INCORPORATING SOCIAL ACTIVISM

TOM C.W. LIN*

ABSTRACT

Corporations and their executives are at the forefront of some of the most contentious and important social issues of our time. Through pronouncements, policies, boycotts, sponsorships, lobbying, and fundraising, corporations are actively engaged in issues like immigration reform, gun regulation, racial justice, gender equality, and religious freedom. This is the new reality of business and social activism in America.

This Article offers the first comprehensive legal examination of this new corporate social activism and its wide-ranging effects on law, business, and society. It begins by providing a brief history of corporations and social activism. Next, it establishes the legal and political foundations of contemporary corporate social activism