward.²⁶ It begins by proposing a new corporate overstory for examining the emerging corporate political governance landscape. Breaking away from a tired and fictitious narrative that unrealistically segregates business from politics, the new overstory is rooted in bedrock themes of corporations as political, profit-seeking, and human-centered enterprises. This new narrative explains how the frustrating malleability of corporate social political action can also be a critical source of its power and promise to change perspectives and norms about business.²⁷ Next, Part III recommends pragmatic approaches for operating in the complicated contemporary terrain. For corporate leaders, it recommends that businesses adopt a framework that analyzes, internalizes, localizes, and specializes corporate social political engagements to maximize their near-term impact while curtailing long-term harms to their businesses. For political leaders, learning from state models in Delaware and Nevada, it argues for workable nonpartisan approaches in business lawmaking and pension management that

²⁴ See *infra* notes 107–202 and accompanying text.

²⁵ See, e.g., Fairfax, *supra* note 21, at 1165–66 (discussing the recent rise of stakeholderism in corporate governance); Elizabeth Pollman, *The History and Revival of the Corporate Purpose Clause*, 99 TEX. L. REV. 1423, 1447–51 (2021) (examining the historical and legal evolution of corporate purpose debates); Bebchuk & Tallarita, *supra* note 21, at 124–26 (highlighting the growing interests in identifying social benefits as part of corporate purpose); Fisch & Solomon, *supra* note 21, at 1309–11 (noting how corporate governance is impacted by definitions and understandings of corporate purpose).

²⁶ See *infra* notes 203–346 and accompanying text.

²⁷ Changing perspectives and norms are critical to changing law and lawmaking in the specialty of business law and beyond. See, e.g., CRISTINA BICCHIERI, NORMS IN THE WILD: HOW TO DIAGNOSE, MEASURE, AND CHANGE SOCIAL NORMS 28–31 (2017) (describing the difference between personally held and societal norms); ERIC A. POSNER, LAW AND SOCIAL NORMS 4–8 (2000) (providing examples of nonlegal regulation from entities other than the state that help to enforce social norms); Sunstein, *supra* note 21, at 904–10 (explaining by way of example how social norms affect what people perceive to be rational behavior); John C. Coffee, Jr., *Do Norms Matter? A Cross-Country Evaluation*, 149 U. PA. L. REV. 2151, 2151–54 (2001) (arguing that compliance with social norms, though not legally enforced, can positively impact the market value of a corporation); Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEO. L.J. 797, 816–17 (2001) (arguing that social norms have a greater impact on the dynamics of boards of directors than laws that require independent directors).

protect entrepreneurs and investors from the dangerous, whimsical winds of short-term partisan politics.

Finally, this Article ends with a brief conclusion that reflects on the unfolding cartography of corporate political governance. It looks forward with hope at how more measured and thoughtful governance in business and politics can help create a more just and prosperous future for humanity, since better corporate governance and political governance are ultimately about better human self-governance.²⁸

I. THE NEW CORPORATE POLITICAL LANDSCAPE

Corporate and political leaders today operate in a shifting, ever-complicated business and political environment. Four critical, interrelated, and reinforcing corporate and political factors serve as enabling systemic forces that shape this new landscape. First, Section A discusses how a new sense of corporate social activism has impacted social expectations as well as corporate behavior.²⁹ Second, Section B explores why rising investor interests in ESG investments have changed how companies run their businesses and engage with society.³⁰ Third, Section C examines how a new and growing class of active retail investors has altered the calculus of corporate and political governance.³¹ And fourth, Section D explains why all of these preceding factors have contributed to transforming longstanding political alignments in business.³²

A. A New Corporate Social Activism

Businesses and their executives are at the vanguard of some of the most important and contentious sociopolitical issues of our time. Through their policies, pronouncements, investments, and divestments, businesses and business leaders are engaging directly with many of these issues in the marketplace as well as in the political arena.³³ This engagement is not entirely new because, throughout U.S. history, corporations have played a critical role in social and political change.³⁴ For instance, during the 1960s, many corporations openly supported the Civil Rights Movement despite facing serious and dangerous

²⁸ See *infra* note 347 and accompanying text.

²⁹ See *infra* notes 33–59 and accompanying text.

³⁰ See *infra* notes 60–86 and accompanying text.

³¹ See *infra* notes 87–100 and accompanying text.

³² See *infra* notes 101–106 and accompanying text.

³³ See TOM C.W. LIN, *THE CAPITALIST AND THE ACTIVIST: CORPORATE SOCIAL ACTIVISM AND THE NEW BUSINESS OF CHANGE* 4–5 (2022).

³⁴ See DAVID CHANDLER, *STRATEGIC CORPORATE SOCIAL RESPONSIBILITY: SUSTAINABLE VALUE CREATION* 9 (4th ed. 2016) (explaining that business leaders face tradeoffs among shareholders, other stakeholders, and the environment in general when running a business).

resistance.³⁵ Many businesses worked and lobbied with President Lyndon Johnson to ensure the passage and enforcement of the landmark Civil Rights Act of 1964 and the Civil Rights Act of 1968.³⁶ Nevertheless, although corporate social activism itself is not new, the technological tools and historical context of the present era have made contemporary corporate social activism meaningfully different.³⁷

Contemporary corporate social activism differs from past corporate activism because it is occurring during a time of significant changes in business, law, and society. Three changes are particularly noteworthy for having helped catalyze corporate social activism. First, modern social expectations now often demand that businesses speak out and act on important social and political issues in a politically divisive world.³⁸ Employees, customers, and other corporate stakeholders now expect and demand that businesses express their social

³⁵ See, e.g., TAYLOR BRANCH, PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963–65, at 80–81, 90 (1998) (describing the pressure that the Civil Rights Movement placed on businesses, and the government’s response to that pressure); Luders, *supra* note 21, at 965–70 (studying varying relationships between business interests and civil rights activists); Kenneth T. Andrews & Michael Biggs, *The Dynamics of Protest Diffusion: Movement Organizations, Social Networks, and News Media in the 1960 Sit-Ins*, 71 AM. SOCIO. REV. 752, 753–54 (2006) (describing civil rights protest sit-ins and their success); Herbert H. Haines, *Black Radicalization and the Funding of Civil Rights: 1957–1970*, 32 SOC. PROBS. 31, 39–40 (1984) (highlighting growth in corporate donations to the National Urban League and the NAACP during the Civil Rights Movement). But see JERROLD M. PACKARD, AMERICAN NIGHTMARE: THE HISTORY OF JIM CROW 163–71 (2003) (discussing the role of corporations in perpetuating customary restrictions, as opposed to statutory restrictions, during the Jim Crow era); TAYLOR BRANCH, AT CANAAN’S EDGE: AMERICA IN THE KING YEARS 1965–68, at 231–32 (2007) (discussing holdout businesses that refused to integrate after the passage of the Civil Rights Act of 1964).

³⁶ See BRANCH, *supra* note 21, at 395 (highlighting corporations’ role in the Civil Rights Movement); CLAY RISEN, THE BILL OF THE CENTURY: THE EPIC BATTLE FOR THE CIVIL RIGHTS ACT 63–74, 247 (2014) (highlighting political battles to pass the Civil Rights Act and the role of Southern businesses in demanding an end to the Jim Crow era); JULIAN E. ZELIZER, THE FIERCE URGENCY OF NOW: LYNDON JOHNSON, CONGRESS, AND THE BATTLE FOR THE GREAT SOCIETY 295–97 (2015) (describing historical events that led to the passage of the Civil Rights Act of 1968).

³⁷ Lin, *supra* note 21, at 1544–45.

³⁸ See Dave Samson, *Business: An Unshakable Force in a Polarized World*, EDELMAN (Jan. 15, 2023), <https://www.edelman.com/trust/2023/Trust-barometer/business-unshakable-force-polarized-world> [<https://perma.cc/5QWT-NMXF>] (reporting on surveys showing that people trust businesses to respond to adverse global events in a moral and competent way); Aaron K. Chatterji & Michael W. Toffel, Opinion, *The Power of C.E.O. Activism*, N.Y. TIMES (Apr. 1, 2016), <https://www.nytimes.com/2016/04/03/opinion/sunday/the-power-of-ceo-activism.html> [<https://perma.cc/FG4B-FY2R>] (“[I]n an era of political polarization, in which we are increasingly cloistered in neighborhoods, social networks and workplaces that serve as echo chambers for our ideological beliefs, corporate neutrality may be outdated.”); Larry Fink, *Larry Fink’s 2018 Letter to CEOs: A Sense of Purpose*, BLACKROCK (2018), <https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter> [<https://perma.cc/2A74-58KS>] (“Society is demanding that companies, both public and private, serve a social purpose. To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society.”).

values as they relate to critical issues of the times.³⁹ The days when businesses stayed superficially apolitical and focused only on profits for shareholders are gone as people increasingly look to businesses for help at a time when their faith in government has eroded.⁴⁰ As such, businesses have responded in kind.⁴¹ Perhaps the most prominent and influential of responses came from Larry Fink, the chairman and chief executive officer (CEO) of BlackRock, the world's largest asset manager, who called for businesses to rethink their purposes more broadly to better account for stakeholders beyond shareholders.⁴² In a series of widely read annual letters from 2018 to 2022, Fink called on businesses to make "a positive contribution to society,"⁴³ to look beyond "the sole pursuit of profits,"⁴⁴ and to "create value for and be valued by its full range of stakeholders in order to deliver long-term value for its shareholders."⁴⁵

Second, the melding of the public and private spheres through the growing privatization of traditional public functions like prisons and policing, along with unprecedented public interventions in private businesses like government bailouts and vaccine mandates, have spurred more private business engage-

³⁹ Robert Safian, *Facebook, Airbnb, Uber, and the Struggle to Do the Right Thing*, FAST CO. (Apr. 11, 2017), <https://www.fastcompany.com/40397294/facebook-airbnb-uber-and-the-struggle-to-do-the-right-thing> [<https://perma.cc/JW3V-JFLV>] ("[C]ompanies are increasingly seeking to align their commercial activities with larger social and cultural values—not just because it makes them look good, but because employees and customers have started to insist on it.").

⁴⁰ See EDELMAN, 2023 EDELMAN TRUST BAROMETER: GLOBAL REPORT 8–9 (2023), <https://www.edelman.com/sites/g/files/aatuss191/files/2023-01/2023%20Edelman%20Trust%20Barometer%20Global%20Report.pdf> [<https://perma.cc/M84F-XMAE>] (indicating that people across the world trust businesses more than they trust their government); James B. Stewart, *C.E.O.s Long Avoided Politics. Trump Is Changing the Calculus.*, N.Y. TIMES, <https://www.nytimes.com/2017/08/16/business/trump-chief-executives-companies.html> [<https://perma.cc/YW4U-SQE2>] (Aug. 18, 2017) (reporting that CEOs, in a rare event, waded into the political realm by repudiating President Trump over comments he made about white supremacists).

⁴¹ See BAINBRIDGE, *supra* note 19, at 2–6 (contextualizing recent developments and debates surrounding corporate purpose with changes in investing and social norms).

⁴² See Anne Tergesen, *BlackRock, World's Largest Asset Manager, Buys Stake in Small-Business 401(k) Startup*, WALL ST. J. (Jan. 13, 2023), <https://www.wsj.com/articles/blackrock-worlds-largest-asset-manager-buys-stake-in-small-business-401-k-startup-11673575134> [<https://perma.cc/4Z6G-J38U>] (reporting that BlackRock is attempting to help small business employees, who often do not have access to retirement benefits, access retirement plans); Will Daniel, *Larry Fink, the Face of ESG, Says 'The Attacks Are Now Personal' for the First Time in His Career. 'They Are Trying to Demonize Issues.'*, FORTUNE (Jan. 17, 2023), <https://fortune.com/2023/01/17/larry-fink-blackrock-esg-investing-personal-attacks-polarized/> [<https://perma.cc/A5D7-H9R8>] (noting that Larry Fink was criticized for promoting the idea that businesses should consider all stakeholders when making business decisions).

⁴³ Fink, *supra* note 38.

⁴⁴ Larry Fink, *Larry Fink's 2019 Letter to CEOs: Purpose & Profit*, BLACKROCK (2019), <https://www.blackrock.com/corporate/investor-relations/2019-larry-fink-ceo-letter> [<https://perma.cc/3S84-N7B6>].

⁴⁵ Larry Fink, *Larry Fink's 2022 Letter to CEOs: The Power of Capitalism*, BLACKROCK (2022), <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter> [<https://perma.cc/6L39-U9G7>].

ment on public social issues.⁴⁶ As businesses take on more state functions and responsibilities, then, not surprisingly, citizens are going to expect businesses to respond to some of society's toughest social and political challenges.⁴⁷ Businesses in many instances have become akin to social and political governance gatekeepers and regulators where public institutions have failed or fallen short.⁴⁸ As a result, businesses, through the free market system, have come to increasingly serve as an engine for social and political change in addition to economic and financial change.⁴⁹

Third, the expansion of corporate political rights with Supreme Court decisions like *Citizens United v. FEC* in 2010 and *Burwell v. Hobby Lobby Stores, Inc.* in 2014, both of which permitted less restrictive allocations of corporate funds for political campaigns, have prompted the greater use of business resources to address social and political issues.⁵⁰ In the years following these two seminal rulings, corporate interests have poured hundreds of millions of dollars into political campaigns directly and indirectly through the use of super PACs and other entities.⁵¹ Understandably, political and social activists have

⁴⁶ See MICHAEL J. SANDEL, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS 7 (2012) (discussing the rise of privatization and its impact on democratic governance); DAVID ROTHKOPF, POWER, INC.: THE EPIC RIVALRY BETWEEN BIG BUSINESS AND GOVERNMENT—AND THE RECKONING THAT LIES AHEAD 195 (2012) (“[C]orporations have grown in influence worldwide and in every instance have played a role in paring away key prerogatives of the state.”); Jon D. Michaels, *Sovereigns, Shopkeepers, and the Separation of Powers*, 166 U. PA. L. REV. 861, 862 (2018) (“Federal, state, and municipal governments are pervasive and increasingly relentless market participants. They run businesses, operate banks, own companies, license intellectual property, trade in private securities, and buy and sell goods and services for themselves and for their beneficiary communities.”); Lin, *supra* note 21, at 1559 (“In contemporary society, the public responsibilities of government and the private endeavors of business have blurred and blended as government and business frequently act in interchangeable ways.”).

⁴⁷ See DONALD COHEN & ALLEN MIKAELIAN, THE PRIVATIZATION OF EVERYTHING: HOW THE PLUNDER OF PUBLIC GOODS TRANSFORMED AMERICA AND HOW WE CAN FIGHT BACK 22–26 (2023) (discussing the privatization of public services); Aaron K. Chatterji & Barak D. Richman, *Understanding the “Corporate” in Corporate Social Responsibility*, 2 HARV. L. & POL’Y REV. 33, 38 (2008) (discussing the strategy of progressive political activists to boycott companies whose actions do not align with the protestors’ political beliefs).

⁴⁸ See Rory Van Loo, *The New Gatekeepers: Private Firms as Public Enforcers*, 106 VA. L. REV. 467, 469–72 (2020) (discussing how businesses have become increasingly influential players in regulatory enforcement); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 344–45 (2004) (describing a “new governance model” where private actors play a more prominent and collaborative role in regulation with society and the marketplace).

⁴⁹ See Fink, *supra* note 45 (“Capitalism has the power to shape society and act as a powerful catalyst for change.”).

⁵⁰ See *Citizens United v. FEC*, 558 U.S. 310, 340–41, 371 (2010) (protecting the political speech of corporations); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 688–92 (2014) (recognizing protections of religious liberties for closely held corporations).

⁵¹ See *Outside Spending: Introduction*, OPEN SECRETS, [https://www.opensecrets.org/outside-spending?type=A&filter=\[https://perma.cc/D3Y5-V3ML\]](https://www.opensecrets.org/outside-spending?type=A&filter=[https://perma.cc/D3Y5-V3ML]) (demonstrating the large increase in out-

sought to use this court-sanctioned right to leverage corporate resources for their causes, even if it deviates from the core profit-seeking operations of a company. In fact, in *Hobby Lobby*, the Court explicitly opined that for-profit corporations may work for objectives beyond profit:

While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives.⁵²

In 2023, as a further expansion of corporate political rights, the Supreme Court held in *303 Creative LLC v. Elenis* that under the First Amendment to the Constitution, a web designer could refuse to work with same-sex couples because same-sex marriage was contrary to her values and beliefs.⁵³ As a result of this continued amplification and protection of corporate power and rights, corporate engagement with political and social issues will likely continue for the foreseeable future.

* * *

Each of these systemic changes in corporate expectations, divisions between traditional private and public functions, and the expansion of corporate political rights has been amplified and accelerated by technological advances in finance, information, artificial intelligence, and social media that have fundamentally changed the way we work, live, and connect with one another.⁵⁴

side spending to political campaigns over the last ten years); LEE DRUTMAN, *THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE* 3–4 (2015) (describing the expansion of corporate lobbying efforts in “almost every process of American democratic policymaking”); LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 183–84 (2011) (describing the negative effects lobbying has had on the average American citizen); Dan Eggen, *Super PACs Dominate Republican Primary Spending*, WASH. POST (Jan. 16, 2012), https://www.washingtonpost.com/politics/super-pacs-dominate-republican-primary-spending/2012/01/11/gIQAdcoq3P_story.html [<https://perma.cc/GXL6-A79X>] (reporting that super PACs funded a seemingly endless supply of commercials for the South Carolina Republican presidential primary in 2012); Mike McIntire & Nicholas Confessore, *Tax-Exempt Groups Shield Political Gifts of Businesses*, N.Y. TIMES (July 7, 2012), <https://www.nytimes.com/2012/07/08/us/politics/groups-shield-political-gifts-of-businesses.html> [<https://perma.cc/ZZ99-JQ58>] (describing how “corporations are trying to influence campaigns by donating money to tax-exempt organizations that can spend millions of dollars without being subject to the disclosure requirements that apply to candidates”).

⁵² 573 U.S. at 711–12.

⁵³ 600 U.S. 570, 588 (2023).

⁵⁴ See R. EDWARD FREEMAN, JEFFREY S. HARRISON & ANDREW C. WICKS, *MANAGING FOR STAKEHOLDERS: SURVIVAL, REPUTATION, AND SUCCESS* 10 (2007) (“The information revolution has

These tools empower activists and citizens to readily organize, communicate, and fundraise to bring their concerns to powerful figures in business and government like never before.⁵⁵ Today, concerned citizens and activists can reach millions of people, raise hundreds of thousands of dollars, and gather masses of people to heighten awareness or protest an issue in a matter of hours from the palm of their hands.⁵⁶

As a result of these shifts in social, political, legal, and technological norms and capabilities, a new type of corporate social activism has emerged. One can agitate for social and political change through public channels of traditional political processes, as well as through private channels of corporate advocacy.⁵⁷ One can effectuate progress on important social issues like voting rights, racial justice, income inequality, gun violence, immigration reform, gender equity, and climate change by changing laws and public policies *and* by changing the institutional practices and priorities at major corporations.⁵⁸ Increasingly, concerned citizens and activists are choosing to pursue progress via the paths of both government and business, thereby changing business and politics all at once, particularly at a time when government can seem frustratingly dysfunctional and unresponsive.⁵⁹

made it possible for businesses around the globe to see vast improvements in productivity and innovation. . . . Information technology has changed the very nature of the way we work with each other”); Tom C.W. Lin, *Artificial Intelligence, Finance, and the Law*, 88 FORDHAM L. REV. 531, 532–33 (2019) (discussing various recent advances in artificial intelligence and financial technology).

⁵⁵ See SIMON MAINWARING, *WE FIRST: HOW BRANDS AND CONSUMERS USE SOCIAL MEDIA TO BUILD A BETTER WORLD* 6 (2011) (“[T]he world is witnessing the ability of social media to connect people and spread the ideas, values, and courage needed for significant political and social transformation.”); Farhad Manjoo, *The Alt-Majority: How Social Networks Empowered Mass Protests Against Trump*, N.Y. TIMES (Jan. 30, 2017), <https://www.nytimes.com/2017/01/30/technology/donald-trump-social-networks-protests.html> [<https://perma.cc/6G3G-U4YH>] (describing the power of decentralized social networks in advancing popular movements).

⁵⁶ See Farhad Manjoo, *How Battling Brands Online Has Gained Urgency, and Impact*, N.Y. TIMES (June 21, 2017), <https://www.nytimes.com/2017/06/21/technology/how-battling-brands-online-has-gained-urgency-and-impact.html> [<https://perma.cc/Q3KG-UDV3>] (“Online campaigns against brands have become one of the most powerful forces in business, giving customers a huge megaphone with which to shape corporate ethics and practices, and imperiling some of the most towering figures of media and industry.”).

⁵⁷ See Sale, *supra* note 21, at 1034 (observing how the failings of corporations can spark outside groups to scrutinize corporate practices); Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REGUL. 499, 513 (2020) (noting that consumers have effectively applied social pressure on corporations to incentivize corporations to change their practices to avoid a negative impact on their reputation).

⁵⁸ See Susan S. Kuo & Benjamin Means, *The Political Economy of Corporate Exit*, 71 VAND. L. REV. 1293, 1296 (2018) (“When conventional political channels are inaccessible, citizens can harness corporate economic power instead.”).

⁵⁹ See Lin, *supra* note 21, at 1559–62 (observing the occurrence of a “public-private convergence” and how activists have responded); Andrew Solender, *Capitol Hill Stunner: 2023 Led to Fewest Laws in Decades*, AXIOS (Dec. 18, 2023), <https://www.axios.com/2023/12/19/118-congress-bills->

B. The Rise and Retreat of ESG

In connection with the emergence of contemporary corporate social activism is the rise and subsequent retreat of ESG investments.⁶⁰ Increasingly, more investors are seeking to make a social impact with their capital by investing in businesses that do well and do good.⁶¹ Surpassing many expectations, impact investments have grown over the last decade or so to account for nearly \$715 billion to \$2.1 trillion in assets under management, depending on how one defines such investments in 2020.⁶² This growth is particularly notable with ESG investments.⁶³ J.P. Morgan reported that in 2021 alone, over \$500 billion was invested in ESG-related funds, representing a 55% year-to-year increase.⁶⁴ This growth in ESG investments has occurred over an extended period of years and across asset classes, including equities and fixed income as Figure 1 indicates.

least-unproductive-chart [<https://perma.cc/WBL2-FBSY>] (noting that the 118th Congress passed only twenty bills into law by the end of 2023).

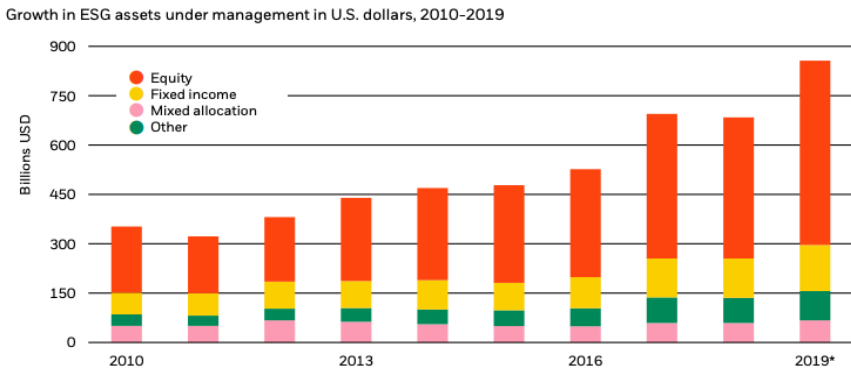
⁶⁰ See Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 388 (2020) (defining ESG investing as “an umbrella term that refers to an investment strategy that emphasizes a firm’s governance structure or the environmental or social impacts of the firm’s products or practices”).

⁶¹ See Robert G. Eccles & Svetlana Klimenko, *The Investor Revolution: Shareholders Are Getting Serious About Sustainability*, HARV. BUS. REV., May–June 2019, at 107, 110 (“Mainstream investors now look for evidence that their portfolio companies are focused on the material ESG issues that matter to financial performance”); ANTONY BUGG-LEVINE & JED EMERSON, IMPACT INVESTING: TRANSFORMING HOW WE MAKE MONEY WHILE MAKING A DIFFERENCE 5 (2011) (“Impact investing recognizes that investments can pursue financial returns while also intentionally addressing social and environmental challenges.”). See generally ARIANE VOLK, INT’L FIN. CORP., INVESTING FOR IMPACT: THE GLOBAL IMPACT INVESTING MARKET 2020 (Matt Benjamin ed., 2021), <https://www.ifc.org/content/dam/ifc/doc/mgmt/2021-investing-for-impact-fin2.pdf> [<https://perma.cc/DE3D-TFLE>] (analyzing the growing market of impact investing).

⁶² Yasemin Saltuk Lamy, Christina Leijonhufvud & Nick O’Donohoe, *The Next 10 Years of Impact Investment*, STAN. SOC. INNOVATION REV. (Mar. 16, 2021), https://ssir.org/articles/entry/the_next_10_years_of_impact_investment [<https://perma.cc/WMQ7-XQUR>].

⁶³ For an excellent overview of the history and development of ESG investments, see generally Elizabeth Pollman, *The Making and Meaning of ESG* (U. Penn. Carey L. Sch., Working Paper No. 659, 2022), <https://ssrn.com/abstract=4219857> [<https://perma.cc/RQS8-N5LW>] (describing how ESG grew from an obscure form of investing to being ubiquitous).

⁶⁴ Jennifer Wu, *ESG Outlook 2022: The Future of ESG Investing*, J.P. MORGAN (Jan. 2, 2022), <https://am.jpmorgan.com/us/en/asset-management/liq/investment-themes/sustainable-investing/future-of-esg-investing/> [<https://perma.cc/CBL8-XV9E>] (citing data reported from Morningstar).

Figure 1: Growth in ESG Funds Under Management, 2010–2019⁶⁵

Sources: BlackRock Investment Institute, with data from the IMF, February 2020. Notes: Data are based on IMF staff calculations using Bloomberg Finance data. The data for 2019 are as of June, the latest available set. The chart shows global ESG mandated funds only.

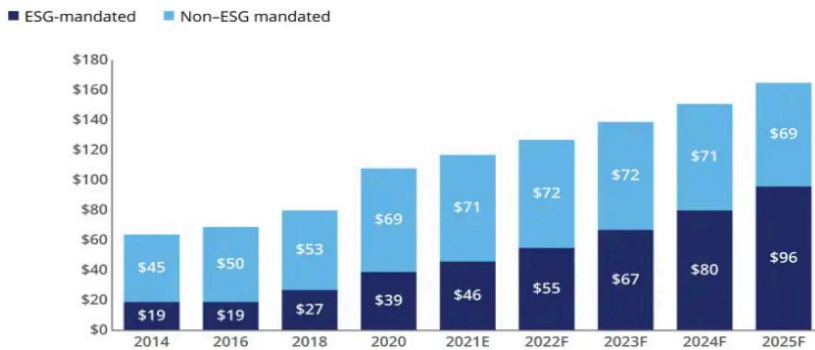
Given the highly intermediated nature of financial markets, in response to increasing demands for ESG investments, firms across the financial industry have created a growing variety of vehicles and instruments available to investors related to such investments.⁶⁶ Companies, in turn, have responded by repositioning their business operations, governance structures, and public communications to attract this large pool of capital for investors and fund managers with a diverse range of interests and motivations.⁶⁷ In 2022, Deloitte estimated that by 2024, ESG-related assets would rise to nearly eighty trillion dollars, or half of all professionally invested assets around the world.⁶⁸

⁶⁵ This figure is from a study issued by BlackRock, one of the largest asset managers in the world. PHILIPP HILDEBRAND, CHRISTOPHER POLK, BRIAN DEESE & JEAN BOLVIN, BLACKROCK, SUSTAINABILITY: THE TECTONIC SHIFT TRANSFORMING INVESTING 4 fig.1 (2020), <https://www.blackrock.com/corporate/literature/whitepaper/bii-portfolio-perspectives-february-2020.pdf> [<https://perma.cc/CHX8-F2D9>].

⁶⁶ See Quinn Curtis, Jill Fisch & Adriana Z. Robertson, *Do ESG Mutual Funds Deliver on Their Promises?*, 120 MICH. L. REV. 393, 399 (2021) (“Descriptively, we uncover an evolving landscape of ESG funds. Today’s ESG funds range from single-issue funds that address water conservation or religious values to those that incorporate screening criteria into the construction of a broad-based index.”); Tom C.W. Lin, *Infinite Financial Intermediation*, 50 WAKE FOREST L. REV. 643, 645–49 (2015) (discussing the highly intermediated and interdependent nature of modern finance).

⁶⁷ See Lisa M. Fairfax, *Board Committee Charters and ESG Accountability*, 12 HARV. BUS. L. REV. 371, 371–72 (2022) (discussing changes in corporate charters with the growth of ESG investments); Amanda M. Rose, *A Response to Calls for SEC-Mandated ESG Disclosure*, 98 WASH. U. L. REV. 1821, 1825 (2021) (“The breadth of topics embraced by ESG, and the breadth of motivations spurring the ESG movement, has created a big tent that has undoubtedly served a purpose in terms of helping the various causes of those involved to gain momentum.”); Stavros Gadinis & Amelia Mizazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1415 (2020) (“ESG’s scope expands by the day with new concerns vying for corporate attention, like the use of sugar in packaged foods or children and screen time.”).

⁶⁸ TANIA LYNN TAYLOR & SEAN COLLINS, DELOITTE CTR. FOR FIN. SERVS., INGRAINING SUSTAINABILITY IN THE NEXT ERA OF ESG INVESTING 4 fig.1 (2022), <https://www2.deloitte.com/us/en/>

Figure 2: Projected Growth of ESG Funds Under Management⁶⁹

This proliferating of ESG investments is not motivated solely by charity, altruism, or some desire to invest in the same assets under the guise of a different label. Rather, the growing ESG investment sector often genuinely offers the marketplace meaningfully different assets designed for generating positive social returns without forfeiting financial returns.⁷⁰

To be sure, this rise in ESG investments has not happened without concerns, controversy, or resistance.⁷¹ Many critics have viewed ESG investments as duplicitous tools of progressives on issues like climate change and diversity, masquerading as investment vehicles to the detriment of investors and society.⁷² Some contend that ESG is an attack on the “American free enterprise system.”⁷³ Others argue that ESG investments may violate the laws governing the fiduciary duties of asset managers and corporate directors or altering core corporate law principles.⁷⁴ Still others argue that regardless of the motivation, the

insights/industry/financial-services/esg-investing-and-sustainability.html [https://perma.cc/T2WS-VGSM].

⁶⁹ *Id.*

⁷⁰ See Curtis et al., *supra* note 66, at 400 (“Our empirical results . . . provide powerful evidence that ESG funds are offering investors something different from traditional funds with respect to both portfolio composition and voting, and that they are doing so without causing investors systematically to sacrifice economic performance.”).

⁷¹ See *id.* at 408–10 (summarizing a variety of concerns and critiques about ESG investments).

⁷² See, e.g., RAMASWAMY, *supra* note 12, at 3–4.

⁷³ See, e.g., CONSUMERS’ RSCH., DEFEATING THE ESG ATTACK ON THE AMERICAN FREE ENTERPRISE SYSTEM I (2023), <https://consumersresearch.org/documents/defeating-esg/> [https://perma.cc/GQT9-JS9Q].

⁷⁴ See, e.g., Jed Rubenfeld & William P. Barr, Opinion, *ESG Can’t Square with Fiduciary Duty*, WALL ST. J. (Sept. 6, 2022), <https://www.wsj.com/articles/esg-cant-square-with-fiduciary-duty-black-rock-vanguard-state-stree-the-big-three-violations-china-conflict-of-interest-investors-11662496552> [https://perma.cc/2Z9U-2J5P] (noting that attorneys general from nineteen states signed a letter to the CEO of BlackRock, warning that ESG investing may violate fiduciary duties to shareholders); Jonathan A. McGowan, *The Trouble with Tibble: Environmental, Social, and Governance (ESG) and Fiduciary Duty*, U. CHI. BUS. L. REV., 2022, at 10, <https://businesslawreview.uchicago.edu/sites/default/>

amorphous, evolving nature of ESG investments makes it particularly problematic for regulators seeking to protect investors.⁷⁵

The concerns and controversies related to ESG investments have resulted in regulatory action and political scrutiny. Nationally, both the Department of Labor (DOL) and the Securities and Exchange Commission (SEC) have taken important actions in the last few years. The DOL amended its regulations regarding fiduciary duties to better account for ESG investments under the Employee Retirement Income Security Act of 1974, as amended.⁷⁶ Similarly, the SEC proposed rules governing the asset management practices, names, and disclosures relating to ESG investments and climate change impact.⁷⁷

Additionally, this skepticism and opposition led to a growing number of state actions to curb the growth of ESG investments.⁷⁸ For instance, in response to corporate social activism and a growing ESG focus by asset managers like BlackRock, Florida and Texas barred their state pension funds from investing in certain ESG funds.⁷⁹ As of July 2023, thirty-seven states have proposed or enacted bills directly limiting or supporting ESG with no signs of a slowdown.⁸⁰ In 2024, the New Hampshire state legislature even introduced a

files/2023-03/The-Trouble-with-Tibble-1.pdf [https://perma.cc/ZT3J-RTT8] (noting the ambiguity surrounding whether ESG investing is a breach of a corporate director's fiduciary duty); William P. Barr & Jonathan Berry, Opinion, *Delaware Is Trying Hard to Drive Away Corporations*, WALL ST. J. (Nov. 24, 2023), https://www.wsj.com/articles/delaware-is-trying-hard-to-drive-away-corporations-business-environmental-social-governance-investing-780f812a?mod=opinion_major_pos6 [https://perma.cc/DWV9-RQ6K] ("Delaware is falling in line with other blue states in embracing ESG, which rejects shareholder value as corporate law's lodestar.").

⁷⁵ See, e.g., Rose, *supra* note 67, at 1826–27.

⁷⁶ See 29 C.F.R. § 2550.404a-1(a) (2024).

⁷⁷ Investment Company Names, 88 Fed. Reg. 70436, 70440 (proposed Sept. 20, 2023) (to be codified at 17 C.F.R. pts. 230, 232, 239, 270, 274); Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. 36654, 36655–56 (proposed June 17, 2022) (to be codified at 17 C.F.R. pts. 200, 230, 232, 239, 249, 274, 279).

⁷⁸ See Nathan Crooks, *Ron DeSantis Takes Aim at 'Woke CEOs'*, BLOOMBERG (July 27, 2022), <https://www.bloomberg.com/news/articles/2022-07-27/desantis-takes-aim-at-woke-esg-investing-singles-out-paypal#xj4y7vzkg> [https://perma.cc/FYU7-WDF7] (reporting on criticisms levied by Florida Governor Ron DeSantis against ESG companies); Rubenfeld & Barr, *supra* note 74 (noting that the Attorneys General of Louisiana and Indiana sent an official warning to their state pension managers that it is a fiduciary duty violation to partake in ESG investing); Kerber, *supra* note 17 (reporting that Florida pulled \$2 billion out of BlackRock funds because of BlackRock's ESG investing policies); Sorkin et al., *supra* note 17 (reporting on Florida's adoption of a proposal to ban ESG investing from its state pension fund); Joselow & Montalbano, *supra* note 17 (reporting that some states are requiring pensions funds to divest from companies that are removing investments from fossil fuel companies).

⁷⁹ See, e.g., Sorkin et al., *supra* note 17; Joselow & Montalbano, *supra* note 17.

⁸⁰ Lance C. Dial, Daniel F.C. Crowley, Jennifer R. McCoy & Brenden R. Chainey, *2023 ESG State Legislation Wrap Up*, K&L GATES (July 25, 2023), <https://www.klgates.com/2023-ESG-State-Legislation-Wrap-Up-7-19-2023> [https://perma.cc/8MFF-DTLQ].

bill that would make certain investment allocations of state funds using ESG factors a violation of the bill's definition of fiduciary duties, and a felony punishable up to twenty years in prison.⁸¹

The growing concerns, controversies, and scrutiny surrounding ESG have, not surprisingly, impacted its influence and growth. The politicization surrounding ESG has become so heated that some of its most prominent supporters, like BlackRock's Larry Fink, abandoned the term altogether by the summer of 2023.⁸² Furthermore, large asset managers like BlackRock also became less supportive of ESG-related resolutions around this time.⁸³ More importantly, in 2023, ESG and sustainable investment vehicles in the United States and Europe experienced significant fund outflows after years of steady growth.⁸⁴ By the end of 2023, "U.S. sustainable funds suffered their first calendar year of outflows since Morningstar began keeping track more than 10 years ago, making 2023 their worst calendar year on record."⁸⁵

Regardless of one's position on the debate over the rise of ESG investments, its related terminology, or its overall future, less debatable is the fact that its growth and prominence have significantly altered the dynamic between business and politics.⁸⁶

⁸¹ Robert Steyer, *It's a Felony: N.H. Bill Would Make It a Crime to Knowingly Use ESG Criteria in Investing Taxpayer Dollars*, PENSIONS & INVS. (Jan. 16, 2024), <https://www.pionline.com/esg/new-hampshire-bill-would-make-it-felony-knowingly-use-esg-criteria-investing-taxpayer-dollars> [<https://perma.cc/HK4S-UK4L>].

⁸² See Isla Binnie, *BlackRock's Fink Says He's Stopped Using 'Weaponised' Term ESG*, REUTERS (June 26, 2023), <https://www.reuters.com/business/environment/blackrocks-fink-says-hes-stopped-using-weaponised-term-esg-2023-06-26/> [<https://perma.cc/2M4D-F22Z>] (quoting the CEO of BlackRock, Larry Fink); Chip Cutter & Emily Glazer, *The Latest Dirty Word in Corporate America: ESG*, WALL ST. J., <https://www.wsj.com/business/the-latest-dirty-word-in-corporate-america-esg-9c776003> [<https://perma.cc/E4MJ-29XZ>] (Jan. 9, 2024) (noting that many companies now avoid use of the term "ESG").

⁸³ Felix Salmon, *What It Looks Like When Woke Capitalism Takes a Nap*, AXIOS, <https://www.axios.com/2024/01/13/esg-blackrock-woke-capitalism> [<https://perma.cc/WU4X-CZPT>] (Jan. 13, 2024).

⁸⁴ See Alyssa Stankiewicz, *Sustainable Funds Hit by Weaker Demand in Q3 2023*, MORNINGSTAR (Oct. 23, 2023), <https://www.morningstar.com/sustainable-investing/sustainable-funds-hit-by-weaker-demand-amid-rising-energy-prices-political-backlash> [<https://perma.cc/47PR-S7M3>] (reporting outflows of \$2.7 billion from U.S. sustainable funds in the third quarter of 2023); Tara O'Connor, *Fears ESG Interest 'Running Out of Steam' as Record Outflows Recorded*, FT ADVISER (Oct. 5, 2023), <https://www.ftadviser.com/investments/2023/10/05/fears-esg-interest-running-out-of-steam-as-record-outflows-recorded/> [<https://perma.cc/2HN3-D3PW>] (reporting that August 2023 saw record outflows from ESG funds).

⁸⁵ Alyssa Stankiewicz, *U.S. Sustainable Funds Register First Annual Outflows in 2023*, MORNINGSTAR (Jan. 17, 2024), <https://www.morningstar.com/sustainable-investing/us-sustainable-funds-register-first-annual-outflows-2023> [<https://perma.cc/ZVJ8-LNXJ>].

⁸⁶ See, e.g., Rubinfeld & Barr, *supra* note 74 (describing a potential clash between a corporate director's fiduciary duties and ESG investing); Michael Copley, *How ESG Investing Got Tangled Up in America's Culture Wars*, NPR (Sept. 12, 2022), <https://www.npr.org/2022/09/12/1121976216/esg-explained> [<https://perma.cc/M8K5-A2SJ>] (explaining why ESG investing has become political in nature); David A. Katz & Laura A. McIntosh, *ESG in 2023: Politics and Polemics*, HARV. L. SCH. F.

C. The Retail Investor Reemergence

Another key catalyst in the making of the contemporary corporate political landscape is the emergence of a new retail investor class.⁸⁷ This emergence of individual retail investors runs counter to multi-decade historical trends of shareholder ownership moving from individuals to institutional investors.⁸⁸ This new, growing class of retail investors is often younger, more tech-driven, and more media-savvy relative to many other investors in the marketplace.⁸⁹ Leveraging social media, this new breed of retail investors can cause significant short-term movements in a company's stock, capture the marketplace's attention, impact corporate governance, and invite the scrutiny of regulators, policymakers, and plaintiff law firms.⁹⁰

ON CORP. GOVERNANCE (Feb. 6, 2023), <https://corpgov.law.harvard.edu/2023/02/06/esg-in-2023-politics-and-polemics/> [<https://perma.cc/P2AX-EKB2>] (noting that new European Union regulations will require U.S. companies to report any ESG initiatives).

⁸⁷ See Jill E. Fisch, *GameStop and the Reemergence of the Retail Investor*, 102 B.U. L. REV. 1799, 1800–02 (2022) (describing the surge of novice retail investors using brokerage apps that created extreme volatility in the equity markets in early 2021); Alexandra Semenova, *Retail Investors Are Pouring a Record \$1.5 Billion per Day into the Stock Market*, YAHOO! FIN. (Feb. 16, 2023), <https://finance.yahoo.com/news/retail-investors-record-inflows-us-stock-market-193801422.html> [<https://perma.cc/Y26G-5HTH>] (describing the surge of retail investors); Karl Ehram, Irena Gecas-McCarthy, Robert Walley & Jill Gregorie, *The Rise of Newly Empowered Individual Investors*, WALL ST. J. (June 16, 2021), <https://deloitte.wsj.com/articles/the-rise-of-newly-empowered-individual-investors-01623870131> [<https://perma.cc/5ADB-BU3X>]; Krishan Arora, *The Rise of the Retail Investor*, FORBES (Nov. 4, 2022), <https://www.forbes.com/sites/forbesagencycouncil/2022/11/04/the-rise-of-the-retail-investor/?sh=a55cc0617555> [<https://perma.cc/8HZZ-BBBV>] (describing how retail investors worked as a group to make stock prices rise quickly in a short period of time).

⁸⁸ See Jill E. Fisch, *Rethinking the Regulation of Securities Intermediaries*, 158 U. PA. L. REV. 1961, 1962–63 (2010) (“The ownership of public equity has shifted substantially from retail to institutional investors since Congress enacted the federal securities laws in the 1930s.”); Sarah C. Haan, *Corporate Governance and the Feminization of Capital*, 74 STAN. L. REV. 515, 525–28 (2022) (noting the significant percentage of individual investors owning public companies in the years following World War II).

⁸⁹ See Sergio Alberto Gramitto Ricci & Christina M. Sautter, *Corporate Governance Gaming: The Collective Power of Retail Investors*, 22 NEV. L.J. 51, 67–73 (2021) (detailing the different generational capabilities to leverage technology in connection with investing); Tom C.W. Lin, *Reasonable Investor(s)*, 95 B.U. L. REV. 461, 466–76 (2015) (outlining a typology of diverse investors in the marketplace).

⁹⁰ See SEC, STAFF REPORT ON EQUITY AND OPTIONS MARKET STRUCTURE CONDITIONS IN EARLY 2021, at 1–2 (2021), <https://www.sec.gov/files/staff-report-equity-options-market-struction-conditions-early-2021.pdf> [<https://perma.cc/7FPX-EYJL>] (describing the factors that caused GameStop's stock price to fluctuate wildly in early 2021); Ricci & Sautter, *supra* note 89, at 83–85 (explaining that new technologies such as smartphones will increase retail investors' ability to more easily trade stocks and to communicate with others about the trading); Fisch, *supra* note 87, at 1831–33 (arguing that greater participation by retail investors is a benefit to corporations as well as to society as a whole); Adam B. Badawi & Frank Partnoy, *Social Good and Litigation Risk*, 12 HARV. BUS. L. REV. 315, 320–22 (2022) (exploring the possible links between a firm's ESG reputation and its securities litigation risk).

In 2020, during the so-called meme stock phenomenon, retail investors using commission-free mobile trading apps like Robinhood and social media forums like Reddit dramatically moved the stocks of companies like AMC, GameStop, and Bed Bath & Beyond.⁹¹ At one point during the meme stock frenzy, GameStop saw its stock increase by nearly 1500% over the course of about two weeks, temporarily giving it a market cap equivalent to those of some of America's longstanding blue-chip companies.⁹² This exciting and volatile movement in the stock markets captured the imagination of the public, the press, and policymakers.⁹³ For a brief period of time, retail investors dominat-

⁹¹ See *AMC Stock Breakdown: Is This Meme Stock a Financial Winner?*, FORBES (Nov. 24, 2022), <https://www.forbes.com/sites/qai/2022/11/24/amc-stock-breakdown-is-this-meme-stock-a-financial-winner/?sh=31691c74492d> [https://perma.cc/UW42-K549] (describing how AMC's stock price volatility was driven by an intense interest from retail investors); Paul R. La Monica, *Meme Mania Returns. GameStop and AMC Soar*, CNN, <https://www.cnn.com/2022/05/12/investing/gamestop-amc-meme-stocks/index.html> [https://perma.cc/B2XF-8EXN] (May 12, 2022) (noting that stocks popular on Reddit, such as GameStop, AMC, and Bed Bath & Beyond, had large price increases and high volatility); Jonathan Ponciano, *New Meme-Stock Rally: Bed Bath & Beyond Surges, but Experts Warn Hype Poses 'Significant Risk'*, FORBES (Jan. 24, 2023), <https://www.forbes.com/sites/jonathanponciano/2023/01/24/new-meme-stock-rally-bed-bath-beyond-surges-but-experts-warn-hype-poses-significant-risk/?sh=4f280b3fccc5> [https://perma.cc/FLJ3-P7X8] (noting the risks of a short squeeze for stocks whose prices have been driven up by retail investors); Hamza Shaban, Aaron Gregg & Bryan Pietsch, *Why Bed Bath & Beyond Shares Spiked More Than 350 Percent This Month*, WASH. POST, <https://www.washingtonpost.com/business/2022/08/17/bed-bath-and-beyond-stock-price/> [https://perma.cc/TQ66-6PWX] (Aug. 18, 2022) (reporting that the Bed Bath & Beyond stock price increased dramatically based on a filing showing an activist investor purchased a large stake in the company).

⁹² Yun Li, *GameStop Mania Explained: How the Reddit Retail Trading Crowd Ran Over Wall Street Pros*, CNBC, <https://www.cnbc.com/2021/01/27/gamestop-mania-explained-how-the-reddit-retail-trading-crowd-ran-over-wall-street-pros.html> [https://perma.cc/Z5CZ-D2KH] (Jan. 28, 2021); Matt Phillips & Taylor Lorenz, *'Dumb Money' Is on GameStop, and It's Beating Wall Street at Its Own Game*, N.Y. TIMES, <https://www.nytimes.com/2021/01/27/business/gamestop-wall-street-bets.html> [https://perma.cc/J8D7-55KP] (Oct. 18, 2021) (mentioning that GameStop's market capitalization briefly reached over \$24 billion).

⁹³ See Laura Davison, *Biden Reaps Record Tax Haul on Meme Stocks' Once-and-Done Frenzy*, BLOOMBERG (May 9, 2022), <https://www.bloomberg.com/news/articles/2022-05-09/meme-stock-frenzy-fuels-record-tax-haul-with-no-bounce-for-biden> [https://perma.cc/LN8V-HZQS] (reporting that government tax revenue was at a record high due to increased activity by retail investors); U.S. HOUSE COMM. ON FIN. SERVS., *GAME STOPPED: HOW THE MEME STOCK MARKET EVENT EXPOSED TROUBLING BUSINESS PRACTICES, INADEQUATE RISK MANAGEMENT, AND THE NEED FOR LEGISLATIVE AND REGULATORY REFORM 3* (2022), https://democrats-financialservices.house.gov/uploadedfiles/6.22_hfsc_gs.report_hmsmeetbp.irm.nlrf.pdf [https://perma.cc/W4SL-EPJE] (explaining that the Committee's report responded to the rise of "meme stocks" popularized by social media); Aaron Cutler & Chase Kroll, *Preparing for the Regulatory Response to 'Meme' Stock Investing*, BLOOMBERG L. (June 18, 2021), <https://news.bloomberglaw.com/securities-law/preparing-for-the-regulatory-response-to-meme-stock-investing> [https://perma.cc/AEQ7-HRPW] (explaining that the meme-stock craze will likely lead to more regulatory scrutiny for financial services firms); Declan Harty, *Why Biden's SEC Chief Is Enraging Wall Street*, POLITICO (Oct. 12, 2022), <https://www.politico.com/news/2022/10/12/wall-street-gary-gensler-sec-00061245> [https://perma.cc/2BHB-2DE8] (reporting that the SEC wants to increase regulations on brokerage firms following the surge of retail investing).

ed the business headlines each day.⁹⁴ Not surprisingly, this buzz also attracted regulatory scrutiny and attention from elected officials, who watched their constituents gain and lose significant sums of money in a matter of days, and sometimes hours.⁹⁵

Although the meme stock frenzy dissipated, the resurgence of retail investors in the capital markets did not.⁹⁶ The number of retail investor accounts has grown significantly over the last few years.⁹⁷ As more retail investors, particularly millennials, use their money to invest in companies that align with their values or simply to maximize their returns without social considerations, their fortunes will likely have regulatory and political implications.⁹⁸ Retail investors are also incredibly media-savvy consumers, voters, and political constituents.⁹⁹

⁹⁴ See, e.g., Catherine Thorbecke, *GameStop Timeline: A Closer Look at the Saga That Upended Wall Street*, ABC NEWS (Feb. 13, 2021), <https://abcnews.go.com/Business/gamestop-timeline-closer-saga-upended-wallstreet/story?id=75617315> [<https://perma.cc/9W6L-ALFW>]; Michelle Price, *A Year on, GameStop Champion Roaring Kitty Is Quiet—Yet Much Richer*, REUTERS (Feb. 2, 2022), <https://www.reuters.com/technology/year-gamestop-champion-roaring-kitty-is-quiet-yet-much-richer-2022-02-02/> [<https://perma.cc/849Y-ZRTN>] (reporting on Keith Gill, who quickly gained notoriety for his large bets on GameStop during the meme stock frenzy); Julia-Ambra Verlaine & Gunjan Banerji, *Keith Gill Drove the GameStop Reddit Mania. He Talked to the Journal.*, WALL ST. J. (Jan. 29, 2021), <https://www.wsj.com/articles/keith-gill-drove-the-gamestop-reddit-mania-he-talked-to-the-journal-11611931696> [<https://perma.cc/W959-BYUP>] (recapping the rise to fame of Keith Gill, the unofficial leader of the Reddit retail investors).

⁹⁵ See generally U.S. HOUSE COMM. ON FIN. SERVS., *supra* note 93; Cutler & Kroll, *supra* note 93; Andrew Ross Sorkin et al., *Rewriting Wall Street's Rulebook*, N.Y. TIMES (June 8, 2022), <https://www.nytimes.com/2022/06/08/business/dealbook/wall-street-sec-gensler-gamestop-meme-stock-trading-rules.html> [<https://perma.cc/LS7Z-SNJJ>] (reporting that the SEC is proposing new rules to protect individual investors); Katanga Johnson & John Mccrank, *U.S. Congressional Panel Calls for Crackdown After 'Meme-Stock' Saga*, REUTERS (June 24, 2022), <https://www.reuters.com/legal/transactional/us-congressional-panel-calls-new-trading-rules-after-meme-stock-saga-2022-06-24/> [<https://perma.cc/TJN3-SFTP>].

⁹⁶ See Arora, *supra* note 87 (highlighting the sustained trend of growth in retail investing even after the meme-stock craze ended); Semenova, *supra* note 87 (noting that retail investors put large amounts of money into the stock market each day in early 2023); V K Vijayakumar, *Newbie Retail Investors Flocking to the Stock Market: Who Will Gain & Who Will Lose?*, ECON. TIMES, <https://economictimes.indiatimes.com/markets/stocks/news/newbie-retail-investors-flocking-to-the-stock-market-who-will-gain-who-will-lose/articleshow/95621821.cms?from=mdr> [<https://perma.cc/GQQ9-EV3E>] (Nov. 19, 2022) (reporting that retail investors account for more than half of daily market transactions in India).

⁹⁷ Arora, *supra* note 87.

⁹⁸ See Michal Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243, 1291–94 (2020) (citing survey data from various sources showing that millennials are more likely than other generations to consider other societal benefits, like environmental impact, when investing in companies); Qianqian Li, Edward M. Watts & Christina Zhu, *Retail Investors and ESG News* 1–4 (Feb. 6, 2024) (on file with SSRN), <https://ssrn.com/abstract=4384675> [<https://perma.cc/97NJ-6A5E>] (explaining that ESG initiatives do have an effect on retail investors deciding to invest in a company).

⁹⁹ See R. Edward Freeman, Joey Burton & Ben Freeman, *Stakeholder Capitalism: Three Generations, One Voice* (describing how millennials are much more knowledgeable about the products they

As such, even if their market ownership remains relatively small compared to institutional shareholders, politicians would naturally want to act or posture in a manner that appeals to them to garner favorable media attention. This, in turn, will also shift the dynamic among business, politics, and regulation.¹⁰⁰

D. A Different Politics of Business

A different politics of business is shaping and being shaped by the changing corporate political landscape. For generations, it was popular American political orthodoxy that conservatives and the Republican Party favored big business, whereas progressives and the Democratic Party favored small business and the working class.¹⁰¹ As companies engage in corporate social activism on a wide range of sociopolitical issues like climate change and LGBTQ+ rights, many conservatives and Republicans have found themselves opposing big businesses who often publicly align more closely with progressives on social issues.¹⁰² Conversely, progressives and Democrats who have often op-

consume and feel more connected to the companies they do business with), in *THE BUSINESS OF BUILDING A BETTER WORLD: THE LEADERSHIP REVOLUTION THAT IS CHANGING EVERYTHING* 105, 110–12 (David Cooperrider & Audrey Selian eds., 2021).

¹⁰⁰ See Sergio Alberto Gramitto Ricci & Christina M. Sautter, Response, *The Corporate Forum*, 102 B.U. L. REV. 1861, 1865–67 (2022) (discussing changing corporate governance and regulatory considerations in response to the resurgence of retail investors); Michal Barzuza, Quinn Curtis & David H. Webber, *ESG and Private Ordering*, 1 U. CHI. BUS. L. REV. 1, 14–20 (2022) (explaining the growing demand for ESG investments and its implications).

¹⁰¹ David A. Hopkins, Opinion, *David A. Hopkins: Are Republicans and Big Business Headed for a Breakup?*, POST BULL. (Oct. 25, 2022), <https://www.postbulletin.com/opinion/columns/david-a-hopkins-are-republicans-and-big-business-headed-for-a-breakup> [<https://perma.cc/H8SA-CAAF>]; Arick Wierson & Bradley Honan, Opinion, *GOP's Culture Wars Force Its Decades-Long Marriage to Big Business to End in Divorce*, NBC NEWS (May 12, 2022), <https://www.nbcnews.com/think/opinion/gop-culture-war-causing-big-business-to-turn-to-democratic-party-rcna28375> [<https://perma.cc/WUS3-ELFG>] (arguing that the interests of corporate America are changing and may now align more with some liberal, rather than conservative, social policies); Joe Nocera, *What Will the Midterms Mean for Big Business?*, N.Y. TIMES, <https://www.nytimes.com/2022/11/05/business/dealbook/midterms-business.html> [<https://perma.cc/EUF8-W7ZN>] (Nov. 6, 2022) (noting that large corporations, which have long been aligned with more Republican Party policies, have more recently spoken out in favor of some Democratic Party policies).

¹⁰² See, e.g., Wierson & Honan, *supra* note 101 (discussing the feud between Florida Governor Ron DeSantis and Disney over Disney's opposition to Florida's law that bans LGBTQ+ discussions in schools up to third grade); Burgess Everett, *McConnell: Big Business Acting Like 'Woke Parallel Government'*, POLITICO (Apr. 5, 2021), <https://www.politico.com/news/2021/04/05/mcconnell-corporate-america-woke-parallel-government-479042> [<https://perma.cc/6RUQ-E8U4>] (reporting on the deteriorating relationship between the Republican Party and large American corporations over social issues); David Gelles, *Billionaire No More: Patagonia Founder Gives Away the Company*, N.Y. TIMES, <https://www.nytimes.com/2022/09/14/climate/patagonia-climate-philanthropy-chouinard.html> [<https://perma.cc/6QYY-DDH7>] (Sept. 21, 2022) (describing how Patagonia founder, Yvon Chouinard, transferred the company he owned to a nonprofit organization rather than selling it or taking it public).

posed businesses on issues like trade, taxes, and regulation have found themselves increasingly aligned with businesses on social issues.¹⁰³

To be sure, this realignment between business interests and the major political parties is imperfect and incomplete. Many sociopolitical issues like the regulation of large technology companies and same-sex marriages can cut across old political lines and alliances.¹⁰⁴ Nevertheless, this new realignment of business and politics has led corporate directors and executives to change their political calculus in both governance considerations and political engagements to better account for the shifting and crosscutting partisan lines and constituencies.¹⁰⁵ On many highly charged political and social issues, corporate executives have to cautiously weigh a variety of political considerations before acting like never before because of the highly partisan political environment of contemporary America.¹⁰⁶

¹⁰³ See, e.g., David Spiegel, *Where Big Corporations Agree with Democrats on Progressive Policy*, CNBC (May 7, 2019), <https://www.cnbc.com/2019/05/07/big-corporations-agree-with-the-democrats-on-some-progressive-ideas.html> [<https://perma.cc/5HSJ-TELJ>] (reporting on a survey that showed chief financial officers of U.S. companies support progressive policies such as paid maternity leave and more company-funded child care); Andrew Ross Sorkin, *Is Big Business the Democrats' New Best Friend?*, N.Y. TIMES (Apr. 6, 2021), <https://www.nytimes.com/2021/04/06/business/dealbook/mcconnell-mlb-democrats-republicans.html> [<https://perma.cc/6LR7-462F>] (commenting on the shift of Democrat politicians from historical opposition to big businesses to teaming up with them to propel social causes); Andrew Edgecliffe-Johnson, Opinion, *Business Needs to Rethink Its Role in Politics*, FIN. TIMES (Aug. 8, 2021), <https://www.ft.com/content/9e391c1f-60af-4f70-84b2-51fcd424ef63> [<https://perma.cc/W24T-CG2S>] (commenting on the increase in corporate boards getting involved in political issues when politicians fail to act).

¹⁰⁴ See, e.g., Jordan Marlatt, *Bipartisan Support for Big Tech Regulation Adds to the Sector's 2023 Challenges*, MORNING CONSULT (Jan. 18, 2023), <https://morningconsult.com/2023/01/18/big-tech-regulation-2023-challenges/> [<https://perma.cc/QW5A-XJ3D>] (noting that a majority of Republicans and Democrats think that major tech companies yield too much power); Annie Karni, *Same-Sex Marriage Bill Passes Senate After Bipartisan Breakthrough*, N.Y. TIMES, <https://www.nytimes.com/2022/11/29/us/politics/same-sex-marriage-bill-senate.html> [<https://perma.cc/BYG4-UNTL>] (Dec. 5, 2022).

¹⁰⁵ See Zack Stanton, *The GOP-Big Business Divorce Goes Deeper Than You Think*, POLITICO (Apr. 15, 2021), <https://www.politico.com/news/magazine/2021/04/15/republican-party-big-business-georgia-voting-rights-conservative-481978> [<https://perma.cc/E3B2-KB3E>] (discussing different strategies that business executives should use for dealing with the split between Republican politicians, many of whom are opposed to businesses wading into politics, and employees and other business stakeholders who want their corporation to take a stand on these issues); Richard A. Devine & R. Michael Holmes, Jr., *Money Talks: Big Business, Political Strategy and Corporate Involvement in US State Politics*, THE CONVERSATION (June 29, 2020), <https://theconversation.com/money-talks-big-business-political-strategy-and-corporate-involvement-in-us-state-politics-140686> [<https://perma.cc/UJ5V-FGF2>] (explaining that corporations spend significant sums of money lobbying the government for a variety of reasons, including to ward off regulations and to improve public relations regarding social movements).

¹⁰⁶ See, e.g., Kevin Draper, Julie Creswell & Sapna Maheshwari, *Nike Returns to Familiar Strategy with Kaepernick Ad Campaign*, N.Y. TIMES (Sept. 4, 2018), <https://www.nytimes.com/2018/09/04/sports/nike-colin-keaepernick.html> [<https://perma.cc/V7TB-A5PM>] (using Nike as an example of a company that has taken political stances in its advertisements, thus risking angering parts of its cus-

* * *

A new corporate political landscape is emerging. A new sense of corporate social activism, a rise in ESG investments, a new generation of active retail investors, and a change in traditional partisan alignments of business and politics have caused the tectonic plates of business and politics to shift and shape a new consequential terrain for law, business, and society.

II. PRACTICAL AND LEGAL TENSIONS

The emerging corporate political landscape exposes practical and legal tensions that animate the governance of our politics and businesses. These tensions complicate and inform critical, larger debates relating to shareholders and stakeholders, meanings and metrics in management, as well as the limitations of private and public power.

First, Section A delves into the ongoing debate about whether corporations should focus solely on the interests of shareholders or have a broader view that includes other interests.¹⁰⁷ Second, Section B discusses the current initiatives and challenges in developing consensus metrics for corporate social activities and efforts like ESG goals.¹⁰⁸ Finally, Section C highlights key limitations and consequences of using corporate power to address social problems.¹⁰⁹

A. Of Shareholders and Stakeholders

The dynamic engagement and entanglement of businesses in critical social and political issues further complicate a long-running legal debate about corporate purpose and social responsibility.¹¹⁰ Should corporations be zealously and narrowly focused on maximizing profits for its shareholders?¹¹¹ Or should corporations account for other stakeholders in pursuit of profits for shareholders?¹¹² The contemporary hyper-partisan, dysfunctional political en-

tomers base); Sapna Maheshwari, *The Delicate Dance of a Progressive C.E.O. in the Trump Era*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/2018/01/15/business/media/sonic-drive-in-clifford-hudson.html> [<https://perma.cc/A4DA-H4YY>] (explaining the difficult balancing act that CEOs of major companies have if they want to voice their political opinions without alienating customers).

¹⁰⁷ See *infra* notes 110–135 and accompanying text.

¹⁰⁸ See *infra* notes 136–151 and accompanying text.

¹⁰⁹ See *infra* notes 152–202 and accompanying text.

¹¹⁰ See Wells, *supra* note 3, at 78 (“Legal debates over corporate social responsibility stretch from the 1930s to the twenty-first century.”).

¹¹¹ See, e.g., Edward B. Rock, *For Whom Is the Corporation Managed in 2020?: The Debate Over Corporate Purpose*, 76 BUS. LAW. 363, 363–67, 391–95 (2021) (providing arguments for and against whether a corporation should have a responsibility to serve more than just its shareholders).

¹¹² See, e.g., Bebchuk & Tallarita, *supra* note 21, at 146–49 (explaining that the incentives of stakeholders versus corporate directors and CEOs are not aligned, thus making it more difficult to widely adopt stakeholderism); Dorothy S. Lund, *Corporate Finance for Social Good*, 121 COLUM. L.

vironment has made common ground harder to find in this long-running debate about shareholders and stakeholders.¹¹³ These interlocking questions have been at the heart of a longstanding, evolving debate among scholars, policymakers, executives, and practitioners dating back to the seminal argument between Adolf A. Berle and E. Merrick Dodd in the 1930s.¹¹⁴

For many advocates and adherents of shareholder primacy, the corporation is merely a contractual nexus or financial mechanism—in language and law—for profit generation, but it does not possess any inherent moral or social obligations.¹¹⁵ Accordingly, the corporation operates with little regard for social impact, except as it affects those directly related to its business and contractual counterparties.¹¹⁶ Thus, for many supporters of shareholder primacy, the static, primary purpose of a corporation should be simply to maximize value for its shareholders over the long term by attracting more investors and capital to generate ever-increasing returns for its growing base of shareholders.¹¹⁷

REV. 1617, 1619–21 (2021) (highlighting that incentives for corporate directors and CEOs are aligned to maximize shareholder value).

¹¹³ See Annie Karni, *House Dysfunction by the Numbers: 724 Votes, Only 27 Laws Enacted*, N.Y. TIMES (Dec. 19, 2023), <https://www.nytimes.com/2023/12/19/us/politics/house-republicans-laws-year.html> [<https://perma.cc/JU28-U9HD>] (reporting on the lack of bills passed in the U.S. House of Representatives in 2023); THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM*, at X–XIV (1st ed. 2012); EZRA KLEIN, *WHY WE'RE POLARIZED 197–200* (2020) (recounting the partisanship at play after Senate Republicans refused to consider President Barack Obama's Supreme Court nominee after the death of Justice Antonin Scalia); Henry N. Butler & Fred S. McChesney, *Why They Give at the Office: Shareholder Welfare and Corporate Philanthropy in the Contractual Theory of the Corporation*, 84 CORNELL L. REV. 1195, 1195 (1999) (characterizing the extensive and exhausting nature of the debate surrounding corporate purpose and shareholder primacy).

¹¹⁴ Compare A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049, 1066–68 (1931) (arguing for a more shareholder-centered view of corporations), with E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1145–48 (1932) (contending that corporations should account for their social impact and obligations).

¹¹⁵ See Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 871 (1997) (discussing how “the nexus-of-contracts model” of corporations is more a metaphorical account of business than an economic one); Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288, 289 (1980) (explaining that corporate firms possess no “owners in any meaningful sense” and are thus just financing vehicles).

¹¹⁶ See HENRY N. BUTLER & LARRY E. RIBSTEIN, *THE CORPORATION AND THE CONSTITUTION*, at viii (1995) (describing a “contractual theory of the corporation that is based on the modern economics of the firm”); Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89 (1985) (“[T]he corporation is not real. It is no more than a name for a complex set of contracts among managers, workers, and contributors of capital.”).

¹¹⁷ See FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 10 (1996) (describing how corporations organize people to create efficiency gains and, in turn, greater profits); Lund & Pollman, *supra* note 21, at 2575 (“The birth of corporate governance and its linkage with shareholder primacy became the dominant mode of discourse in the decades that followed [the 1980s].”). But see Ann M. Lipton, *What We Talk About When We Talk About Share-*

One of the most important advocates of shareholder profit maximization as the primary corporate purpose was Milton Friedman, the Nobel Prize-winning free market economist.¹¹⁸ In a highly influential *New York Times* article, Friedman unequivocally stated, “there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game.”¹¹⁹ Furthermore, for Friedman and other shareholder primacy proponents, shifting corporate purpose away from profits and shareholders to social progress and stakeholders would “clearly harm the foundations of a free society.”¹²⁰

In contrast, for advocates and adherents of stakeholderism, the corporation is a legal vessel for enhancing the welfare of shareholders, employees, customers, communities, and other key constituencies in society.¹²¹ Proponents of a more stakeholder-oriented view of corporate purpose see the objective of a corporation to be dynamic, multivariate, and beyond the blind, amoral pursuit of maximizing profits for shareholders.¹²²

More importantly, outside of theoretical academic debates, many in society and business now expect companies to care about local communities, the environment, employees, and other important issues facing society—not just financial returns for shareholders.¹²³ In fact, in 2019, the Business Roundtable, a

holder Primacy, 69 CASE W. RES. L. REV. 863, 866–68 (2019) (arguing that shareholder primacy need not only focus on shareholder wealth maximization).

¹¹⁸ Milton Friedman: Biographical, NOBEL PRIZE, <https://www.nobelprize.org/prizes/economic-sciences/1976/friedman/biographical/> [<https://perma.cc/MB5W-A428>].

¹¹⁹ Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at 32, <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html> [<https://perma.cc/T66J-5HQ6>] (quoting MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962)).

¹²⁰ *Id.*

¹²¹ See Lisa M. Fairfax, *Doing Well While Doing Good: Reassessing the Scope of Directors’ Fiduciary Obligations in For-Profit Corporations with Non-Shareholder Beneficiaries*, 59 WASH. & LEE L. REV. 409, 430–33 (2002) (discussing the differing views of those who think the corporation should focus on shareholder wealth maximization and those who think that the corporation should also consider other stakeholders); Dodd, *supra* note 114, at 1147–48, 1161 (arguing that corporations exist in part to provide social services to the public).

¹²² See, e.g., Kent Greenfield, *In Defense of Corporate Persons*, 30 CONST. COMMENT. 309, 312 (2015) (“Requiring corporations to attend to a broader range of stakeholders would make corporations more like people, [and] would make them better citizens”); Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1190, 1195–99 (2002) (discussing the theory of team production, which argues against shareholder primacy); Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335, 348 (2015) (“[A] singular focus on profits will be likely to induce [corporations] to take shortcuts that could result in harm to others through product defects, environmental spoilage, and firm failures, which hurt not only stockholders, but employees, creditors, and all who breathe the air and pay taxes.”).

¹²³ See, e.g., CONE COMM’NS, 2017 CONE COMMUNICATIONS: CSR STUDY 6 (2017), <https://www.cbd.int/doc/case-studies/inc/cs-inc-cone-communications-en.pdf> [<https://perma.cc/G7NA-2RPR>]

powerful association representing the CEOs of the largest American corporations, released a statement expressing a commitment to a stakeholder-oriented approach to corporate purpose to help foster “an economy that serves all Americans.”¹²⁴ This recent shift in norms and perspective has been a catalyst for the rise of corporate social responsibility, corporate social activism, and social impact-related investments, like investments in ESG funds.¹²⁵ This shift also helps to explain the growth of benefit corporations, legal entities chartered to pursue explicitly the dual purposes of social benefit and financial profit and that are now permissible in forty states.¹²⁶

Because of the highly politically charged nature of contemporary American society, this debate about shareholders and stakeholders has been tainted with divisive partisan politics. Conservatives, who oppose corporations embracing stakeholderism as a means to support socially progressive causes, champion a return to a seemingly purer prior state of shareholder primacy.¹²⁷

(finding that a majority of Americans want businesses to engage in solving major social concerns); Sarah E. Light, *The Law of the Corporation as Environmental Law*, 71 STAN. L. REV. 137, 139 (2019) (“Many private firms have adopted different forms of private environmental governance to improve their environmental footprints, going beyond mere compliance with rules of traditional environmental law.”).

¹²⁴ *Business Roundtable Redefines the Purpose of a Corporation to Promote ‘An Economy That Serves All Americans’*, BUS. ROUNDTABLE (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> [<https://perma.cc/7UTR-J5TG>].

¹²⁵ See BUGG-LEVINE & EMERSON, *supra* note 61, at 5 (“Impact investing recognizes that investments can pursue financial returns while also intentionally addressing social and environmental challenges.”).

¹²⁶ See Brett McDonnell, *The Corrosion Critique of Benefit Corporations*, 101 B.U. L. REV. 1421, 1421 (2021) (concluding that claims that benefit corporations have a negative effect on stakeholderism are only true to the extent that they implicate that regular corporations must only focus on shareholder wealth maximization, but that benefit corporations have useful branding benefits); *Status Tool*, SOC. ENTER. L. TRACKER, <https://socentlawtracker.org/#/bcorps> [<https://perma.cc/N2V4-ZA2E>] (showing the forty states that have enacted benefit corporation legislation as of 2022).

¹²⁷ See, e.g., Katie Glueck & Frances Robles, *Punishing Disney, DeSantis Signals a Lasting G.O.P. Brawl with Business*, N.Y. TIMES (Apr. 22, 2022), <https://www.nytimes.com/2022/04/22/us/politics/desantis-disney-florida.html> [<https://perma.cc/G9GQ-ZM83>] (reporting on the clash between Florida Governor DeSantis and Disney over political stances that Disney is taking); Ross Douthat, Opinion, *What Does the Right Do When Big Business Turns Against Republicans?*, N.Y. TIMES (Apr. 27, 2022), <https://www.nytimes.com/2022/04/27/opinion/desantis-musk-disney.html> [<https://perma.cc/H6B5-NUEM>] (arguing that the recent conservative backlash against businesses taking political stances may not last long); Jessica Gwynn, *GOP Wins House Majority, Sends a Message to ‘Woke’ Businesses: Get Out of Politics*, USA TODAY, <https://www.usatoday.com/story/money/2022/11/16/republican-house-warning-woke-business/10711866002/> [<https://perma.cc/KEJ5-XEDC>] (Nov. 18, 2022) (discussing the plans Republicans have to punish corporations that have waded too far into politics); Laura Davison, *Republicans Picking a Fight with ‘Woke’ Corporate America (2)*, BLOOMBERG TAX (Nov. 28, 2022), <https://news.bloombergtax.com/daily-tax-report/republicans-are-picking-a-fight-with-woke-corporate-america> [<https://perma.cc/86GC-95RV>] (discussing GOP plans to pressure businesses to stay out of political and cultural issues); Everett, *supra* note 102 (noting that Re-

Conversely, progressives, who embrace a more expansive view of corporate purpose, denounce a narrow focus on profits for shareholders as outdated and misguided.¹²⁸ Unsurprisingly, politicians have rewarded companies that supported their perspectives with public praise and subsidies, and punished businesses that opposed their views with criticism and sanctions.¹²⁹ In 2023, Florida, led by Governor Ron DeSantis, threatened and engaged in a series of state actions to punish Disney for its corporate social policies and positions, causing the company to lose hundreds of millions of dollars and, in turn, causing the state to lose a one-billion-dollar investment and thousands of jobs.¹³⁰

Further complicating the shareholders versus stakeholders debate is the fact that three asset managers—BlackRock, State Street, and Vanguard—

publicans, who used to champion big business, have attacked it when businesses take progressive political stances).

¹²⁸ See Andrew Ross Sorkin et al., *Corporate America's Not-So-New Allies*, N.Y. TIMES (Apr. 6, 2021), <https://www.nytimes.com/2021/04/06/business/dealbook/democrats-republicans-business.html> [<https://perma.cc/XZY5-HACW>] (noting that Democrats align with big businesses when they agree on social issues); Michael Peregrine, 'About Damn Time': Where Progressives May Take Corporate Governance, FORBES (Apr. 8, 2019), <https://www.forbes.com/sites/michaelperegrine/2019/04/08/about-damn-time-where-progressives-may-take-corporate-governance/?sh=2da031503b76> [<https://perma.cc/WYE7-WXXL>] (discussing Senator Elizabeth Warren's proposed law, the Accountable Capitalism Act, which would require businesses above a certain size to consider more than just shareholders when making business decisions); Press Release, Elizabeth Warren, Senator, U.S. Senate, Warren Introduces Accountable Capitalism Act (Aug. 15, 2018), <https://www.warren.senate.gov/newsroom/press-releases/warren-introduces-accountable-capitalism-act> [<https://perma.cc/F5EP-36CT>] (summarizing the main points of the proposed Accountable Capitalism Act); Abdurrahman Kayiklik, *How Elizabeth Warren Is Reviving the Concession Theory of the Corporation*, CLS BLUE SKY BLOG (Nov. 1, 2019), <https://clsbluesky.law.columbia.edu/2019/11/01/how-elizabeth-warren-is-reviving-the-concession-theory-of-the-corporation/> [<https://perma.cc/V8PP-LFPP>] (arguing that the Accountable Capitalism Act is the start of a trend of greater corporate regulation).

¹²⁹ See Leslie Josephs, *Georgia Lawmakers Pull Airline Tax Break After Delta Killed NRA Discounts*, CNBC (Mar. 1, 2018), <https://www.cnbc.com/2018/03/01/georgia-lawmakers-pull-airline-break-after-delta-killed-nra-discounts.html> [<https://perma.cc/B3JR-DDRH>]; Richard Fausset, *Georgia Passes Bill That Stings Delta Over N.R.A. Position*, N.Y. TIMES (Mar. 1, 2018), <https://www.nytimes.com/2018/03/01/business/delta-nra-georgia.html> [<https://perma.cc/6WQY-CZ4C>]; Brooks Barnes, *Disney to Lose Special Tax Status in Florida Amid 'Don't Say Gay' Clash*, N.Y. TIMES (Apr. 21, 2022), <https://www.nytimes.com/2022/04/21/business/disney-florida-special-tax-status.html> [<https://perma.cc/CU9V-TSDA>]; Nikki McCann Ramirez, *DeSantis Calling Special Session to Punish Disney for Opposing Anti-LGBTQ Law*, ROLLING STONE (Feb. 2, 2023), https://www.rollingstone.com/politics/politics-news/ron-desantis-special-session-punish-disney-1234672868/?sub_action=logged_in [<https://perma.cc/4WL9-DYX2>]; Glueck & Robles, *supra* note 127; Gerald F. Seib, *Why Business Leaders Are Taking Political Stands*, WALL ST. J., <https://www.wsj.com/articles/political-systems-failures-compel-corporate-activism-11618842598> [<https://perma.cc/7SEF-FVVL>] (Apr. 19, 2021) (arguing that businesses are entering the political arena more so than in decades past both to appeal to the younger generation, whom businesses hope to recruit as employees, and because government is failing to act to improve societal problems).

¹³⁰ Brooks Barnes, *Disney Pulls Plug on \$1 Billion Development in Florida*, N.Y. TIMES (May 18, 2023), <https://www.nytimes.com/2023/05/18/business/disney-ron-desantis-florida.html> [<https://perma.cc/HA7Y-6ULN>].

dominate ownership and influence in almost every major publicly traded corporation in the United States via the various exchange-traded funds, index funds, and mutual funds they manage for investors.¹³¹ In recent years, these three institutions were collectively the largest shareholders of nearly ninety percent of the S&P 500 companies, which are five hundred of the largest publicly traded companies in the United States.¹³² This means that three investors with relatively small teams of analysts have an exponentially outsized power and influence over corporate governance.¹³³ Not surprisingly, as businesses increasingly engage in social and political issues, these large institutional investors will also hold outsized influence over political governance.¹³⁴ In the emerging corporate political landscape, these institutional shareholders have to navigate the difficult crisscrossing financial and political roads to ensure that they attend to their investor and other stakeholder interests properly, or otherwise risk political scrutiny and regulatory actions.¹³⁵

Collectively, the changing corporate political landscape has further complicated the seminal, longstanding debate and dynamic between shareholders and stakeholders.

B. Of Meanings and Metrics

A chief critique and challenge for businesses engaging in social and political issues is that such engagements lack consensus definitions and bench-

¹³¹ See Jeff Schwartz, *Stewardship Theater*, 100 WASH. U. L. REV. 393, 395 (2022) (“A small group of asset managers have accumulated unrivaled wealth and power. Industry leaders—like BlackRock, Vanguard, and State Street (the ‘Big 3’)—have compiled massive equity holdings in public companies through the mutual funds and exchange traded funds (ETFs) that they oversee.”).

¹³² Jan Fichtner, Eelke M. Heemskerk & Javier Garcia-Bernardo, *Hidden Power of the Big Three? Passive Index Funds, Re-Concentration of Corporate Ownership, and New Financial Risk*, 19 BUS. & POL. 298, 313 (2017).

¹³³ See, e.g., Angel Au-Yeung, *The 70 BlackRock Analysts Who Speak for Millions of Shareholders*, WALL ST. J. (June 18, 2022), <https://www.wsj.com/articles/the-70-blackrock-analysts-who-speak-for-millions-of-shareholders-11655517497> [<https://perma.cc/Y59S-99LE>] (noting the power that BlackRock analysts hold because of how popular their index funds have become).

¹³⁴ See, e.g., Angel Au-Yeung, *BlackRock Walks a Political Tightrope on Climate Issues*, WALL ST. J. (Oct. 9, 2022), <https://www.wsj.com/articles/blackrock-walks-a-political-tightrope-on-climate-issues-11665279040> [<https://perma.cc/4Y5P-CWRR>] (noting the delicate position BlackRock is in because it is faced with pressure about its ESG investments); Dan Morenoff, Opinion, *Break Up the ESG Investing Giants*, WALL ST. J. (Aug. 31, 2022), <https://www.wsj.com/articles/break-up-the-esg-investing-giants-state-street-blackrock-vanguard-voting-ownership-big-three-competitor-antitrust-11661961693> [<https://perma.cc/DR2K-BHXY>] (noting that BlackRock, Vanguard, and State Street are facing pressure from state attorneys general who want clarification about whether ESG investing fits within the companies’ fiduciary duties to shareholders).

¹³⁵ See Schwartz, *supra* note 131, at 398 (arguing that large institutional shareholders may attempt to appease political actors by “[a]cting in a way that regulators and politicians have signaled that they prefer reduces the risk of regulatory action and increases the chances of regulatory forbearance, and noting that “large asset managers have much to fear”).

marks for properly evaluating corporate social impact and success.¹³⁶ How does one compare and measure the efficacy of corporate actions for the betterment of society if there are no consensus definitions and metrics? Whereas one can audit a business and hold it accountable for its financial performance based on widely agreed-upon metrics under the Generally Accepted Accounting Principles, no similar body of rules and principles exist yet for social or environmental impact.¹³⁷ Evaluating and auditing corporate governance performance is hard even with widely agreed-upon benchmarks and definitions, but it is made much harder without consensus metrics and meanings on critical concepts like corporate social and political engagements.¹³⁸

Many investors today, as previously noted, are not just seeking positive financial returns but also positive social impact.¹³⁹ Not surprisingly, businesses and entrepreneurs have responded in kind with numerous investment offerings, corporate initiatives, and business ventures to promote social benefit.¹⁴⁰ This shift in capital markets and corporate governance is perhaps most evident in the incredible growth of ESG investments and the increasing sociopolitical activism of America's largest companies.¹⁴¹ But because of a dearth of consensus meanings and metrics, impact investing vehicles, particularly ESG investments, reflect a wide range of strategies and disclosures that are at times cross-cutting and conflicting while all supposedly aspiring towards positive social

¹³⁶ BAINBRIDGE, *supra* note 19, at 135–37.

¹³⁷ See Paul Brest & Colleen Honigsberg, *Measuring Corporate Virtue and Vice: Making ESG Metrics Trustworthy* (noting the lack of metrics to measure ESG success, and listing the challenges of creating a system of ESG reporting going forward), in *FRONTIERS IN SOCIAL INNOVATION: THE ESSENTIAL HANDBOOK FOR CREATING, DEPLOYING, AND SUSTAINING CREATIVE SOLUTIONS TO SYSTEMIC PROBLEMS* 79, 80–83 (Neil Malhotra ed., 2022).

¹³⁸ See Jens Frankenreiter, Cathy Hwang, Yaron Nili & Eric L. Talley, *Cleaning Corporate Governance*, 170 U. PA. L. REV. 1, 4–8 (2021) (discussing various issues with assessing corporate governance and the corporate governance debate in general).

¹³⁹ See BUGG-LEVINE & EMERSON, *supra* note 61, at 5 (explaining that impact investing can seek to both increase profits and provide social benefits); Paula Goldman, *Impact Investing: Harnessing the Power of Business for Social Good*, THE GUARDIAN (Dec. 2, 2013), <https://www.theguardian.com/global-development-professionals-network/2013/dec/02/impact-investing-business-charity-social-good> [<https://perma.cc/5B3M-ZZSN>] (providing an example of a successful company that arose out of impact investing).

¹⁴⁰ Goldman, *supra* note 139.

¹⁴¹ See *supra* notes 29–106 and accompanying text; *ESG and Impact Investing*, GOLDMAN SACHS, https://www.gsam.com/content/gsam/us/en/institutions/strategies/explore-by-solution/esg-and-impact-investing.html#tabpanel_f9a0=dGFicGFuZWxfZjJhMF8xL3B1YmxpYy8x [<https://perma.cc/WJ64-U8XY>] (promoting Goldman Sachs Asset Management's ESG investing initiatives); George Serafeim, *Social-Impact Efforts That Create Real Value*, HARV. BUS. REV., Sept.–Oct. 2020, <https://hbr.org/2020/09/social-impact-efforts-that-create-real-value> [<https://perma.cc/J3N4-7V83>] (arguing that companies should integrate ESG initiatives into business operations rather than just use them as a marketing tool); *Impact Investing*, MERCK, <https://www.merck.com/company-overview/sustainability/impact-investing/> [<https://perma.cc/CFU6-NLLN>] (describing how impact investing helps drive Merck's financial goals and improves social outcomes).

impact.¹⁴² For example, depending on the definition and interpretation used, some ESG assessments would include fossil fuel giant Exxon in an ESG fund while excluding Tesla, a pioneer in electric vehicles—even though the former arguably has a greater deleterious impact on the climate than the latter.¹⁴³ Regardless of one's position in the larger debate about this shift towards explicitly pro-social investments, less debatable is the fact that to date, there are few widely agreed-upon metrics and definitions for many of these pro-social corporate endeavors.¹⁴⁴

In the absence of consensus meanings and metrics, companies establish and define their own benchmarks and commitments.¹⁴⁵ Understandably, companies often characterize these social efforts and commitments in a manner that highlights their best intentions and highest impact, regardless of whether the motives are actually as pure or the effects as meaningful.¹⁴⁶ More problematic, the lack of consensus meanings and metrics also means less accountability as corporate directors and officers use company resources to pursue their own personal, social, and political agendas in the name of corporate social responsibility or ESG values.¹⁴⁷ As such—and unsurprisingly—critics and skeptics of corporate social initiatives and actions have accused businesses of using their pro-social actions as disingenuous measures to greenwash or whitewash their misdeeds and shortcomings.¹⁴⁸

¹⁴² See Curtis et al., *supra* note 66, at 399 (noting that ESG can have different definitions for different investors).

¹⁴³ See Emile Hallez, *Variability in ESG Ratings Makes a Murky Picture for Investors*, INV. NEWS (June 1, 2022), <https://www.investmentnews.com/variability-in-esg-ratings-makes-a-murky-picture-for-investors-222210> [<https://perma.cc/Y6ML-WH8Q>] (reporting on the criticism and apparent counterintuitiveness of ExxonMobil being in an ESG index, whereas Tesla was not); Daniel Foelber, *Is ExxonMobil Really More ESG Friendly Than Tesla?*, ESG REV. (July 6, 2022), <https://esgreview.net/2022/07/06/is-exxonmobil-really-more-esg-friendly-than-tesla-2/> [<https://perma.cc/RFM5-5JRM>] (explaining how Tesla is lacking in the social and governance components of ESG).

¹⁴⁴ BAINBRIDGE, *supra* note 19, at 135–37.

¹⁴⁵ See *id.*; Nell Minow, *Six Reasons We Don't Trust the New "Stakeholder" Promise from the Business Roundtable*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 2, 2019), <https://corpgov.law.harvard.edu/2019/09/02/six-reasons-we-dont-trust-the-new-stakeholder-promise-from-the-business-roundtable/> [<https://perma.cc/6G36-YM74>] (making arguments against stakeholderism).

¹⁴⁶ See, e.g., Fairfax, *supra* note 21, at 1193–98 (discussing various challenges in identifying and scoring stakeholder commitments in the absence of clear metrics and meanings); Eduardo Porter, *Charitable Giving by Corporations Is Also About Getting, a New Study Finds*, N.Y. TIMES (Apr. 3, 2018), <https://www.nytimes.com/2018/04/03/business/economy/charitable-giving-corporations.html> [<https://perma.cc/2YQF-29PL>] (noting that corporations often use charity to lobby politicians for self-serving purposes).

¹⁴⁷ See BAINBRIDGE, *supra* note 19, at 138 (“The absence of workable standards gives rise to the central accountability problem associated with stakeholder capitalism, because in the absence of clear standards directors will be tempted to pursue their own self-interest.”).

¹⁴⁸ See, e.g., RAMASWAMY, *supra* note 12, at 5 (arguing that State Street and its Fearless Girl campaign was an example of a company that promoted diversity as a public relations stunt); Melissa J. Durkee, *Astroturf Activism*, 69 STAN. L. REV. 201, 229–32 (2017) (describing strategies that business-

In sum, the lack of clearly defined concepts and metrics for many corporate social activities presents one of the toughest legal and practical challenges for such endeavors.¹⁴⁹ It opens up corporate governance decisions focused on both shareholders and stakeholders to allegations and insinuations of inauthenticity, hypocrisy, or even fraud.¹⁵⁰ Although some progress has been made to create rules and standards to better measure corporate social activities on issues related to various ESG factors, such as environmental impact, broad consensus metrics remain fleeting.¹⁵¹

C. Of Limitations and Lamentations

The rise of corporations engaging in social and political issues raises some tough questions for executives, policymakers, and the state about the appropriate roles of public and private power. Although the benefits of corporate social efforts are real and numerous, there are also serious limitations and risks.

es use to lobby politicians without drawing attention to the fact that they are doing so); Jill M. D'Aquila, *The Current State of Sustainability Reporting: A Work in Progress*, CPA J. (July 2018), <https://www.cpajournal.com/2018/07/30/the-current-state-of-sustainability-reporting> [<https://perma.cc/4WSX-GSN6>] (discussing problems with the reporting of sustainability initiatives by companies, such as the lack of a unified standard); Brest & Honigsberg, *supra* note 137, at 80–83 (listing the problems with the current state of ESG reporting); Martha C. Wilson, *A Critical Review of Environmental Sustainability Reporting in the Consumer Goods Industry: Greenwashing or Good Business?*, 3 J. MGMT. & SUSTAINABILITY, no. 4, 2013, at 1, 1 (explaining that sustainability reports may be inconsistent and incomplete because they are voluntary and not mandated by law); Lisa M. Fairfax, *Dynamic Disclosure: An Exposé on the Mythical Divide Between Voluntary and Mandatory ESG Disclosure*, 101 TEX. L. REV. 273, 296–98 (2022) (detailing complaints about ESG reporting, including that companies will highlight positive details and omit negative details, and that the lack of uniform reporting makes comparing companies' ESG performance difficult); Daniel Foelber, *The Gilded Age of Greenwashing*, ESG REV. (Jan. 5, 2022), <https://esgreview.net/2022/01/05/the-gilded-age-of-greenwashing/> [<https://perma.cc/CS6N-XDAK>] (noting that greenwashing could be quite prevalent in the auto industry).

¹⁴⁹ Fairfax, *supra* note 21, at 1197–99.

¹⁵⁰ See Fairfax, *supra* note 148, at 296–98 (describing reasons for the concerns that ESG reports may be inaccurate or imprecise); Press Release, SEC, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 21, 2022), <https://www.sec.gov/news/press-release/2022-46> [<https://perma.cc/8LKB-86JS>] (announcing proposed rules by the SEC for requiring registered companies to disclose the process by which they identify risks to the climate); Dieter Holger, *Global Sustainability Disclosure Standards for Companies Set to Take Effect in 2024*, WALL ST. J., <https://www.wsj.com/articles/global-sustainability-disclosure-standards-for-companies-set-for-2024-749f68be> [<https://perma.cc/MQZ9-GWZ4>] (Feb. 17, 2023).

¹⁵¹ See, e.g., Holger, *supra* note 150 (explaining that new environmental reporting standards take effect in 2024); The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21334 (proposed Mar. 21, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249) (summarizing an SEC proposed rule amendment that would require disclosure of information related to climate risks in annual reports as well as in registration statements).

1. Limitations

In terms of limitations, corporations are constrained by their resources, core missions, and the law to fully engage and address many social and political issues.¹⁵² First, businesses have limited resources to properly address some of the most entrenched and difficult challenges confronting society. Issues like climate change, gun violence, and racial justice require resources that individual companies, no matter how well-capitalized, simply do not possess.¹⁵³ Amazon, one of the most valuable and innovative companies in the world, had a market value of about \$1 trillion in 2023 and spends about \$40 billion annually on research and development.¹⁵⁴ If it wanted to make a meaningful impact on reducing the deleterious effects of climate change on its own, it could spend a sum equal to its entire annual research and development expenditure, or even its entire market cap, and not have a significant effect. This is due to the size of the climate change challenge, as some estimates suggest that a meaningful impact on climate change would likely cost about \$200 trillion.¹⁵⁵

Second, in addition to limited resources, the mission of companies is first and foremost to run their businesses successfully. Although they can shape their business practices and social efforts to have a positive social impact, the core of their work is ultimately driven by producing products and services that help them grow and succeed financially.¹⁵⁶ A firm would be hard-pressed to attract and retain capital by stating that its purpose is untethered to profit or financial returns at all, and instead, primarily focused on social benefit. There are nonprofit organizations and public institutions better suited to focus primarily on operations for social benefit.¹⁵⁷ For-profit businesses cannot focus

¹⁵² See ANAND GIRIDHARADAS, WINNERS TAKE ALL: THE ELITE CHARADE OF CHANGING THE WORLD 260–63 (2018) (explaining that some corporations feel incapable of creating societal change).

¹⁵³ See, e.g., Naomi Oreskes & Auden Schendler, *Corporations Will Never Solve Climate Change*, HARV. BUS. REV. (Dec. 4, 2015), <https://hbr.org/2015/12/corporations-will-never-solve-climate-change> [<https://perma.cc/94BE-HWGN>] (arguing that it is not feasible for businesses to voluntarily solve the climate crisis without government mandates).

¹⁵⁴ Prableen Bajpai, *Which Companies Spend the Most in Research and Development (R&D)?*, NASDAQ (June 21, 2021), <https://www.nasdaq.com/articles/which-companies-spend-the-most-in-research-and-development-rd-2021-06-21> [<https://perma.cc/7M2N-GMPW>]; see Dan Gallagher, *Amazon Has a Lot of Pumps to Prime*, WALL ST. J. (July 11, 2023), <https://www.wsj.com/articles/amazon-has-a-lot-of-pumps-to-prime-343765af> [<https://perma.cc/DL32-SW8X>] (noting that Amazon's market cap exceeds \$1 trillion).

¹⁵⁵ Mark Gongloff, Opinion, *\$200 Trillion Is Needed to Stop Global Warming. That's a Bargain.*, BLOOMBERG (July 5, 2023), <https://www.bloomberg.com/opinion/articles/2023-07-05/-200-trillion-is-needed-to-stop-global-warming-that-s-a-bargain?embedded-checkout=true> [<https://perma.cc/L85W-Y5YJ>].

¹⁵⁶ See Fairfax, *supra* note 21, at 1165–66 (discussing the trend of corporations operating to benefit more than just shareholders).

¹⁵⁷ See Peter Molk & D. Daniel Sokol, *The Challenges of Nonprofit Governance*, 62 B.C. L. REV. 1497, 1504–06 (2021) (explaining that the legal structure of nonprofit corporations puts them in a

chiefly on unprofitable pursuits and actions without any plans for positive financial returns. To put it more succinctly, for-profit businesses exist for, and because of, profit.¹⁵⁸

Third, the law places a variety of limits on how private businesses and actors may engage with a host of social and political issues. Corporate law itself mandates that directors act as fiduciaries in the best interests of their shareholders.¹⁵⁹ Corporate law requires that directors and boards act with a duty of care, which means “that amount of care which ordinarily careful and prudent men would use in similar circumstances.”¹⁶⁰ Additionally, corporate law requires that directors and boards act with a duty of loyalty that prioritizes “the best interest of the corporation and its shareholders” over any other interests.¹⁶¹ Directors and boards must act in good faith and in the best interest of shareholders; they must subordinate any other loyalties.¹⁶² As such, even if directors wanted to prioritize social and political pursuits over shareholder interests, the law limits their ability to do so.¹⁶³

Admittedly, corporate law does afford firms and executives much deference and flexibility under the business judgment rule doctrine.¹⁶⁴ Nevertheless, that deference is not boundless.¹⁶⁵ Uninformed decisions without proper busi-

better position to pursue social initiatives because nonprofits have no shareholders for whom profits must be maximized).

¹⁵⁸ Friedman, *supra* note 119; Fink, *supra* note 45.

¹⁵⁹ See, e.g., *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 968 (Del. Ch. 1996) (explaining that directors fulfill their fiduciary duty when they act in good faith and on an informed basis in overseeing the corporation on behalf of shareholders); Tom C.W. Lin, *Executive Private Misconduct*, 88 GEO. WASH. L. REV. 327, 353–61 (2020) (discussing corporate fiduciary duties).

¹⁶⁰ *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125, 130 (Del. 1963).

¹⁶¹ *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 191 (Del. Ch. 2005) (quoting *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993), *modified*, 636 A.2d 956 (Del. 1994)), *aff'd*, 906 A.2d 114 (Del. 2006).

¹⁶² See, e.g., *United States v. De La Mata*, 266 F.3d 1275, 1293 (11th Cir. 2001) (explaining that the “duty of loyalty[] obligates officers and directors to avoid fraud, bad faith, usurpation of corporate opportunities, and self-dealing” (citing *FDIC v. Gonzalez-Gorron dona*, 833 F. Supp. 1545, 1549 (S.D. Fla. 1993))).

¹⁶³ See Lin, *supra* note 159, at 353 (explaining that corporate law mandates that directors act in the best interest of shareholders).

¹⁶⁴ See, e.g., *Joy v. North*, 692 F.2d 880, 885 (2d Cir. 1982) (“Whatever the terminology, the fact is that liability is rarely imposed upon corporate directors or officers simply for bad judgment and this reluctance to impose liability . . . has been doctrinally labelled the business judgment rule.”); *Shlensky v. Wrigley*, 237 N.E.2d 776, 779 (Ill. App. Ct. 1968) (“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.” (quoting *Helfman v. Am. Light & Traction Co.*, 187 A. 540, 550 (N.J. Ch. 1936))); *Kamin v. Am. Express Co.*, 383 N.Y.S.2d 807, 810–11 (Sup. Ct. 1976) (“The directors’ room rather than the courtroom is the appropriate forum for thrashing out purely business questions . . .”).

¹⁶⁵ See, e.g., *Joy*, 692 F.2d at 886 (explaining that the business judgment rule “does not apply in cases, e.g., in which the corporate decision lacks a business purpose, is tainted by a conflict of interest,

ness rationales or motivations are not protected by law.¹⁶⁶ Business decisions that implicate fraud, illegality, and bad faith are also not protected under the business judgment rule doctrine.¹⁶⁷ These legal safeguards restrict firms from deviating too far from their corporate purposes and engaging completely for social and political ends without financial concerns.¹⁶⁸

Beyond corporate law, an array of state and federal laws limits the ability of businesses to fully engage in social and political change. State and federal campaign financing laws attempt to place limits on how much money businesses and executives can contribute to influence our political processes and elections.¹⁶⁹ Federal law, through legislation like the Logan Act, restricts Americans from freely and openly working and negotiating with certain international parties and sovereigns.¹⁷⁰ Federal labor law and regulations governing pensions restrict what pension managers can do with funds on behalf of their holders.¹⁷¹ International law limits corporate rights and powers in a variety of ways that restrict firm capabilities in addressing geopolitical crises and challenges.¹⁷²

Collectively, these limitations in resources, operations, and law create tensions for executives, policymakers, and other stakeholders regarding corporate social political engagement. These limitations raise serious questions about the appropriateness and efficacy of such efforts and the proper role of business in society.

is so egregious as to amount to a no-win decision, or results from an obvious and prolonged failure to exercise oversight or supervision" (citations omitted)).

¹⁶⁶ See *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) ("Under the business judgment rule there is no protection for directors who have made 'an unintelligent or unadvised judgment.'" (quoting *Mitchell v. Highland-Western Glass Co.*, 167 A. 831, 833 (Del. Ch. 1933))), *overruled by* *Gantler v. Stephens*, 956 A.2d 695 (Del. 2009).

¹⁶⁷ *Shlensky*, 237 N.E.2d at 780.

¹⁶⁸ *Joy*, 692 F.2d at 886.

¹⁶⁹ See generally LOBBYING, PACS AND CAMPAIGN FINANCE: 50 STATE HANDBOOK, Westlaw (database updated Oct. 2023) (describing various state laws that govern corporate campaign contributions and influence in politics).

¹⁷⁰ See, e.g., *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–21 (1936) (explaining why the executive branch, and not the legislative branch, has control over negotiations with foreign powers); Logan Act, 18 U.S.C. § 953 (making illegal any foreign correspondence with foreign government officials with the intention to influence foreign government actions).

¹⁷¹ See, e.g., Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 (restricting certain types of transactions that a fiduciary of a plan may conduct).

¹⁷² See, e.g., Julian G. Ku, *The Limits of Corporate Rights Under International Law*, 12 CHI. J. INT'L L. 729, 751–53 (2012) (describing the complexities of the intersection of corporate law and international law).

2. Lamentations

In terms of lamentations, there are legitimate concerns that corporate social engagements further politicize the marketplace, marginalize important issues, and undermine democratic institutions and principles.

First, corporate efforts to address highly contested social and political issues could further politicize the marketplace and polarize an already divided society. Consumers and politicians would be inclined to divide companies into blue and red companies based on their positions on a variety of social issues.¹⁷³ Many consumers already use their consumption choices as a means to express their social and political preferences.¹⁷⁴ For instance, in 2023, Target and Anheuser Busch both received significant criticism and faced consumer boycotts for promotions and products that supported the LGBTQ+ community, leading to the near term loss of millions of dollars in sales and billions of dollars in market capitalization.¹⁷⁵

Furthermore, as corporations become more engaged in social issues, they will draw greater scrutiny from policymakers and politicians who decry them as “woke” businesses and executives.¹⁷⁶ Alternatively, politicians could reward businesses whose views align with their own.¹⁷⁷ In terms of putative actions,

¹⁷³ See, e.g., Sarah C. Haan, *The CEO and the Hydraulics of Campaign Finance Deregulation*, 109 NW. U. L. REV. 269, 269 (2015) (“Voters increasingly view their consumer activities, not their campaign contributions, as the most meaningful way to participate in politics.”); Sophia Cai, *Trump-world Gets Behind a MAGA-Friendly Shopping Site*, AXIOS (Nov. 30, 2023), <https://www.axios.com/2023/11/30/trump-maga-shopping-site> [<https://perma.cc/MEG4-E6YD>].

¹⁷⁴ See, e.g., LAWRENCE B. GLICKMAN, *BUYING POWER: A HISTORY OF CONSUMER ACTIVISM IN AMERICA* 203 (2009) (studying how “Americans used their pocketbooks to achieve their social and political goals”); Carissa J. Morgan, Candace C. Croney & Nicole J. Olynk Widmar, *Exploring Relationships Between Ethical Consumption, Lifestyle Choices, and Social Responsibility*, 6 ADVANCES APPLIED SOCIO. 199, 199 (2016) (describing how consumers and corporations consider “a wide array of ethical concerns” in their decisions).

¹⁷⁵ See Mike Allen & Eleanor Hawkins, *How Bud Light Became a Microcosm of America in 2023*, AXIOS (Apr. 18, 2023), <https://www.axios.com/2023/04/18/bud-light-microcosm-america-2023> [<https://perma.cc/BB8F-GZL8>] (describing how quickly conservatives called for boycotts after Bud Light commenced a marketing partnership with a transgender social media influencer); Jordyn Holman & Julie Creswell, *Brands Embracing Pride Month Confront a Volatile Political Climate*, N.Y. TIMES (May 25, 2023), <https://www.nytimes.com/2023/05/25/business/target-pride-lgbtq-companies-backlash.html> [<https://perma.cc/M6GX-7J85>] (describing the backlash Target faced when selling LGBTQ+ clothing and merchandise during Pride Month).

¹⁷⁶ See Glueck & Robles, *supra* note 127 (reporting on the DeSantis-Disney clash); Douthat, *supra* note 127 (describing how Republicans turned away from big businesses that waded into certain political issues); Guynn, *supra* note 127 (describing a Republican plan to stop businesses from pursuing progressive policies); Davison, *supra* note 127 (noting the growing tension between Republican lawmakers and large corporations); Everett, *supra* note 102 (explaining specific clashes between Republicans and big businesses).

¹⁷⁷ See, e.g., Nelson D. Schwartz, *Trump Sealed Carrier Deal with Mix of Threat and Incentive*, N.Y. TIMES (Dec. 1, 2016), <https://www.nytimes.com/2016/12/01/business/economy/trump-carrier-pence-jobs.html?searchResultPosition=1> [<https://perma.cc/4E6V-WUL9>] (examining then-President-

politicians could target businesses that take social positions adverse to their political interests for investigations, regulation, and other punitive actions. Such actions might include the cancellation of tax subsidies and government contracts or divestments from state pension funds. For instance, Georgia eliminated a fifty-million-dollar tax break for Delta Airlines in 2018 in retaliation for the company's decision to cancel discounts to the National Rifle Association members after the Parkland school shooting.¹⁷⁸ In 2022, Florida revoked Disney's special designations and benefits in the state after the company spoke out against a state law that targeted the LGBTQ+ community.¹⁷⁹ More recently, in 2023, California Governor Gavin Newsom aimed to punish Walgreens for its business decision concerning the distribution of an abortion pill.¹⁸⁰ This tit-for-tat corporate political dynamic could lead to a dangerous form of "crony capitalism" that erodes both principled corporate and political governance to the detriment of business and society.¹⁸¹ Influential corporate and political leaders could end up engaging in a deleterious dance of "stewardship theater" through which they attempt to appease one another and subvert the best interests of their respective core constituents.¹⁸²

Second, the rise of corporate engagement in social and political issues could ultimately marginalize some important issues as an elite corporate managerial class prioritizes sociopolitical causes, methods, and remedies for the rest of society.¹⁸³ Corporate executives will likely prefer to work on issues

elect Trump's methods in pressuring corporations to adopt particular corporate policies); Michael D. Shear & Cecilia Kang, *Amazon Has Lots of Company as Trump Slams 'Stupid' Businesses*, N.Y. TIMES (Apr. 3, 2018), <https://www.nytimes.com/2018/04/03/us/politics/trump-amazon.html> [<https://perma.cc/WQ3F-A3UV>] (stating that President Trump's "Twitter posts have carried with them the threat, sometimes explicit, that he is prepared to use the power of the presidency to undermine the companies that anger him").

¹⁷⁸ Josephs, *supra* note 129; Fausset, *supra* note 129.

¹⁷⁹ Barnes, *supra* note 129.

¹⁸⁰ Belluck & Creswell, *supra* note 16.

¹⁸¹ See COMM. FOR ECON. DEV. OF CONF. BD., CRONY CAPITALISM: UNHEALTHY RELATIONS BETWEEN BUSINESS AND GOVERNMENT 5 (2015), https://www.ced.org/pdf/CED_-_Crony_Capitalism_-_Report.pdf [<https://perma.cc/8WYZ-P8G5>] (defining "crony capitalism" as "deals between some private interests . . . and government that 'pick winners' and thereby also pick losers, on the basis of political influence rather than merit"); Stout, *supra* note 122, at 1197–98 (discussing how firms often lobby for and receive government subsidies and preferential tax treatments).

¹⁸² Schwartz, *supra* note 131, at 399; see Jill E. Fisch, *How Do Corporations Play Politics?: The FedEx Story*, 58 VAND. L. REV. 1495, 1500 (2005) ("[C]orporate demand for political activity is a natural response to the effect of legal rules on business operations. As a result, regulatory restrictions are more likely to restructure corporate political activity than to eliminate it.").

¹⁸³ See FREDRIK DEBOER, HOW ELITES ATE THE SOCIAL JUSTICE MOVEMENT 8–11 (2023) (discussing how social elites capture and shape contemporary social justice movements); Saura Masconale & Simone M. Sepe, *Citizen Corp.—Corporate Activism and Democracy*, 100 WASH. U. L. REV. 257, 266–67 (2022) (discussing "democratic losses" that arise from corporate political activism); ROBERT A. DAHL, ON DEMOCRACY 182 (2d ed. 2015) ("Unequal ownership and control of major

where they can garner the most positive publicity in addition to doing good, thus causing the marginalization of certain less popular social issues.¹⁸⁴ Executives, fearful of backlash from politicians and the public, may understandably shy away from speaking out on issues that could alienate or offend key customers, suppliers, regulators, or markets in favor of issues that have broader appeal.¹⁸⁵ For instance, a business that is heavily dependent on one country or state for its suppliers and customers might feel reluctant to engage on issues contrary to that country or state's leadership for fear of offending its government.¹⁸⁶ Similarly, companies with a large base of progressive millennial consumers and employees will feel more inclined to work on prominent progressive issues like environmental sustainability, gender equality, workforce diversity, or LGBTQ+ rights favored by that demographic segment.¹⁸⁷ As such, many important social and political issues would be subordinated from the larger corporate sociopolitical agenda in our democracy.¹⁸⁸

Furthermore, the elite corporate managerial class is largely homogenous.¹⁸⁹ A 2023 study by Deloitte reported that 77.8% of Fortune 500 board members are white, and just 22.2% of board members are minorities, whereas 69.6% of all directors are male.¹⁹⁰ Consequently, regardless of how well-intentioned millionaire or billionaire corporate executives may be, they may nevertheless face difficulties identifying and understanding the real concerns of their much more diverse working-class employees, customers, and share-

economic enterprises in turn contribute massively to the inequality in political resources . . . and thus to extensive violations of political equality among democratic citizens.”).

¹⁸⁴ See Masconale & Sepe, *supra* note 183, at 266 (noting that the largest companies will have control over what social issues are put at the forefront).

¹⁸⁵ *Id.* at 297–98.

¹⁸⁶ See Steve Banker, *Apple's Reliance on China Poses a Problem for the Company*, FORBES (Jan. 19, 2023), <https://www.forbes.com/sites/stevebanker/2023/01/19/apples-china-problem/?sh=554c352c282f> [<https://perma.cc/75JY-7LMH>] (discussing how the Apple supply chain relies on China and thus makes it difficult for Apple not to do business with China); Patrick McGee, *How Apple Tied Its Fortunes to China*, FIN. TIMES (Jan. 17, 2023), <https://www.ft.com/content/d5a80891-b27d-4110-90c9-561b7836f11b> [<https://perma.cc/K6XJ-8E5F>] (describing how Apple built a strong supply chain in China); Apple Inc., Annual Report (Form 10-K) (Oct. 27, 2022) (mentioning Apple's reliance on China).

¹⁸⁷ Masconale & Sepe, *supra* note 183, at 292–94 (arguing that companies will cater to the social causes their stakeholders value most).

¹⁸⁸ See *id.* at 297–303 (discussing how corporate governance principles lead to corporate social and political engagements that favor majoritarian, progressive causes).

¹⁸⁹ See DELOITTE, MISSING PIECES REPORT: A BOARD DIVERSITY CENSUS OF WOMEN AND UNDERREPRESENTED RACIAL AND ETHNIC GROUPS ON FORTUNE 500 BOARDS 19 tbl.3 (7th ed. 2023) <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/us-missing-pieces-7th-edition-report.pdf> [<https://perma.cc/84D2-844P>].

¹⁹⁰ *Id.*

holders who make up the bulk of society.¹⁹¹ Compounding the lack of diversity in the corporate managerial class is a desire to conform to peer practices in corporate governance so as not to be an outlier in the marketplace, thus making meaningful change on a wide range of issues that much more difficult.¹⁹²

Third, the rise of corporate engagement in social and political issues could undermine democratic institutions, values, and principles.¹⁹³ As businesses increasingly engage in political and social change, people will increasingly look to businesses and an elite managerial class to solve society's problems.¹⁹⁴ This shift from public to private solutions could ultimately weaken our already fragile democratic institutions and processes, along with the public's faith in them.¹⁹⁵ As businesses increasingly engage in managing political and social challenges, the market values of businesses could distort and subvert the principles and values of a democratic society.¹⁹⁶ As George Orwell presciently lamented in 1946 about the rise of "managerial societies":

Capitalism is disappearing, but Socialism is not replacing it. What is now arising is a new kind of planned, centralized society which will be neither capitalist nor, in any accepted sense of the word, democratic. The rulers of this new society will be the people who effectively control the means of production: that is, business executives, technicians, bureaucrats and soldiers . . . under the name of 'managers'. These people will eliminate the old capitalist class, crush the

¹⁹¹ See, e.g., LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 6 (2d ed. 2016) ("The opinions of millions of ordinary citizens in the bottom one-third of the income distribution have *no* discernible impact on the behavior of their elected representatives."); Kent Greenfield, *Corporate Citizenship: Goal or Fear?*, 10 U. ST. THOMAS L.J. 960, 970 (2013) ("The key flaw of American corporations is that they have become a vehicle for the voices and interests of an exceedingly small managerial and financial elite—the notorious one percent.").

¹⁹² See Lund & Pollman, *supra* note 21, at 2623 ("The corporate governance machine's emphasis on a platonic governance ideal leads to an additional . . . result: It hampers innovation in corporate governance. . . . [T]he corporate governance machine not only pushes corporations to adopt the same governance blueprint, it also restricts the items that appear on the menu.").

¹⁹³ See SANDEL, *supra* note 46, at 110–14.

¹⁹⁴ See Aaron Horvath & Walter W. Powell, *Contributory or Disruptive: Do New Forms of Philanthropy Erode Democracy?* (arguing that "private initiatives for special public purposes . . . crowd out the public sector, further reducing both its legitimacy and its efficacy, and replace civic goals with narrower concerns about efficiency and markets"), in *PHILANTHROPY IN DEMOCRATIC SOCIETIES: HISTORY, INSTITUTIONS, VALUES* 87, 89 (Rob Reich, Chiara Cordelli & Lucy Bernholz eds., 2016).

¹⁹⁵ See COHEN & MIKAELIAN, *supra* note 47, at 118–23 (arguing that greater privatization limits the rights of people and curtails democracy).

¹⁹⁶ See Kuo & Means, *supra* note 58, at 1294 ("Critics contend that corporations subvert democracy by using their economic resources to lobby for corporate-friendly policies and to elect accommodating politicians.").

working class, and so organize society that all power and economic privilege remain in their own hands.¹⁹⁷

Furthermore, many in society could increasingly come to expect the government to operate like a business by using purely market-driven values to solve society's ills.¹⁹⁸ This can be highly problematic because although businesses exist for the primary pursuit of profit, there are other civic priorities and public pursuits that cannot be measured by profit.¹⁹⁹ Conventional business objectives of profit and efficiency may contravene core democratic values of justice and equal protection.²⁰⁰ Caring for the sick, weak, and poor may be unprofitable and unglamorous, but these are nevertheless worthy pursuits for a compassionate, democratic society. Similarly, social initiatives like disaster relief, public safety, disease control, and access to education should never be driven entirely by revenue or profits. Simply put, there are civic priorities and public pursuits that are simply too big and complicated for private businesses to address using market tools and values alone. A good and functioning government is needed for civic progress. As President Abraham Lincoln stated, "[t]he legitimate object of government is to do for a community of people whatever they need to have done, but cannot do at all, or cannot so well do, for themselves, in their separate and individual capacities."²⁰¹

Collectively, these lamentations about the risks of corporate engagements on social and political issues complicate traditional understandings and practices of business.²⁰² These lamentations also highlight the real risks of contemporary corporate political governance for law and society.

¹⁹⁷ George Orwell, *Second Thoughts on James Burnham*, POLEMIC, no. 3, May 1946, <https://www.orwellfoundation.com/the-orwell-foundation/orwell/essays-and-other-works/second-thoughts-on-james-burnham/> [<https://perma.cc/5XFG-MA86>].

¹⁹⁸ Lin, *supra* note 21, at 1588–91 (arguing that businesses becoming too involved in social activism could corrode the democratic values of society).

¹⁹⁹ See MARIANA MAZZUCATO, MISSION ECONOMY: A MOONSHOT GUIDE TO CHANGING CAPITALISM 35–37 (2021); Simmons, *supra* note 20, at 780 (“Corporate political engagement is complex. It extends well beyond political spending and raises profound democratic legitimacy concerns.”).

²⁰⁰ See JOEL BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER 88 (2004) (“Corporations have no capacity to value political systems, fascist or democratic, for reasons of principle or ideology.”).

²⁰¹ Abraham Lincoln, *Fragment on Government*, in 1 ABRAHAM LINCOLN: COMPLETE WORKS, COMPRISING HIS SPEECHES, LETTERS, STATE PAPERS, AND MISCELLANEOUS WRITINGS 178, 180 (John G. Nicolay & John Hay eds., n.p., Century Co. 1894) (1854).

²⁰² See, e.g., Andrzej Rapaczynski, *Impact Investing as a Form of Lobbying and Its Corporate-Governance Effects*, 11 CAPITALISM & SOC’Y, Dec. 2016, at 1, 3–5 (discussing how socially conscious investors and stakeholders complicate modern corporate governance).

III. KEY IMPLICATIONS AND RECOMMENDATIONS

The difficult practical and legal issues raised by the changing corporate political governance landscape have broad implications for law, politics, business, and society. They challenge conventional understandings and practices about effectuating social change, best business practices, and the appropriate relationship between government and business. Although the contours of the changing landscape remain to be defined, corporate executives, policymakers, and other stakeholders can adopt new perspectives and approaches to navigate the road ahead. More specifically, this Article recommends a new, explanatory overstory for corporate involvement in social and political issues in Section A.²⁰³ Section B then provides a new framework for systematically organizing and operationalizing corporate social efforts within firms.²⁰⁴ Finally, Section C concludes Part III with models from Delaware and Nevada for promulgating business regulations and managing public pensions in this new, complicated corporate political landscape.²⁰⁵

A. A New Corporate Overstory

A key implication of the emerging corporate political landscape is that conventional narratives about corporations and politics need to be updated to better reflect new realities and changed perspectives. Arguments alone are inadequate to persuade.²⁰⁶ Humans are story-driven creatures; stories help us organize and make sense of the world, and, in turn, engage with it.²⁰⁷ As such, a new narrative about business and corporations is necessary.

In the conventional narratives, stories of corporations and capital are too often told as tales of selfish, amoral business pursuits for private wealth and profit. In contrast, stories of politics and public interest are told as tales of self-

²⁰³ See *infra* notes 206–271 and accompanying text.

²⁰⁴ See *infra* notes 272–307 and accompanying text.

²⁰⁵ See *infra* notes 308–346 and accompanying text.

²⁰⁶ RICHARD POWERS, *THE OVERSTORY: A NOVEL* 336 (2018) (“The best arguments in the world won’t change a person’s mind. The only thing that can do that is a good story.”).

²⁰⁷ See, e.g., WILL STORR, *THE SCIENCE OF STORYTELLING: WHY STORIES MAKE US HUMAN AND HOW TO TELL THEM BETTER* 2–7 (2020) (noting how our minds organize the world through narratives); JONATHAN GOTTSCHALL, *THE STORYTELLING ANIMAL: HOW STORIES MAKE US HUMAN* 91–93 (2012) (discussing how our minds process stories); Mor Regev, Christopher J. Honey, Erez Simony & Uri Hasson, *Selective and Invariant Neural Responses to Spoken and Written Narratives*, 33 J. NEUROSCIENCE 15978, 15978–81 (2013) (describing the set-up and results of experiments to determine whether and how humans perceive written and oral language differently); Elena Renken, *How Stories Connect and Persuade Us: Unleashing the Brain Power of Narrative*, NPR (Apr. 11, 2020), <https://www.npr.org/sections/health-shots/2020/04/11/815573198/how-stories-connect-and-persuade-us-unleashing-the-brain-power-of-narrative> [<https://perma.cc/W2JK-MU73>] (discussing physiological responses that humans have when listening to stories).

less acts for the public good. These tired, traditional tropes suggest that those toiling in private enterprise have little to do with those working in public service, and vice versa. Viewing and understanding corporations through such a narrow, outdated framework keeps us bound to old corporate norms when new, more honest narratives are necessary.²⁰⁸

A new corporate overstory is needed to shift these conventional narratives to better capture the realities of our time, where businesses are engaging and shaping social and political debates like never before.²⁰⁹ This new corporate overstory will provide the structural scaffolding necessary to rebuild and remake conventional business practices and public policies for a more dynamic and complex society.²¹⁰ Whereas the conventional corporate overstory confines businesses to an oversimplified, apolitical sphere of private profit for rational, unempathetic shareholders on one timeline, the new corporate overstory proposed here centers a new, more honest narrative of business on the motif of corporations as political, profit-driven, and human-centered entities. This proposed new corporate overstory allows businesses to better reimagine and re-engage with an uncertain world filled with complicated, interdependent shareholders and stakeholders.²¹¹

1. Corporations Are Political

More than merely business entities, corporations are also “political entities.”²¹² At its most basic point of legal creation, a corporation exists because

²⁰⁸ See, e.g., Fairfax, *supra* note 21, at 1237–39 (discussing the difficulties of shifting corporate norms); Marcel Kahan, *The Limited Significance of Norms for Corporate Governance*, 149 U. PA. L. REV. 1869, 1899 (2001) (questioning the practical impact of corporate norms).

²⁰⁹ See, e.g., Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1291–92 (1999) (discussing how changing norms impact corporate governance); Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1015–17 (1997) (arguing that narratives given by Delaware court opinions shape corporate behavior and processes).

²¹⁰ Freeman, *supra* note 21, at 450–55 (describing the popular narrative of businesses as organizations that care only about maximizing profits).

²¹¹ See REBECCA HENDERSON, *REIMAGINING CAPITALISM IN A WORLD ON FIRE* 49–55 (2020) (arguing for businesses to reconsider traditional tenets of capitalism and business, using the example of Unilever purchasing sustainably produced tea).

²¹² See STEPHEN BOTTOMLEY, *THE CONSTITUTIONAL CORPORATION: RETHINKING CORPORATE GOVERNANCE* 12 (2007) (“[I]n their own way corporations are political entities.”); Christopher May, *Who’s in Charge? Corporations as Institutions of Global Governance*, PALGRAVE COMM’NS, Dec. 22, 2015, at 1, 6, <https://doi.org/10.1057/palcomms.2015.42> [<https://perma.cc/Q4JS-HKML>] (“It is relatively common then to recognise that corporations are *political* institutions, as well as economic ones”); Pierre-Yves Néron, *Business and the Polis: What Does It Mean to See Corporations as Political Actors?*, 94 J. BUS. ETHICS 333, 333 (2010) (conceiving of “corporations as political actors”).

of the recognition and imprimatur of a political state.²¹³ Beyond the political nature of its legal creation and existence, many corporate governance decisions are both business and political decisions because they reflect the values of the company, its leaders, and its times.²¹⁴ This is true for many decisions, large and small, direct or indirect. For instance, the wages and benefits a company offers its employees are more than just purely financial decisions. Offering paid parental leave for your employees is not just an employment benefit but also a political and social expression, as much as not offering the benefit when you are able to do so.²¹⁵ Donating millions of dollars in corporate funds directly to political campaigns, issue advocacy organizations, and corporate political action committees are clearly political actions.²¹⁶ Similarly, choosing not to operate in certain markets because you disagree with the human rights practices of their governing nations' political regimes is a business decision as much as it is a political or geopolitical one. The calculus many companies made regarding their operations in Russia following its invasion of Ukraine in 2022 is similar to the calculus many companies have made over the years regarding their operations in China, Saudi Arabia, and Apartheid South Africa.²¹⁷ Furthermore,

²¹³ See THOMAS DONALDSON, *CORPORATIONS AND MORALITY* 5 (1982) (“[C]orporations are creations of the state.”).

²¹⁴ See Lund & Pollman, *supra* note 21, at 2565 (describing corporate governance as “a complex governance system in the United States composed of law, institutions, and culture that orients corporate decisionmaking toward shareholders”).

²¹⁵ See Kathryn Dill & Angela Yang, *Companies Are Cutting Back on Maternity and Paternity Leave*, WALL ST. J., <https://www.wsj.com/articles/the-surprising-benefit-some-companies-are-taking-away-parental-leave-11661125605> [<https://perma.cc/C5DH-TTC4>] (Aug. 22, 2022) (reporting a decrease in the number of companies offering parental leave to employees).

²¹⁶ See DRUTMAN, *supra* note 51, at 3–4 (explaining that businesses have a large influence on policy and legislation because of their importance in the economy); Steven Greenhouse, *Here's a Memo from the Boss: Vote This Way*, N.Y. TIMES (Oct. 26, 2012), <https://www.nytimes.com/2012/10/27/us/politics/bosses-offering-timely-advice-how-to-vote.html> [<https://perma.cc/J2FB-87KM>] (explaining that since the Supreme Court's *Citizens United* ruling, companies can suggest to their employees for whom to vote in elections); McIntire & Confessore, *supra* note 51 (noting that corporations are donating more money to nonprofit organizations in an attempt to influence elections).

²¹⁷ See Stiff, *supra* note 9 (listing companies that pulled out of Russia because of the Ukraine war); Shannon Bond, *Hong Kong Protests Put U.S. Businesses in a Tough Spot with China*, NPR (Oct. 11, 2019), <https://www.npr.org/2019/10/11/769193163/hong-kong-protests-put-u-s-businesses-in-a-tough-spot-with-china> [<https://perma.cc/2WQM-3NLF>] (describing how companies have appealed China to continue doing business there amid the protests in Hong Kong); Jeanne Whalen, Ben Golliver & Steven Zeitchik, *China Lashes Out at Western Businesses as It Tries to Cut Support for Hong Kong Protests*, WASH. POST (Oct. 8, 2019), <https://www.washingtonpost.com/business/2019/10/08/china-lashes-out-western-businesses-it-tries-cut-support-hong-kong-protests/> [<https://perma.cc/7ZNZ-RG23>] (giving examples of companies who, wanting to stay in China's good graces, made sure they did not show support for the Hong Kong protests); Stephen Kalin & Justin Scheck, *U.S. Businesses Sour on Saudi Arabia in Blow to Crown Prince's Growth Plans*, WALL ST. J. (Jan. 15, 2022), <https://www.wsj.com/articles/u-s-businesses-sour-on-saudi-arabia-in-blow-to-crown-princes-growth-plans-11642242604> [<https://perma.cc/WWE4-7PAN>] (describing the poor investment growth from foreign companies into Saudi Arabia because of its large bureaucracy and frequent human rights vio-

as corporations make such politically calculated decisions regarding their businesses, they have become increasingly viewed as political targets in international disputes and conflicts.²¹⁸

The narrative that corporations were once apolitical and have suddenly become “woke” simply does not reflect history or reality.²¹⁹ Corporations have been major players in American politics throughout the nation’s history. Corporations have lobbied for favorable trade and tax policies, deregulation, and subsidies for decades.²²⁰ Corporations have also contributed enormous sums of money to political campaigns to help elect politicians that may be beneficial to their firms and industries.²²¹ These political engagements have important financial and social ramifications for the rest of society that transcend individual firms’ balance sheets. Tax policy, environmental regulation, trade deals, subsidies, and other public policies shaped by corporations have significant social implications on citizens and communities.²²² Simply put, there is nothing apolitical or asocial about corporate campaign contributions and corporate lobbying.

Perhaps those arguing for corporations to remain apolitical and focused pathologically on a narrowly defined notion of shareholder wealth maximization are really arguing for companies to remain adherent, or return to a politics of the past, of a status quo that better aligns with their own political and eco-

lations); Karen Paul, *After the Americans Leave, What Next?*, N.Y. TIMES, Aug. 7, 1998 (§ 3), at 3, <https://www.nytimes.com/1988/08/07/business/business-forum-business-and-apartheid-after-the-americans-leave-what-next.html> [<https://perma.cc/X98L-5ATH>] (describing the exodus of American companies from South Africa because of pressure from social activists).

²¹⁸ See Tom C.W. Lin, *Business Warfare*, 63 B.C. L. REV. 1, 3–5 (2022) (discussing the emerging threat of businesses being targeted for attacks and sanctions in connection with international geopolitical disputes and conflicts).

²¹⁹ See Lin, *supra* note 21, at 1562–67 (discussing the evolution of the debate about corporate social responsibility in the United States starting in the 1950s).

²²⁰ See JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS 5–8 (2010) (explaining the important role capitalism and business has played in shaping American politics); *Lobbying and Trade Associations*, CHEVRON, <https://www.chevron.com/sustainability/governance/lobbying-and-trade-associations> [<https://perma.cc/VP8V-VAFP>] (describing Chevron’s lobbying strategy); Tony Romm, *Corporate America Launches Massive Lobbying Blitz to Kill Key Parts of Democrats’ \$3.5 Trillion Economic Plan*, WASH. POST (Aug. 31, 2021), <https://www.washingtonpost.com/us-policy/2021/08/31/business-lobbying-democrats-reconciliation/> [<https://perma.cc/R989-7NFZ>] (reporting that a variety of businesses are lobbying together to prevent lawmakers from enacting President Biden’s economic plan); Lee Drutman, *Corporate Lobbying*, YALE UNIV. PRESS (July 21, 2020), <https://yalebooks.yale.edu/2020/07/21/corporate-lobbying/> [<https://perma.cc/MDT9-NZJ5>] (describing the increase in lobbying in the United States since the 1970s and how that has made passing new legislation much more difficult).

²²¹ See *Corporate Donations Tracker*, ACCOUNTABLE.US, <https://accountable.us/projects/corporate-donations-tracker/> [<https://perma.cc/E2DC-9B6U>] (listing companies along with the amount they donated to elected officials who objected to the results of the 2020 presidential election).

²²² See, e.g., Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 546–48 (2000) (discussing the influence of private actors on administrative law).

conomic power standings.²²³ But to be clear, the business and political policies of the past—of the status quo—are not apolitical or asocial; they reflect certain political preferences and power structures.²²⁴

In sum, corporations are and have always been political.²²⁵ They exist as part of dynamic societies and have always shaped and been shaped by the social and political developments of their times.²²⁶ Seeing and understanding corporations as political business enterprises allows for more honest and productive debates and discussions about their appropriate role in society as partners with government, rather than as substitutes or opponents of the government.²²⁷

2. Corporations Are Profit-Driven

Corporations are driven by profit.²²⁸ By its very constitution, a for-profit business exists to make a profit for its shareholders—no matter the rhetoric and deeds on behalf of other stakeholders.²²⁹ Although businesses can and do have positive social benefits and political intentions as part of their missions and operations, their core objective is profit generation and profit maximization.²³⁰ Profitable businesses survive and thrive over time; unprofitable ones

²²³ See, e.g., COLIN MAYER, PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD 35–45 (2018) (discussing the power dynamic between shareholders and the board of directors in a corporation).

²²⁴ See David Kenny, *Politics All the Way Down: Originalism as Rhetoric*, 31 DPCE ONLINE 661, 664 (2017), <https://www.dpceonline.it/index.php/dpceonline/article/view/439> [<https://perma.cc/9SR7-FS6C>] (“But maintaining the *status quo* is not apolitical. The *status quo* is the product of the political choices of the past . . .”).

²²⁵ BOTTOMLEY, *supra* note 212, at 12.

²²⁶ WILLIAM MAGNUSON, FOR PROFIT: A HISTORY OF CORPORATIONS 3–10 (2022).

²²⁷ MAZZUCATO, *supra* note 199, at 93–102 (using NASA’s Apollo missions as examples of successful cooperation between the government and private businesses that accomplished more than either could do separately).

²²⁸ See BAINBRIDGE, *supra* note 19, at 170 (arguing that “pursuing profit is baked into the corporation’s DNA”); Fink, *supra* note 45 (“Make no mistake, the fair pursuit of profit is still what animates markets; and long-term profitability is the measure by which markets will ultimately determine your company’s success.”); Masconale & Sepe, *supra* note 183, at 261 (“[C]orporations were originally established . . . to increase the overall wealth by successfully providing goods and services.”).

²²⁹ See Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001) (making note of “recent dominance of a shareholder-centered ideology of corporate law”); Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2065 (2001) (“Shareholder wealth maximization is usually accepted as the appropriate goal in American business circles.”).

²³⁰ See Stephen M. Bainbridge, Response, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1423 (1993) (“Shareholder wealth maximization long has been the fundamental norm which guides U.S. corporate decisionmakers.”); Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 CASE W. RES. L. REV. 497, 527 (2011) (“[W]hen corporations speak, it is speech of an economic—not a political—nature, due to corporations’ singular fidelity to profit maximization.”).

fail. This is not inherently problematic; the pursuit of profit in well-working, sensibly regulated free markets can be, and has been throughout history, a source of tremendous innovation, wealth generation, and social progress.²³¹

Perhaps surprising to some, the fact that corporations are motivated by profit has been the source of much debate.²³² Advocates arguing for a reaffirmation and return to a traditional, narrow corporate purpose focused solely on shareholder profits see profit as the be-all and end-all—a corporation’s means, ends, and purpose.²³³ Opponents of the traditional view often denounce or fail to fully embrace profit-seeking and argue for reprioritizations of corporate purpose to better account for the interests of all stakeholders, rather than just shareholders.²³⁴ Both sides of the debate are in many respects trapped by the old corporate overstory, which suggests that there was and is only one way for businesses to succeed in maximizing profits for their shareholders—a zealous amoral and apathetic pursuit of profit devoid of values and political judgments that too often hurts society.²³⁵

The conventional overstory about corporations and profits is too narrow; it improperly limits business innovation and creativity that produces financial

²³¹ See JOHN MACKEY & RAJ SISODIA, *CONSCIOUS CAPITALISM: LIBERATING THE HEROIC SPIRIT OF BUSINESS* 11 (2013) (“In the long arc of history, no human creation has had a greater positive impact on more people more rapidly than free-enterprise capitalism. It is unquestionably the greatest system for innovation and social cooperation that has ever existed.”); Lynn A. Stout, *The Corporation as a Time Machine: Intergenerational Equity, Intergenerational Efficiency, and the Corporate Form*, 38 SEATTLE U. L. REV. 685, 686 (2015) (“[T]he corporate form offers not only a useful savings and investment technology for individuals seeking to serve their own interests, but also a vehicle for the present generation to altruistically pass resources forward through time to benefit those who will live in the future.”).

²³² See, e.g., LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* 6–7 (2012) (challenging the shareholder primacy model that dominates American business); Tamara Belinfanti & Lynn Stout, *Contested Visions: The Value of Systems Theory for Corporate Law*, 166 U. PA. L. REV. 579, 586 (2018) (“Scholars, judges, regulators, and practitioners have long debated what corporations are and what their purpose should be.”); Leo E. Strine, Jr., *Our Continuing Struggle with the Idea That For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 136–38 (2012) (providing the BP oil spill as an example of a company that took large risks because it would keep all the profits of success and society would bear the burden of any negative outcomes).

²³³ See Bainbridge, *supra* note 230, at 1423 (“Shareholder wealth maximization long has been the fundamental norm which guides U.S. corporate decisionmakers.”); Hansmann & Kraakman, *supra* note 229, at 439 (noting “recent dominance of a shareholder-centered ideology of corporate law”); Roe, *supra* note 229, at 2065 (“Shareholder wealth maximization is usually accepted as the appropriate goal in American business circles.”).

²³⁴ See, e.g., Hillary A. Sale, *The New “Public” Corporation*, 74 LAW & CONTEMP. PROBS. 137, 139–41 (2011) (arguing for broader conception of corporate purpose that better accounts for public stakeholders beyond firm shareholders); Greenfield, *supra* note 122, at 312 (“Requiring corporations to attend to a broader range of stakeholders would make corporations more like people, [and] would make them better citizens . . .”).

²³⁵ See BAKAN, *supra* note 200, at 88 (giving the example of IBM working with the Nazi party solely because it increased profits).

and social returns across varying timelines.²³⁶ It suggests that businesses operate in a zero-sum world where what benefits shareholders must come at a cost to other stakeholders.²³⁷ And it suggests that many, if not most, corporate decisions must privilege shareholders and one time horizon to the detriment of everyone else in society. It leaves little room for the possibility that shareholder wealth generation often benefits and directly confers benefits to non-shareholder stakeholders financially, socially, and politically—as is often the case.²³⁸

Moreover, the conventional overstory limits the government's role in helping to mitigate the negative externalities that arise from corporate profit-seeking.²³⁹ It suggests that government and public policies are separate from business and profit-seeking, and not intertwined—as they are in reality.²⁴⁰ As such, governments should focus on establishing rules, regulations, and institutions to protect the public welfare, whereas corporations should focus on increasing economic welfare within the parameters set by governments.²⁴¹

This conventional overstory has, over time, ultimately helped to promote and perpetuate an unhealthy embrace of business and market-based solutions that too often reflexively reject government involvement and public solutions.²⁴² The conventional story, however persuasive or appealing it is, does

²³⁶ See *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 36 (Del. Ch. 2013) (“It is, of course, accepted that a corporation may take steps . . . that do not maximize profits currently. They may do so, however, because such activities are rationalized as producing greater profits over the long-term.” (quoting Strine, *supra* note 232, at 147 n.34)); Belinfanti & Stout, *supra* note 232, at 586 (alluding to “different theories or models” of corporations).

²³⁷ But see EDMANS, *supra* note 21, at 4–6 (arguing that businesses can both grow profits and achieve greater social welfare).

²³⁸ See *id.* at 4–7 (arguing that business decisions need not always be zero sum); BAINBRIDGE, *supra* note 19, at 170 (“Pursuit of shareholder value maximization leads to more efficient resource allocation, creates new social wealth, and promotes economic and political liberty.”).

²³⁹ See BAINBRIDGE, *supra* note 19, at 170 (“To be sure, there will always be externalities. Just as pursuing profit is baked into the corporation’s DNA, so is externalizing costs.”); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 738–56 (2005) (discussing how profit-seeking by firms can cause negative social externalities created by a singular pursuit of shareholder wealth maximization).

²⁴⁰ Strine & Walter, *supra* note 122, at 359–61 (explaining that the *Citizens United* case allowed corporations to become more intertwined with politics and government).

²⁴¹ See *id.* at 358 (“For-profit corporations should therefore stick to trying to make money within the ‘rules of the game’ set by government. It was government’s job to set those rules in the public interest and to put in place what regulatory standards were needed to protect those affected by corporate profit seeking.”); RAMASWAMY, *supra* note 12, at 75 (“The genius of the American vision was to separate the activities of innovators and entrepreneurs from those of other societal institutions, like church and state and local government. While the leaders of other institutions—including government—looked after the interests of society at large, American capitalists were legally obligated to look after only their own interests.”).

²⁴² NAOMI ORESKES & ERIK M. CONWAY, *THE BIG MYTH: HOW AMERICAN BUSINESS TAUGHT US TO LOATHE GOVERNMENT AND LOVE THE FREE MARKET* 1–7 (2023) (discussing how some busi-

not reflect a history or reality where business and government work together to address societal challenges with public policy and private market solutions.²⁴³ For instance, many large infrastructure projects in the United States, such as highways, railways, and airports, are built by private companies with public guidance and financing.²⁴⁴

A new, more honest corporate overstory that recognizes profit expansively as a key motivator and objective of business is necessary to engender more fruitful discussions about the appropriate engagements of business in politics and society.²⁴⁵ Unapologetically acknowledging the fact that corporations are motivated by profit *and* have a multiplicity of means to achieve profitability in line with their fiduciary duties to their shareholders hues closer to reality.²⁴⁶ This clear recognition of the profit-seeking nature of the corporation allows for more meaningful discussions and policies about corporate political governance and the need for rules, regulation, and government.²⁴⁷ Corporate law, after all, recognizes the boundless possibilities of profit-seeking businesses by affording them great latitude and judicial deference in their internal governance through the seminal business judgment rule doctrine while still placing legal guardrails to curb corporate excesses.²⁴⁸ Additionally, corporate law already obligates

nesses opposed even government regulation regarding what seemed an obvious societal benefit, such as child labor laws).

²⁴³ See, e.g., MITCHELL WEISS, *WE THE POSSIBILITY: HARNESSING PUBLIC ENTREPRENEURSHIP TO SOLVE OUR MOST URGENT PROBLEMS* 5–10 (2021) (discussing the importance of entrepreneurship in government for creating a better future); SARA VALAGUZZA & EDUARDO PARISI, *PUBLIC PRIVATE PARTNERSHIPS: GOVERNING COMMON INTERESTS*, at x–xii (2020) (using the example of an adopt-a-highway program to demonstrate how both society and private corporations can benefit when they work together).

²⁴⁴ See, e.g., JEFFREY DELMON, *PUBLIC-PRIVATE PARTNERSHIP PROJECTS IN INFRASTRUCTURE: AN ESSENTIAL GUIDE FOR POLICY MAKERS* 1–12 (2d ed. 2017) (discussing the benefits of infrastructure projects where the government and private corporations work together).

²⁴⁵ Strine, *supra* note 232, at 136–38 (arguing that businesses, in the pursuit of profit, take large risks that are born by society).

²⁴⁶ See Strine & Walter, *supra* note 122, at 347 (opining that profit-seeking by corporations “does not mean that corporate managers cannot consider other constituencies and interests affected by the corporation’s conduct . . . but it does mean that they can only do so when that is instrumental to profit generation”); Robert T. Miller, Response, *Delaware Law Requires Directors to Manage the Corporation for the Benefit of Its Stockholders and the Absurdity of Denying It: Reflections on Professor Bainbridge’s Why We Should Keep Teaching Dodge v. Ford Motor Co.*, 48 J. CORP. L. 32, 34 (2023) (“[D]irectors may direct value to non-shareholder constituencies (such as employees, customers, creditors, or suppliers) today if, by doing so, they hope to produce greater value for shareholders in the future.”).

²⁴⁷ Strine, *supra* note 232, at 136 (“In the end, policy makers should not delude themselves about the corporation’s ability to police itself; government still has a critical role in setting the rules of the game.”).

²⁴⁸ See, e.g., *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (acknowledging the broad legal deference given to boards of directors), *overruled by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000); *Joy v. North*, 692 F.2d 880, 885 (2d Cir. 1982) (“Whatever the terminology, the fact is that liability is

businesses to consider stakeholder interests as part of doing what is best for their shareholders.²⁴⁹

A new corporate overstory that recognizes profit expansively is necessary to free corporate discourse from the dogmas of the past.²⁵⁰ It would encourage the corporate reimagination, reinvention, and “creative destruction” that is at the heart of free market capitalism.²⁵¹ Rather than remaining trapped in a zero-sum world where the socioeconomic pie never grows and everyone operates on a single timeline of profit generation, the new overstory creates a space that entertains the theoretical and practical possibilities of shareholders profiting *and* stakeholders benefiting across various time horizons.²⁵² In a modern, interdependent marketplace and society, increased awareness of non-shareholder stakeholder interests need not always come at the expense of long-term value creation for shareholders.²⁵³

rarely imposed upon corporate directors or officers simply for bad judgment and this reluctance to impose liability . . . has been doctrinally labelled the business judgment rule.”); *Kamin v. Am. Express Co.*, 383 N.Y.S.2d 807, 810–11 (Sup. Ct. 1976) (“The directors’ room rather than the courtroom is the appropriate forum for thrashing out purely business questions”); *Fairfax*, *supra* note 21, at 1207 (“[C]ourts already grant corporations the flexibility to advance and even favor the interests of non-shareholders.”); Martin Lipton, *Corporate Purpose: Stakeholders and Long-Term Growth*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 29, 2019), <https://corpgov.law.harvard.edu/2019/05/29/corporate-purpose-stakeholders-and-long-term-growth/> [<https://perma.cc/Q8TF-HG46>] (noting that shareholders are within their rights to favor that the businesses they own focus, at least in part, on ESG initiatives).

²⁴⁹ See, e.g., *Marchand v. Barnhill*, 212 A.3d 805, 821 (Del. 2019) (holding that corporate “directors must make a good faith effort” to oversee and monitor operations to prevent harms to customers that may hurt the interests of shareholders); *Fairfax*, *supra* note 21, at 1207 (“[I]f corporate officers and directors have the obligation to operate in the best interests of the corporation, and there is growing consensus that such operation must include focusing on other stakeholders, then theoretically this obligation . . . already exists.”).

²⁵⁰ See HENDERSON, *supra* note 211, at 7–11 (arguing for a shift away from traditional business understandings and practices predicated on maximizing shareholder value).

²⁵¹ See JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 82–83 (Harper & Row 1975) (1942) (describing “Creative Destruction” as the “process of industrial mutation . . . that incessantly revolutionizes the economic structure *from within*, incessantly destroying the old one, incessantly creating a new one”); Fink, *supra* note 45 (“At the foundation of capitalism is the process of constant reinvention—how companies must continually evolve as the world around them changes or risk being replaced by new competitors.”).

²⁵² See BAINBRIDGE, *supra* note 19, at 10 (“[C]orporate actions that benefit stakeholders—such as employees—help the firm become more profitable and thus redound to the benefit of shareholders.”); EDMANS, *supra* note 21, at 4–6 (discussing ways to operate businesses that benefit shareholders and stakeholders and increase economic opportunities in society and markets).

²⁵³ See Fink, *supra* note 45 (“Make no mistake, the fair pursuit of profit is still what animates markets; and long-term profitability is the measure by which markets will ultimately determine your company’s success.”); *Fairfax*, *supra* note 21, at 1175 (highlighting arguments that align profit with stakeholderism); Travis Laster, *Attorney General Barr Could Use Some Help on Delaware Law*, LINKEDIN (Nov. 26, 2023), <https://www.linkedin.com/pulse/attorney-general-barr-could-use-some-help-delaware-law-travis-laster-kwcse/> [<https://perma.cc/L3RK-HFLG>] (“[T]here are many forms of

Furthermore, a new overstory that unabashedly recognizes the corporate profit motive also creates a space for the government to act in response to problems that profits and markets are inevitably ill-suited to address fully on their own.²⁵⁴ The new corporate overstory helps establish the predicate that even when businesses are doing social and political good in seeking profit, government action and intervention are still necessary. And it does so by acknowledging that the pursuit of profits will invariably limit certain corporate options and distinguishing corporate governance from democratic governance.²⁵⁵ For example, on a monumental issue like climate change, government action is necessary to effectuate meaningful change, even if corporations are working in good faith to address it.²⁵⁶

3. Corporations Are Human-Centered

Corporations are human-centered enterprises.²⁵⁷ The law has long recognized that corporations are legal persons.²⁵⁸ But beyond legal definition and doctrine, corporations are also enterprises owned, made, effectuated, and oper-

ESG, and not all contest that directors' duties run to the stockholders. Some versions justify ESG as a means of promoting stockholder value.").

²⁵⁴ See MITCH LANDRIEU, *IN THE SHADOW OF STATUES: A WHITE SOUTHERNER CONFRONTS HISTORY* 126 (2018) ("Businesses function to earn a profit; cities are governed to deliver public services You can employ 'best practices' to weed out rot or improve delivery of services; but you don't run a police department or any public works department to make a profit.").

²⁵⁵ See, e.g., Usha Rodrigues, *The Seductive Comparison of Shareholder and Civic Democracy*, 63 WASH. & LEE L. REV. 1389, 1390 (2006) ("Shareholders are not citizens; their investments are voluntary and relatively liquid"); 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, 1872 (2017) ("[H]uman investors are not so much citizens of the corporate governance republic as they are the voiceless and choiceless many whose economic prospects turn on power struggles among classes of haves who happen to control the capital . . . of typical American investors.").

²⁵⁶ See Fink, *supra* note 45 ("[B]usinesses can't do this alone, and they cannot be the climate police. . . . We need governments to provide clear pathways and a consistent taxonomy for sustainability policy, regulation, and disclosure across markets. They must also support communities affected by the transition, help catalyze capital for the emerging markets, and invest in the innovation and technology that will be essential to decarbonizing the global economy."); MAZZUCATO, *supra* note 199, at 163–67 (discussing the partnership between the state and businesses to address large challenges).

²⁵⁷ See Waheed Hussain, *Corporations, Profit Maximization and the Personal Sphere*, 28 ECON. & PHIL. 311, 325 (2012) ("[C]orporations are human enterprises: they are made up of many individuals engaged in coordinated activities with other individuals.").

²⁵⁸ See, e.g., Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (1 Wheat.) 518, 636 (1819) (characterizing the corporation as "an artificial being, invisible, intangible, and existing only in contemplation of law"); Greenfield, *supra* note 122, at 321 (discussing how corporations possess some but not all constitutional rights); Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV. 639, 640 (2016) ("Since the founding of the United States, state corporate law has established essential characteristics of the corporate form, including the idea that incorporation creates an entity with separate existence.").

ationalized by human beings in social communities.²⁵⁹ As such, they reflect the contradictions, complexities, and richness of the individual human beings that create, own, patronize, move, operate, and manage them.²⁶⁰ The conventional view of businesses as amoral, asocial, and apolitical rational engines of profit is not just too narrow; it is untrue.²⁶¹ It ignores the contradictions, complexities, and richness of human beings—beings who, as the poet Walt Whitman wrote, “contain multitudes.”²⁶²

Many corporate governance arguments are really not disagreements about business objectives or legal methods but disagreements between people with different backgrounds and life experiences that inform diverging preferences and time horizons.²⁶³ The conventional corporate overstory too often operates as if all investors and business executives share the same backgrounds, beliefs, preferences, and time horizons, thereby leading to disputes where common goals and shared aims are lost in crosstalk and inaction.

Corporations are social and political because the humans that make them possible are social and political beings.²⁶⁴ The traditional overstory, which suggests that business can be separated from the political preferences and so-

²⁵⁹ See Hillary A. Sale, *The Corporate Purpose of Social License*, 94 S. CAL. L. REV. 785, 789 (2021) (“[B]usinesses are social, not just economic, institutions.”).

²⁶⁰ See Caleb N. Griffin, *Humanizing Corporate Governance*, 75 FLA. L. REV. 689, 740 (2023) (“[H]uman investors have a deeply held interest in nonfinancial ends, such as environmental sustainability and societal welfare, in addition to their interest in financial returns.”); Hussain, *supra* note 257, at 326 (“Any normative conception of the corporation must pay special attention to the personal sphere, a sphere in which each individual has a certain kind of sovereignty over her life.”).

²⁶¹ LIN, *supra* note 33, at 163–65.

²⁶² As Walt Whitman wrote:

Do I contradict myself?
Very well then . . . I contradict myself;
I am large . . . I contain multitudes.

Walt Whitman, *Song of Myself*, in LEAVES OF GRASS 13, 55 (Brooklyn, Rome Bros. 1855).

²⁶³ See MORGAN HOUSEL, SAME AS EVER: A GUIDE TO WHAT NEVER CHANGES 193 (2023) (“An important component of human behavior is that people who’ve had different experiences than you will think differently than you do. They’ll have different goals, outlooks, wishes, and values. So most debates are not actual disagreements; they’re people with different experiences talking over each other.”).

²⁶⁴ See Aaron K. Chatterji & Michael W. Toffel, *Do CEO Activists Make a Difference? Evidence from a Field Experiment* 1 (Harv. Bus. Sch., Working Paper No. 16-100, 2016) (providing examples of CEOs of large companies taking political stances on controversial issues); Liz Mineo, *Top Business Execs More Polarized Than Nation as Whole*, HARV. GAZETTE (Aug. 15, 2022), <https://news.harvard.edu/gazette/story/2022/08/top-business-execs-more-polarized-than-nation-as-whole/> [<https://perma.cc/2L7L-BT9N>] (discussing the drawbacks of political polarization of CEOs at large companies); Taylor Telford, *Top Business Executives Have Gotten Even More Republican, Study Finds*, WASH. POST (July 6, 2022), <https://www.washingtonpost.com/business/2022/07/06/corporate-political-polarization-study/> [<https://perma.cc/X3DH-TK6Y>] (reporting on a study that found, based on voter registration files of over 3,700 executives of large U.S. companies, 68% of executives were Republican in 2020).

cial histories of the humans behind them, is simply fantastical and untrue.²⁶⁵ There is no way to fully divorce and divide the corporate from the political, just as there is no way to divide work from life, to divorce the professional from the personal.²⁶⁶ The supposed boundary between the personal and the business often does not exist. If you are laid off or promoted because of a business decision, it is deeply personal. If your work is underappreciated or rewarded by your employer, it is deeply personal. If your job is relocated or reorganized, it is deeply personal. If you are seen and embraced or ignored and shunned by your workplace, it is deeply personal.

The corporate, the political, the professional, and the personal are intertwined and interdependent. Humanity and all its flourishes and foibles are ultimately essential to any good business enterprise.²⁶⁷ To avoid continuing to build business practices and public policies based on a faulty scaffolding established by the old corporate overstory, a new corporate narrative that better accounts for the complex, human-centered nature of the corporation is necessary.²⁶⁸

Recognizing that businesses are human enterprises made up of complicated people with both altruistic preferences to act for the public good and self-serving desires to act for private wealth allows us to discuss, and perhaps appreciate, corporate political governance issues more honestly, productively, and gracefully.²⁶⁹ A new, human-centered corporate narrative helps us better understand why businesses and people can sometimes take seemingly contra-

²⁶⁵ See Roger Martin, *The Problem with Removing Humanity from Business Models* (arguing that business models should not discount or overlook the human element), in *THE BUSINESS OF BUILDING A BETTER WORLD: THE LEADERSHIP REVOLUTION THAT IS CHANGING EVERYTHING* 127, 130–31 (David Cooperrider & Audrey Selian eds., 2022).

²⁶⁶ See MATTHEW KELLY, *OFF BALANCE: GETTING BEYOND THE WORK-LIFE BALANCE MYTH TO PERSONAL AND PROFESSIONAL SATISFACTION*, at viii (2011) (“You cannot separate the personal and professional aspects of an individual’s life. You can consider them separately to gain insight, but the practical separation of the two is impossible.”); MOLLY M. MELIN, *THE BUILDING AND BREAKING OF PEACE: CORPORATE ACTIVITIES IN CIVIL WAR PREVENTION AND RESOLUTION* 2 (2021) (“Business and politics are linked to the extent that one cannot be extracted from the other.”).

²⁶⁷ See Martin, *supra* note 265, at 130–31 (explaining that humans can never completely separate work and personal life).

²⁶⁸ See FREEMAN ET AL., *supra* note 54, at 5–7 (explaining that businesses naturally need to consider stakeholders in their business operations to succeed).

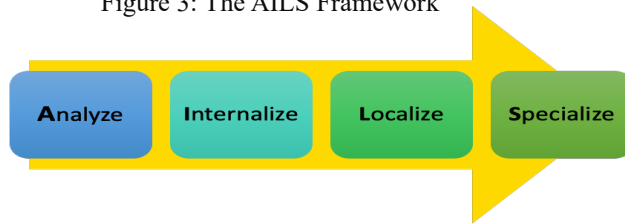
²⁶⁹ See Yung-An Hu & Day-Yang Liu, *Altruism Versus Egoism in Human Behavior of Mixed Motives: An Experimental Study*, 62 AM. J. ECON. & SOCIO. 677, 678–79 (2003) (explaining the challenge of delineating the different motivations people may have for helping others); Hendrik Slabbinck & Arjen Van Witteloostuijn, *Explicit and Implicit Basic Human Motives, and Public Service Motivation*, 11 FRONTIERS PSYCH. 1, 2–3 (2020) (detailing human motivation drivers, specially the motivation to positively affect society); Herbert A. Simon, *Altruism and Economics*, 83 AM. ECON. REV. 156, 158–59 (1993) (arguing that neoclassical economics as constructed cannot properly analyze altruism); Susan Rose-Ackerman, *Altruism, Ideological Entrepreneurs and the Non-Profit Firm*, 8 VOLUNTAS: INT’L J. VOLUNTARY & NONPROFIT ORGS. 120, 121–23 (1997) (providing different justifications for why people might give to others).

dictory or crosscutting positions on certain political and social issues.²⁷⁰ A new, human-centered corporate narrative can also help us better appreciate how sometimes, despite good intentions and best efforts to serve shareholders and stakeholders, businesses nevertheless stumble or fail in their pro-social pursuits.²⁷¹ And this new narrative will hopefully help break policy debates and discourse away from tired traps that suggest corporations must be all about profits in one time horizon, through one perspective, or none at all. Doing so can, in turn, lead to more sensible and workable discussions that better unlock the boundless possibilities of businesses and the people working behind them to improve our corporations and our communities.

B. The AILS Framework

The emerging corporate political landscape will be one of the toughest terrains for business executives to navigate for the foreseeable future. It is filled with pitfalls that could cause companies serious reputational harm, financial damage, consumer resentment, and regulatory scrutiny.²⁷² For better or worse, corporate law empowers directors with wide latitude to assess these risks and act (or not) on behalf of the corporation on political and social matters.²⁷³ To help directors and other business leaders navigate this treacherous territory, this Article recommends a new framework for corporate social engagement built on the core, actionable concepts of Analyze, Internalize, Localize, and Specialize (AILS).

Figure 3: The AILS Framework



²⁷⁰ See Banker, *supra* note 186 (describing the political challenges of Apple having its supply chain in China). But see Leswing, *supra* note 10 (noting an example of Apple supporting progressive policies in the United States after the Supreme Court curtailed abortion rights); Brooks Barnes, *Disney, Built on Fairy Tales and Fantasy, Confronts the Real World*, N.Y. TIMES, <https://www.nytimes.com/2022/04/17/business/disney-politics-florida.html> [<https://perma.cc/5ZSS-4JFD>] (June 22, 2023) (explaining that Disney used to try to avoid offending the consumer in any way, but has been forced to take a stand in recent divisive political times).

²⁷¹ *Segway Inc. v. Cai*, No. 2022-1110, 2023 WL 8643017, at *5 (Del. Ch. Dec. 14, 2023) (“Bad things can happen to corporations despite fiduciaries exercising the utmost good faith.”).

²⁷² Simmons, *supra* note 20, at 781.

²⁷³ See *Simeone v. Walt Disney Co.*, 302 A.3d 956, 958–59 (Del. Ch. 2023) (“Delaware law vests directors with significant discretion to guide corporate strategy—including on social and political issues. . . . The board is empowered to weigh these competing considerations and decide whether it is in the corporation’s best interest to act (or not act).”).

The AILS framework is designed to help corporate leaders engage more thoughtfully with sensitive social issues to enhance firm value while minimizing bad publicity, reputational damage, and economic harm.²⁷⁴ Directors and senior executives can use the framework to set strategic principles and operational systems for corporate social and political engagements.²⁷⁵ Additionally, compliance officers, attorneys, and managers can use the framework to prepare tactical responses and engagements on social and political controversies. One can tailor the AILS framework to each firm's governance structure and concerns, allowing each firm to more thoughtfully and skillfully take initiative and engage with social and political issues based on their own capabilities, values, and interests.²⁷⁶ Although there are no clear maps for the road ahead, a pragmatic framework can serve as a useful compass for firms as they traverse this new complicated territory at the intersection of business and politics.

1. Analyze

To start, businesses should conduct a thorough analysis of their social and political activities, as well as their social and political impact.²⁷⁷ Businesses should carefully study and measure their sociopolitical expenditures and efforts, similar to how they assess their operational and financial expenditures and efforts.²⁷⁸ This is particularly true for large businesses that operate across the country or around the world. First, businesses must become better aware of their social and political activities, including political contributions on the local, state, and international levels. Although many businesses are well aware of their national and federal activities, they are less aware of their local and inter-

²⁷⁴ See, e.g., *id.* ("Given the diversity of viewpoints held by directors, management, stockholders, and other stakeholders, corporate speech on external policy matters brings both risks and opportunities."); Anahit Mkrtchyan, Jason Sandvik & Vivi Z. Zhu, *CEO Activism and Firm Value*, MGMT. SCI., Nov. 9, 2023, at 1, 21, <https://doi.org/10.1287/mnsc.2023.4971> [<https://perma.cc/K4HW-9JKG>] (finding that CEO activism that aligns with employee and customer sociopolitical preferences can increase firm value).

²⁷⁵ See *Marchand v. Barnhill*, 212 A.3d 805, 821 (Del. 2019) ("As with any other disinterested business judgment, directors have great discretion to design context- and industry-specific approaches . . .").

²⁷⁶ See, e.g., Lawrence A. Cunningham, *Who Are Quality Shareholders and Why You Should Care*, 47 DEL. J. CORP. L. 575, 577 (2023) (advocating for tailored corporate governance approaches as opposed to "one size fits all" approaches).

²⁷⁷ See, e.g., KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS & PROGRESSIVE POSSIBILITIES* 107–09 (2006) (arguing for legal and practical reforms that better account for corporate social impact).

²⁷⁸ See, e.g., JOHN DOERR, *MEASURE WHAT MATTERS: HOW GOOGLE, BONO, AND THE GATES FOUNDATION ROCK THE WORLD WITH OKRS* 120–25 (2018) (discussing the importance of metrics in guiding corporate governance).

national activities.²⁷⁹ Second, businesses must better assess their social and political impacts and efficacy. This will allow them to better account for how they deploy scarce corporate resources and to determine which programs to expand or eliminate.

Collectively, better analysis and auditing of a company's corporate and social-political engagements will help ensure that company operations and assets are well-deployed to have the greatest impact on social causes while still maintaining fiduciary obligations to shareholders.²⁸⁰ It can also help bolster the fact that businesses cannot, and need not engage on every social or political issue. Additionally, even when engaging with an issue, businesses certainly need not do so publicly. Sometimes the most impactful work on an issue is done internally within a business or behind the scenes, out of the public limelight.

Furthermore, better analysis and auditing will also allow executives to respond to new issues in a more thoughtful and well-informed manner that is consistent with their company's ongoing operations and strengths.²⁸¹ For instance, in the years following the killing of George Floyd in 2020, many businesses engaged in racial equity or civil rights audits to help ensure that their internal practices regarding race were consistent with their external public rhetoric.²⁸²

Gathering and analyzing data related to a company's corporate and social-political activities will undoubtedly require resources and trust, as some of this information can be deeply personal and sensitive. Nevertheless, businesses must undertake this endeavor in earnest because, in its absence, they risk serious reputational and financial harm. This damage can come in the form of accusations of hypocrisy on an issue like racial justice if, for example, senior executives are promoting messages and values that are inconsistent with a

²⁷⁹ See, e.g., Hui Chen & Eugene Soltes, *Why Compliance Programs Fail—and How to Fix Them*, HARV. BUS. REV., Mar.–Apr. 2018, at 117, 119 (arguing that better measurement of compliance programs would allow firms to decrease noncompliance); Maximilian J.B. Hall, *BCCI: The Lessons for Bank Supervisors Part 2: Deficiencies in International Supervisory Arrangements*, 1 J. FIN. REGUL. & COMPLIANCE 298, 300 (1993) (discussing the difficulty of regulating international banks).

²⁸⁰ See, e.g., FRESHFIELDS BRUCKHAUS DERINGER LLP, A LEGAL FRAMEWORK FOR IMPACT: SUSTAINABILITY IMPACT IN INVESTOR DECISION-MAKING 10–14 (2021), <https://www.freshfields.us/4a199a/globalassets/our-thinking/campaigns/legal-framework-for-impact/a-legal-framework-for-impact.pdf> [<https://perma.cc/L45B-2TQ9>] (studying various factors and legal considerations involved with impact investing).

²⁸¹ See Chen & Soltes, *supra* note 279, at 119 (explaining the importance of tracking metrics for improving businesses).

²⁸² See Alicia E. Plerhoples, *ESG & Anti-Black Racism*, 24 U. PA. J. BUS. L. 909, 924–25 (2022) (citing Amazon as an example of a company whose shareholders voted down a racial equity audit); Saijel Kishan, *What Are Civil Rights Audits, and Why Are Companies Doing Them?*, BLOOMBERG, <https://www.bloomberg.com/news/articles/2022-05-03/what-civil-rights-audits-are-and-why-firms-do-them-quicktake> [<https://perma.cc/XGK4-C9MJ>] (Dec. 2, 2022).

company's actual actions, policies, and results.²⁸³ Thus, without a proper accounting of their corporate and social efforts, businesses risk facing charges of mispending corporate resources in contravention of their fiduciary duties.

2. Internalize

As part of a comprehensive analysis of their social and political efforts, corporations should account for the social and political issues most important to their internal stakeholders, especially employees, and assess how their internal policies reflect their public political and social statements.²⁸⁴ Internal stakeholders and policies are just as important for a firm's success, if not more important, than external stakeholders and pronouncements.²⁸⁵ Businesses should begin their social efforts and engagements internally within their own firms. Although employees and labor may have historically received inadequate attention in discussions about corporate governance, this exclusion might now be a thing of the past.²⁸⁶ To start, companies should treat all their employees and contractors well and create a culture where labor is valued and cared for.²⁸⁷ Compensate them fairly, provide them with safe working conditions, and give them more than adequate benefits so that they can truly share in the profits and wealth of the business.²⁸⁸ Moreover, treating employees well can also carry the added benefit of fostering and promoting social and political values internally that a firm may then champion externally, such as diversity and equity.²⁸⁹ Ultimately, it is difficult to present yourself authentically as a

²⁸³ See, e.g., Plerhoples, *supra* note 282, at 931 ("Companies must move from platitudes to action and accountability.").

²⁸⁴ See, e.g., Matthew T. Bodie, *Labor Relations at the Woke Corporation*, 79 N.Y.U. ANN. SURV. AM. L. 171, 178 (2023) (providing Starbucks as an example of a company acting to support its stakeholders by committing to sustainability goals linked to coffee).

²⁸⁵ Sigal Barsade & Olivia A. O'Neill, *Employees Who Feel Love Perform Better*, HARV. BUS. REV., Jan. 13, 2014, <https://hbr.org/2014/01/employees-who-feel-love-perform-better> [<https://perma.cc/3TZB-6SG3>] (sharing the results of a study that show that employees performed better on several metrics when they felt their employer cared about them).

²⁸⁶ George S. Georgiev, *The Human Capital Management Movement in U.S. Corporate Law*, 95 TUL. L. REV. 639, 642–44 (2021) (explaining that employees are starting to become a focus of corporate governance).

²⁸⁷ See WILL GUIDARA, UNREASONABLE HOSPITALITY: THE REMARKABLE POWER OF GIVING PEOPLE MORE THAN THEY EXPECT 40–44 (2022) (describing, through personal narrative, the importance of making employees feel valued to build a productive team).

²⁸⁸ PAUL SARVADI, TAKE CARE OF YOUR PEOPLE: THE ENLIGHTENED CEO'S GUIDE TO BUSINESS SUCCESS 59–63 (2019).

²⁸⁹ See, e.g., Alexandra Kalev & Frank Dobbin, *The Surprising Benefits of Work/Life Support*, HARV. BUS. REV., Sept.–Oct. 2022, <https://hbr.org/2022/09/the-surprising-benefits-of-work-life-support> [<https://perma.cc/W9TM-TB66>] (reporting on research showing that treating employees well likely increases the diversity of the organization); Bryan J. Brim & Jennifer Robison, *What Wellbeing Means in the Coronavirus Era*, GALLUP (May 15, 2020), <https://www.gallup.com/workplace/310877/>

good, socially responsible corporate citizen if you are not willing to listen and take care of the very people that make your success as a business possible.²⁹⁰

In the absence of proper internal social and political engagements, businesses risk discord and dissent from their employees when political issues become charged and contested. Furthermore, without properly accounting for the needs and preferences of internal stakeholders, businesses risk offending customers, investors, and potential recruits who view them as disingenuous in their external social and political efforts.

3. Localize

Once companies have meaningfully engaged with their internal stakeholders, they should, whenever appropriate, prioritize their social and political efforts locally before expanding their engagements to a broader geographic scope. Too often, top-down state and private actions leave out and leave behind local communities in their attempts to help solve socioeconomic challenges that impact those very communities.²⁹¹ Businesses tend to operate better when they have the acceptance or license of their communities.²⁹² Taking better account of the needs and preferences of local communities is critical to more inclusive, impactful, and beneficial corporate social and political engagements.²⁹³ This is similar to how many successful global corporations like McDonald's take into account the needs and preferences of operations in certain locales and adapt their offerings accordingly.²⁹⁴

wellbeing-means-coronavirus-era.aspx [https://perma.cc/UYB4-SZU7] (arguing that employees whose employer works with them in improving physical and mental health are more productive for the business).

²⁹⁰ See Stephen Trzeciak, Anthony Mazzarelli & Emma Seppälä, *Leading with Compassion Has Research-Backed Benefits*, HARV. BUS. REV., Feb. 27, 2023, <https://hbr.org/2023/02/leading-with-compassion-has-research-backed-benefits> [https://perma.cc/5R5T-H4SC] (reporting that research has shown that an organization that shows compassion to its employees will have more productive employees).

²⁹¹ RAGHURAM RAJAN, THE THIRD PILLAR: HOW MARKETS AND THE STATE LEAVE THE COMMUNITY BEHIND, at xviii–xxii (2019) (describing how communities can go into a downward spiral, and that focusing efforts locally, rather than globally, can help revitalize such communities).

²⁹² See Sale, *supra* note 259, at 789–90 (“[B]usinesses require both legal license and social license to operate. Social license derives not from legally granted permission, but instead from the development of legitimacy, credibility, and trust within the relevant communities and stakeholders.”).

²⁹³ See, e.g., PAUL COLLIER, THE FUTURE OF CAPITALISM: FACING THE NEW ANXIETIES 191–96 (2018) (critiquing how current business and market practices often exclude and leave behind local communities at the expense of wealthy enclaves).

²⁹⁴ See Alice Crawford, Sarah A. Humphries & Margaret M. Geddy, *McDonald's: A Case Study in Glocalization*, 9 J. GLOB. BUS. ISSUES 11, 11–12 (2015) (explaining how McDonald's catered to local preferences as it expanded into new markets around the globe); Matthew Meltzer, *McDonald's Is Offering Menu Items from Other Countries. And We Tried Them All.*, MATADOR NETWORK (Sept. 17, 2018), <https://matadornetwork.com/read/mcdonalds-international-menu-items/> [https://perma.cc/

The surrounding communities of a company's operations, offices, and storefronts usually consist of many of that company's key supporters, customers, and employees, as well as critics.²⁹⁵ By prioritizing their corporate political and social efforts internally and locally first, companies position themselves to succeed where they are often most familiar and comfortable—the communities closest to them, which are often also the communities that make their success possible.²⁹⁶ Creating a positive impact in these local communities for key local constituencies can boost company morale and create momentum for the company to expand its efforts more broadly.²⁹⁷ For instance, Philadelphia-based Comcast, working with local activists and officials, provided free, reliable high-speed Wi-Fi at various hot spots in Philadelphia for local residents and students during the early, particularly difficult phase of the COVID-19 pandemic.²⁹⁸ These localized efforts can often generate visible positive impact, community appreciation, and political goodwill much more quickly than national and international efforts. This dynamic could create a local, virtuous cycle for firms in which their political and social efforts lead to better communities and markets for their businesses and, in turn, validate their “social license[s]” to the public.²⁹⁹

4. Specialize

To advance their positions and maximize their impact, corporations should prioritize and focus their social and political efforts on issues most relevant to their businesses and engage in ways that leverage their comparative expertise.³⁰⁰ Instead of trying to engage on a host of worthy issues in a variety of ways to appeal to a wide range of causes and constituencies, businesses

NJ2N-Y6AH] (describing the menu items that McDonald's creates in different countries that are inspired by local cuisines).

²⁹⁵ See JOHN A. QUELCH & KATHERINE E. JOCZ, *ALL BUSINESS IS LOCAL: WHY PLACE MATTERS MORE THAN EVER IN A GLOBAL, VIRTUAL WORLD* 4–11 (2012) (discussing the importance of local communities for businesses).

²⁹⁶ See RAJAN, *supra* note 291, at xx–xxii (discussing the importance of local communities to a business's success).

²⁹⁷ QUELCH & JOCZ, *supra* note 295, at 4–11.

²⁹⁸ Press Release, Comcast, Comcast Extends COVID Support Through June 30, 2021 (Dec. 7, 2020), <https://corporate.comcast.com/press/releases/covid-support-extended> [<https://perma.cc/UM2T-GJWH>].

²⁹⁹ See Sale, *supra* note 259, at 789 (“The theory of social license is that businesses and other entities exist with permission from the communities in which they are located, as well as permission from the greater community and outside stakeholders.”).

³⁰⁰ See, e.g., ANTONIO NIETO-RODRIGUEZ, *THE FOCUSED ORGANIZATION: HOW CONCENTRATING ON A FEW KEY INITIATIVES CAN DRAMATICALLY IMPROVE STRATEGY EXECUTION* 93–96 (2012) (providing Apple as an example of a company that narrowed its focus to a few products which resulted in better execution of its business strategy).

should specialize in their social and political efforts.³⁰¹ Rather than simply donating money or outsourcing social and political engagement to third parties, corporations should thoughtfully concentrate and prioritize their capital and expertise on efforts where they can offer a comparative advantage to enhance their sense of purpose and maximize their impact.³⁰² For instance, FedEx's social activism efforts should leverage the corporation's expertise in delivery and logistics; Airbnb's efforts should focus on housing; and J.P. Morgan's efforts should focus on finance.³⁰³

By focusing and prioritizing on areas of comparative advantage and core competencies, businesses can better align their social activism with their business interests when there exists a clear, mutually beneficial nexus between the two.³⁰⁴ In many instances, when sensibly operationalized, specialization can allow companies to marry their capitalist impulses with a desire to do social good.³⁰⁵ For example, in 2021, in an effort to do good during the height of the COVID-19 pandemic, Uber and Lyft leveraged their roles as transportation providers in partnering with the federal government to provide free rides to and from COVID-19 vaccine sites.³⁰⁶ Although this benefitted public health

³⁰¹ See, e.g., Daniel M. Bernhofen & John C. Brown, *On the Genius Behind David Ricardo's 1817 Formulation of Comparative Advantage*, 32 J. ECON. PERSPS. 227, 227–30 (2018) (discussing the concept of economic comparative advantage, as well as the idea that specialization allows trade to increase the wealth of both parties in an exchange); JAMES C. LEONTIADES, *MULTINATIONAL CORPORATE STRATEGY: PLANNING FOR WORLD MARKETS* 54–58 (1985) (enumerating various ways that firms specialize to enhance their comparative advantage).

³⁰² See, e.g., MAZZUCATO, *supra* note 199, at 3–10 (discussing the importance of mission and purpose to address large social challenges).

³⁰³ These three companies distribute their corporate social efforts broadly with some concentration on their respective core specialties. See FEDEX CORP., 2022 ESG REPORT 23 (2022), https://www.fedex.com/content/dam/fedex/us-united-states/sustainability/gcrs/FedEx_2022_ESG_Report.pdf [<https://perma.cc/47Y4-BWC9>] (mentioning FedEx's options for carbon neutral shipping); J.P. MORGAN CHASE & CO., 2021 ENVIRONMENTAL SOCIAL & GOVERNANCE REPORT 10 (2021), <https://www.jpmorganchase.com/content/dam/jpmc/jpmorgan-chase-and-co/documents/jpmc-esg-report-2021.pdf> [<https://perma.cc/2YLW-3NB4>] (highlighting the bank's initiatives such as financing small businesses and affordable housing); AIRBNB, AN UPDATE ON ENVIRONMENTAL, SOCIAL, AND GOVERNANCE (ESG) AT AIRBNB 6–7 (2021), [https://s26.q4cdn.com/656283129/files/doc_downloads/governance_doc_updated/Airbnb-ESG-Factsheet-\(Final\).pdf](https://s26.q4cdn.com/656283129/files/doc_downloads/governance_doc_updated/Airbnb-ESG-Factsheet-(Final).pdf) [<https://perma.cc/TU29-HETD>] (noting the company's initiative to combat housing discrimination).

³⁰⁴ See, e.g., ALICE KORNGOLD, *A BETTER WORLD, INC.: HOW COMPANIES PROFIT BY SOLVING GLOBAL PROBLEMS . . . WHERE GOVERNMENTS CANNOT* 15 (2014) (“By helping to advance people from extreme poverty to the middle class, businesses anticipate achieving long-term strategic growth through access to new markets, workforce development, product innovation, and product distribution.”).

³⁰⁵ See MATTHEW BISHOP & MICHAEL GREEN, *PHILANTHROCAPITALISM: HOW THE RICH CAN SAVE THE WORLD* 2–3 (2008) (discussing philanthropy rooted in capitalist values); MINOW, *supra* note 1, at 11–12 (“Social entrepreneurship is a new buzzword to characterize efforts by philanthropists to bring market-style ideas or business accountability methods to philanthropic investment.”).

³⁰⁶ *Vaccines for All: Announcing Free or Discounted Rides to Vaccination Sites*, LYFT (May 10, 2021), <https://www.lyft.com/blog/posts/vaccines-for-all-announcing-free-rides-for-anyone-getting-a>

widely by encouraging vaccination, these efforts also benefited Uber and Lyft by creating safer markets for their drivers and attracting new customers for their services. In sum, much like specialization in core business operations, specialization in corporate social and political endeavors increases the odds of creating opportunities for social benefit that also aid the bottom lines of the businesses themselves.³⁰⁷

* * *

Corporate engagements on social and political issues will likely remain one of the most challenging issues for business leaders in the coming years. By analyzing, internalizing, localizing, and specializing in their social and political efforts under the AILS framework, corporations enhance the likelihood that their engagements and resources are used to create greater social good, as well as to safeguard and enhance the financial interests of their firms. Although there exists no clear roadmap for the changing terrain at the fault lines of business and politics, the new proposed AILS framework can serve as a pragmatic compass to guide corporate executives in thinking, planning, and acting on their corporate social and political efforts in the years to come.

C. Lessons from Delaware and Nevada

In response to the rise in corporate engagements on social and political issues, political leaders have responded with increased scrutiny and regulation of businesses.³⁰⁸ Two areas where public policy has been particularly prolific in response to corporate social and political engagements are state business regulation and public pension fund policies. In recent years, several state leaders punished businesses that supported social and political positions contrary to theirs by enacting new regulations and removing favorable laws.³⁰⁹ Additionally, several political leaders also moved to restrict or divest public pension fund investments in funds and businesses that they deemed “woke” or problematic.³¹⁰

shot [<https://perma.cc/J3L6-PF55>]; *Rides for Vaccinations*, UBER, <https://www.uber.com/us/en/impact/rides-for-vaccines/> [<https://perma.cc/3BEB-BYG8>].

³⁰⁷ See, e.g., GREGORY KESLER & AMY KATES, LEADING ORGANIZATION DESIGN: HOW TO MAKE ORGANIZATION DESIGN DECISIONS TO DRIVE THE RESULTS YOU WANT 82–83 (2011) (analyzing how various companies specialize in their business operations to produce better products and financial results); KORNGOLD, *supra* note 304, at 15.

³⁰⁸ See *supra* notes 173–202 and accompanying text.

³⁰⁹ See *supra* notes 173–202 and accompanying text.

³¹⁰ 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> [<https://perma.cc/4SQP-LULK>] (providing examples of states, such as Louisiana and Arkansas, that pulled hundreds of millions of dollars from investment managers that they deemed too focused on climate issues).

These public policy moves, regardless of motives, can cause serious harm to communities, economies, and constituents. Myopic and careless public policies that retaliate against businesses for their social and political activities can lead to businesses divesting from certain communities and taking jobs and significant tax revenues with them.³¹¹ Similarly, retaliatory state public pension and retirement plan policies that limit investment choices can cause significantly reduced returns for constituents and retirees.³¹² Although states can vary widely in their business regulations and pension and retirement fund practices, this Article looks to the states of Delaware and Nevada for larger lessons on corporate lawmaking and public pension fund management policies in a changing corporate political governance landscape.

1. The Delaware Corporate Lawmaking Model

Delaware offers an exemplary model for public policymakers who are considering and engaging in retaliatory legal changes against businesses in response to their social and political activities.³¹³ The state has long been the leader for corporate charters in the United States and is indisputably the most influential jurisdiction in terms of corporate law, both nationally and perhaps globally.³¹⁴ Delaware's dominance can be explained in part by how it has insulated its corporate lawmaking processes from the worst whims of short-term, reactionary partisan politics.

Delaware astutely safeguards its business laws and regulations from petty partisan politics that could harm the state, businesses, and the global economy

³¹¹ See, e.g., Barnes, *supra* note 130 (reporting on the jobs and investments that the local community around Disney World would lose because of the political fight with Governor DeSantis).

³¹² See, e.g., Ross Kerber, *Anti-ESG Bill Could Cut Indiana Pension Returns by \$6.7 Bln*, REUTERS (Feb. 7, 2023), <https://www.reuters.com/business/sustainable-business/anti-esg-bill-could-cut-indiana-pension-returns-by-67-bln-analysis-2023-02-07/> [<https://perma.cc/695U-UCZL>] (providing Indiana as an example of a state whose pension fund is expected to have lower returns if a proposed law is passed that would limit the fund's exposure to environmental investments).

³¹³ Lund & Pollman, *supra* note 21, at 2579–82 (explaining that shareholder primacy is the generally understood norm of corporate law in Delaware).

³¹⁴ See JEFFREY W. BULLOCK, DELAWARE DIVISION OF CORPORATIONS: 2022 ANNUAL REPORT 1, <https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2022-Annual-Report-cy.pdf> [<https://perma.cc/7ZEJ-2WHY>] [hereinafter BULLOCK, 2022 REPORT] (“Consistent with past years, the First State continues to be the domicile of choice for members of the Fortune 500 at nearly 68.2 percent. Approximately 79 percent of all U.S. initial public offerings in the calendar year 2022 were registered in Delaware.”); JEFFREY W. BULLOCK, DELAWARE DIVISION OF CORPORATIONS: 2021 ANNUAL REPORT 1, <https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2021-Annual-Report.pdf> [<https://perma.cc/2Z9A-ZBV4>] (“Approximately 93 percent of all U.S. initial public offering in the calendar year 2021 were registered in Delaware.”); Lund & Pollman, *supra* note 21, at 2579 (“For more than a century, Delaware has held the top honor of being home to the greatest number of public corporations and producing the most influential corporate law.”).

due to the large number of important companies incorporated in Delaware.³¹⁵ Delaware offers critical legal safeguards in several ways. First, Delaware's corporate law, and changes to it, originate not in the state legislature but in the Council of the Delaware State Bar Association's Corporation Law Section, a body of longstanding, learned business lawyers and leaders, rather than elected politicians.³¹⁶ As such, short-term partisan politics play a reduced role in crafting and changing Delaware's business regulations relative to other states.³¹⁷ Second, Delaware's Constitution requires that its major courts have only "a bare majority" of judges from one political party.³¹⁸ Additionally, Delaware's Constitution requires its three major courts to adjudicate business disputes—the Delaware Supreme Court, the Court of Chancery, and the Superior Court—be nearly evenly divided between jurists of the two major political parties.³¹⁹ These provisions ensure that no party can dominate its judiciary, especially on matters relating to business. Third, the Delaware Court of Chancery is structured to provide a specialized, swift, and learned forum for some of the most contentious and complicated business disputes, without fear of partisan favor or backlash.³²⁰ Collectively, these structural safeguards, along with strong legal norms in the state bar, help shield Delaware business law and Delaware corporations from many dangers that arise out of whimsical, reactionary, and potentially damaging short-term political impulses.

The beauty of the Delaware model is that its nonpartisan deference to disinterested experts ultimately allows entrepreneurs and executives to govern their respective businesses nimbly and in a manner that can succeed in the face of changing political and social environments and over varying timelines.³²¹ Although politicians often think and act in terms of election cycles that last just a few years or news cycles that last a few hours, bad public policy concerning

³¹⁵ See BULLOCK, 2022 REPORT, *supra* note 314, at 1 (noting that a majority of Fortune 500 companies are incorporated in Delaware).

³¹⁶ Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1752–55 (2006); Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 DEL. J. CORP. L. 885, 899–901 (1990).

³¹⁷ Ofer Eldar & Gabriel Rauterberg, *Is Corporate Law Nonpartisan?*, 2023 WISC. L. REV. 177, 177.

³¹⁸ DEL. CONST. art. IV, § 3.

³¹⁹ *Id.*

³²⁰ Eldar & Rauterberg, *supra* note 317, at 220–21.

³²¹ See Cunningham, *supra* note 276, at 577 ("Delaware corporate law is enabling, deferential, and aims to protect the shareholders. It defines the norm in corporate governance as recognizing differences among companies—the need to tailor governance to fit."); Jesse M. Fried, *The Uneasy Case for Favoring Long-Term Shareholders*, 124 YALE L.J. 1554, 1565 (2015) ("[A]s a matter of economic theory, the effect of managers' time horizons (that is, whether managers serve short-term or long-term shareholders) on stakeholder welfare is actually indeterminate.").

business can have serious negative long-term consequences for a state and community as companies leave or underinvest in reaction to unfavorable policies.³²²

Admittedly, the judicial and institutional norms of Delaware corporate lawmaking will be difficult to replicate on a national or state level. But Congress and state legislatures can form and use independent advisory commissions akin to the Council of the Delaware State Bar Association's Corporation Law Section to address some of the more difficult, politically charged issues concerning business regulation.³²³ In the past, the federal government and state governments have used independent advisory commissions to handle politically fraught topics like military base closures, Social Security reforms, congressional redistricting, and the September 11th attacks.³²⁴ The appeal of such commissions is that they allow a group of experts to provide sage, nonpartisan counsel and offer political cover for elected officials on politically difficult or unpopular actions by affording deference to the commission.³²⁵

In sum, as local and national politicians respond to and retaliate against businesses for their social and political activities, policymakers should look to the Delaware model for lessons on how best to minimize the deleterious effects of reactionary partisan politics in business law and regulation.

2. The Nevada Public Employees Pensions Approach

Nevada offers a simple yet powerful approach for public policymakers seeking to use public pension funds to respond to the changing corporate polit-

³²² See Barnes, *supra* note 130 (reporting on the job and investment losses the community around Disney World will experience because of the clash between Disney and Governor DeSantis).

³²³ See Mark Fenster, *Designing Transparency: The 9/11 Commission and Institutional Form*, 65 WASH. & LEE L. REV. 1239, 1246–48 (2008) (providing a broad overview of the functions and limits of advisory committees in government); Michael H. Cardozo, *The Federal Advisory Committee Act in Operation*, 33 ADMIN. L. REV. 1, 1–5 (1981) (describing advisory committees and the debate over how they should be regulated). See generally TERRENCE R. TUTCHINGS, RHETORIC AND REALITY: PRESIDENTIAL COMMISSIONS AND THE MAKING OF PUBLIC POLICY (1979) (providing results and analyses of a comprehensive study of commissions).

³²⁴ See *About Us*, CAL. CITIZENS REDISTRICTING COMM'N, <https://wedrawthelines.ca.gov/about-us/> [<https://perma.cc/TZX6-4LJS>] (explaining the advisory commission's role in redrawing California's congressional districts); 2005 DEF. BASE CLOSURE & REALIGNMENT COMM'N, REPORT TO THE PRESIDENT (2005), <https://www.acq.osd.mil/brac/docs/BRAC-2005-Commission-Report.pdf> [<https://perma.cc/TDM6-5339>] (providing recommendations to the President about which military bases to shut down); *National Commission on Social Security Reform (aka The Greenspan Commission)*, SOC. SEC. ADMIN., <https://www.ssa.gov/history/greenspn.html> [<https://perma.cc/N3UW-KQXM>] (describing the purpose of the advisory committee set up to recommend how to fix financial issues with the Social Security program); *About the Commission*, NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., <https://govinfo.library.unt.edu/911/about/index.htm> [<https://perma.cc/HEE2-QL2T>] (establishing a bipartisan advisory committee in response to the September 11th attacks, which was tasked with investigating the circumstances that led to the terrorist attacks).

³²⁵ Fenster, *supra* note 323, at 1246–48.

ical landscape. The Nevada Public Employees Retirement System fund (NVPERS), which had assets of \$58.3 billion as of the fiscal year ending June 2023, is governed by a board of seven individuals appointed by the Governor of Nevada, as required by law.³²⁶ The board, however, has historically left investment decisions to its investment officer, who manages this substantial fund alone, working out of a small, simple office with a single desk.³²⁷ The investment officer is paid about \$127,000 per year, substantially less than the salary of a first-year associate at America's top large law firms.³²⁸ Yet NVPERS has consistently outperformed many of its peers, not only year after year, but also over three-year, five-year, and ten-year timelines.³²⁹ Even in a particularly tough recent year for the overall market in 2022, when the S&P 500 Index was down nearly 20% for the year, NVPERS only lost about 5%.³³⁰ A key appeal of the Nevada approach is its focus on low-cost, passive investments like index funds, without regard for the social and political views of the underlying assets or asset managers.³³¹

In contrast to the Nevada approach, in recent years, several governors, state treasurers, and other state political leaders have sought to use the tens of billions of dollars in public retirement and pension funds under their stewardship to actively reward companies that align with their political views on certain issues and punish those who do not.³³² For example, in 2022, the Gover-

³²⁶ NEV. REV. STAT. § 286.120(1) (2023); PUB. EMPS.'S RET. SYS. OF NEV., POPULAR ANNUAL FINANCIAL REPORT FOR THE FISCAL YEAR ENDED JUNE 30, 2023, at 4 (2023), <https://www.nvpers.org/sites/default/files/2024-01/FY23PAFR.pdf> [<https://perma.cc/PJU8-F9GZ>].

³²⁷ Timothy W. Martin, *What Does Nevada's \$35 Billion Fund Manager Do All Day? Nothing*, WALL ST. J. (Oct. 19, 2016), <https://www.wsj.com/articles/what-does-nevadas-35-billion-fund-manager-do-all-day-nothing-1476887420> [<https://perma.cc/DWJ3-762B>]; see Michael Katz, *Nevada PERS Loses 5.1% in Fiscal Year 2022*, CHIEF INV. OFFICER (Sept. 13, 2022), <https://www.ai-cio.com/news/nevada-pers-loses-5-1-in-fiscal-year-2022/> [<https://perma.cc/57WG-9Z2E>] (noting that despite losing value, Nevada's pension fund still outperformed its benchmark fund).

³²⁸ Martin, *supra* note 327; David Thomas, *N.Y. Law Firms Raise Starting Salaries to \$215,000 as Lawyer Pay Race Continues*, REUTERS (Jan. 20, 2022), <https://www.reuters.com/legal/legalindustry/ny-law-firm-raises-starting-salaries-215000-lawyer-pay-race-continues-2022-01-20/> [<https://perma.cc/7PGF-8HB2>].

³²⁹ *Pension Fund Returns Tracker*, PENSIONS & INVS., <https://www.pionline.com/section/returns-tracker> [<https://perma.cc/E3VQ-EEGF>].

³³⁰ Jesse Pound & Samantha Subin, *Stocks Fall to End Wall Street's Worst Year Since 2008, S&P 500 Finishes 2022 Down Nearly 20%*, CNBC, <https://www.cnbc.com/2022/12/29/stock-market-futures-open-to-close-news.html> [<https://perma.cc/CR5Q-CHV4>] (Dec. 30, 2022); Zachary Christensen, Steve Vu, Jordan Campbell & Anil Niraula, *The 2022 Fiscal Year Investment Results for State Pension Plans*, REASON FOUND. (Feb. 7, 2023), <https://reason.org/data-visualization/2022-investment-results-for-state-pension-plans/#:~:text=> [<https://perma.cc/U7XF-XYHD>].

³³¹ See Martin, *supra* note 327 (reporting that highly political events like the 2016 U.S. presidential election do not change the investment strategy of NVPERS, which focuses on low-cost investments).

³³² See, e.g., Gelles, *supra* note 310 (reporting that Louisiana and Arkansas have made investment decisions based on stances companies take on social issues such as climate change).

nors of Florida and Texas moved to restrict their respective states' pension funds from investing in certain businesses or with certain asset managers due to differences in views about climate change.³³³ Florida's restrictions went so far as to prohibit state pension fund managers from considering "social, political or ideological interests" in their investment decisions.³³⁴ Similarly, on the other side, pension funds like the massive \$440 billion California Public Employees' Retirement System (CalPERS) have long focused on ESG and sustainable investments.³³⁵ Regardless of political and social persuasions, attempts by public policymakers and elected officials to actively micromanage pension investments can lead to subpar returns for retirees and investors.³³⁶ Placing limits or prohibitions on certain types of funds, assets, and managers ultimately limits how retirees and investors can maximize returns.³³⁷

Another key appeal of the Nevada approach is its aim to generate the best returns for all its investors and retirees without fear or favor toward political and social considerations.³³⁸ By focusing investments on a broad array of low-cost, passive funds and assets, the Nevada approach allows investors and retirees to benefit from a wide range of investment opportunities to generate the best returns over the long run, which may not be possible if public policymakers remove certain investment vehicles because of petty political considerations.³³⁹ For example, had certain pension funds been prohibited from invest-

³³³ Joselow & Montalbano, *supra* note 17; Sorkin et al., *supra* note 17.

³³⁴ Sorkin et al., *supra* note 17 (quoting *A Resolution Directing an Update to the Investment Policy Statement and Proxy Voting Policies for the Florida Retirement System Defined Benefit Pension Plan, and Directing the Organization and Execution of an Internal Review*, ST. BD. OF ADMIN. OF FLA. (Aug. 23, 2022), <https://www.flgov.com/wp-content/uploads/2022/08/ESG-Resolution-Final.pdf> [<https://perma.cc/92QQ-DQ4G>]).

³³⁵ See *CalPERS Announces Preliminary Net Investment Return of -6.1% for the 2021–22 Fiscal Year*, CALPERS (July 20, 2022), <https://www.calpers.ca.gov/page/newsroom/calpers-news/2022/calpers-preliminary-investment-return-2021-22> [<https://perma.cc/3TXP-M2VV>] (providing a general performance review of CalPERS for 2022); *Environmental, Social & Governance Integration*, CALPERS, <https://www.calpers.ca.gov/page/investments/sustainable-investments-program/esg-integration> [<https://perma.cc/AJ4S-3NU8>] (July 6, 2023) (describing CalPERS' sustainability investment strategy).

³³⁶ See Kerber, *supra* note 312 (describing a bill in Indiana that seeks to limit fund managers of the state from considering ESG factors in making investment decisions, which would likely harm investment returns).

³³⁷ See *id.* (noting the trend of Republican legislators attempting to limit the use of ESG factors when making pension fund investment decisions).

³³⁸ See PUB. EMPS.'S RET. SYS. OF NEV., PERS' FUND: INVESTMENT OBJECTIVES & POLICIES 5 (2018), <https://www.nvpers.org/sites/default/files/2019-08/PERS-Investment-Policies.pdf> [<https://perma.cc/F9RT-8YAD>] (prohibiting by law the use of Nevada's pension fund to further a social purpose).

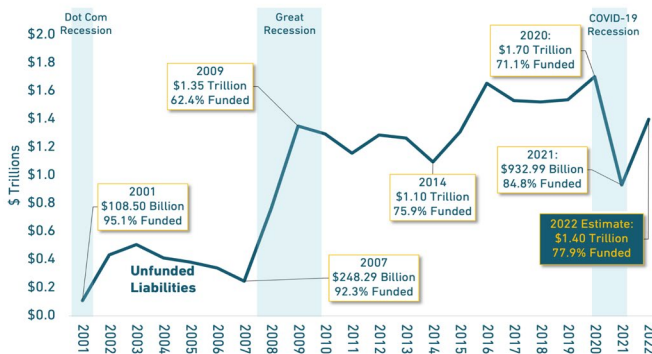
³³⁹ See *id.* at 9 (describing diversified asset allocation of investments); Matthew Cunningham-Cook, *DeSantis Allows Anti-“Woke” Giveaway to Big Wall Street Donors*, THE LEVER (May 16, 2023), <https://www.levernews.com/desantis-allows-anti-woke-giveaway-to-big-wall-street-donors/> [<https://perma.cc/7Y7L-KE62>] (reporting that Governor DeSantis directed the pension fund investments to private equity funds that donated to his campaign).

ing in large technology companies over the last two decades, those funds would have seriously underperformed because they would have missed out on much of the growth fueled by a handful of large technology companies during that period.³⁴⁰ Additionally, investments that are actively managed to screen for political preferences, like most other actively managed assets, will likely charge higher fees. Higher fees will, in turn, cut into the returns for investors.³⁴¹

Generating the best returns for investors and retirees is critically important as the Baby Boomer generation enters retirement, which was accelerated in part by the COVID-19 pandemic.³⁴² As tens of millions of Americans enter retirement in the coming years, pension and retirement fund returns will carry even greater significance.³⁴³ Moreover, public pension funds on the whole have been materially underfunded over the last two decades, as illustrated by Figure 4.³⁴⁴

Figure 4: Underfunded Public Pension Plans, 2001–2022³⁴⁵

TOTAL UNFUNDED LIABILITIES AND FUNDED RATIO
FOR STATE & LOCAL PENSION PLANS | 2001-2021 + 2022 ESTIMATE



Source: Equable Institute analysis of public plan valuation reports and CAFRs. Trendline shown is based on market value of assets; using the "actuarial" value of assets shows a similar trend. See methodology section for details on 2021 estimate.

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³⁴⁰ See Michael Wursthorn, *Five Big Tech Stocks Are Driving Markets. That Worries Some Investors.*, WALL ST. J., <https://www.wsj.com/articles/five-big-tech-stocks-are-driving-markets-that-worries-some-investors-11640060038> [<https://perma.cc/PR35-LTDY>] (Dec. 21, 2021) (reporting that just five companies were responsible for one-third of the S&P 500's 24% gain in 2022).

³⁴¹ See Javier Gil-Bazo & Pablo Ruiz-Verdú, *The Relation Between Price and Performance in the Mutual Fund Industry*, 64 J. FIN. 2153, 2153–55 (2009) (describing fee structures in the mutual fund industry and how they affect returns); *Updated Investor Bulletin: How Fees and Expenses Affect Your Investment Portfolio*, SEC, <https://www.sec.gov/oiea/investor-alerts-bulletins/ib-fees-expenses> [<https://perma.cc/H4GZ-M6KL>] (July 19, 2023) (explaining that even small fees, when compounded over many years, can detract significantly from investment returns).

³⁴² Richard Fry, *The Pace of Boomer Retirements Has Accelerated in the Past Year*, PEW RSCH. CTR. (Nov. 9, 2020), <https://www.pewresearch.org/fact-tank/2020/11/09/the-pace-of-boomer-retirements-has-accelerated-in-the-past-year/> [<https://perma.cc/AX5Y-MQM4>].

³⁴³ *Id.*

³⁴⁴ *State of Pensions 2022: National Pension Funding Trends*, EQUABLE (July 20, 2022), <https://equable.org/pension-funding-trends-2022/> [<https://perma.cc/G23F-QKXF>].

³⁴⁵ *Id.*

Beyond sensibly increasing opportunities for superior returns, another key appeal of the Nevada approach is that it implicitly accounts for the political pluralism and diversity of its investors and retirees.³⁴⁶ No significantly large population of investors, retirees, or people, for that matter, is homogenous in their social and political preferences. As such, adhering to a pension management model that considers the plurality and diversity of shareholders is not only the right approach financially but also the right approach socially and politically.

Ultimately, as more national and state politicians engage in pension management through legislation, they would be wise to heed lessons from the Nevada approach, which focuses on low-cost, passive investments like index funds, aiming to maximize returns without being influenced by the social and political views of the underlying investments or investment managers.

CONCLUSION

Governance matters.³⁴⁷ Addressing the critical, crosscutting issues and questions presented by the new corporate political governance landscape will be one of the most consequential and demanding challenges for political leaders, corporate executives, and ordinary citizens in the coming years. These issues and questions are forged in a complex crucible of profit, power, and politics that governs our key public and private institutions. Although a perfect guidebook for the road ahead remains illusory, a better roadmap and compass are certainly within our grasp.

This Article offers a comprehensive, new, and better way of viewing, deconstructing, understanding, and addressing the promising powers and persistent perils presented by the new corporate political governance landscape for law, politics, society, and business. It examines the structural forces underlying those issues, analyzes core legal and practical tensions that have made such issues so difficult to resolve, and recommends pragmatic proposals for scholars, executives, and policymakers in a changing political arena and business marketplace. It calls for a new corporate overstory for better understanding

³⁴⁶ See, e.g., Tabitha Mueller, Jacob Solis & Sean Golonka, *Battleground Nevada Holds Its Purple Hue, as Republican 'Red Wave' Fails to Gain Traction in Midterm Elections*, NEV. INDEP., <https://thenevadaindependent.com/article/battleground-nevada-holds-its-purple-hue-as-republican-red-wave-fails-to-gain-traction-in-midterm-elections> [<https://perma.cc/7QYA-7N4C>] (Nov. 21, 2022) (reporting on the closely divided nature of voters and citizens in Nevada).

³⁴⁷ See, e.g., DAVID LARCKER & BRIAN TAYAN, *CORPORATE GOVERNANCE MATTERS: A CLOSER LOOK AT ORGANIZATIONAL CHOICES AND THEIR CONSEQUENCES* 12–13 (2d ed. 2016) (discussing how corporate governance impacts firm performance); Daniel Kaufmann, Aart Kraay & Pablo Zoido-Lobaton, *Governance Matters 3* (World Bank Dev. Rsch. Grp. Macroeconomics & Growth & World Bank Inst. Governance, Regul. & Fin., Working Paper No. 2196, 1999), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=188568 [<https://perma.cc/7UEF-V5MK>] (finding that better political governance leads to better development outcomes in various nation-states).

contemporary business actions, creates an original framework for analyzing corporate social and political engagements, and encourages more sensible models for policymaking in business regulation and pension management.

Throughout its analysis, this Article fully recognizes that corporate engagement in political and social governance is neither a cure-all for society's problems nor devoid of serious risks and drawbacks. But because business influence and power do not seem to be waning anytime soon, this Article also recognizes that corporations have played, and can continue to play, a significant role in how we govern and are governed to better confront serious challenges like racial injustice, economic inequality, healthcare access, gun violence, and climate change. These existential challenges of our time are simply too important, too large, and too complicated to leave to governments and nonprofits to face on their own. Moreover, companies could not fully insulate themselves from these challenges in running their businesses, even if they tried. There remains much progress to be made on the arduous road ahead. To that end, this Article aspires to serve as a hopeful, early roadmap and working compass—for understanding and navigating the new corporate political governance landscape.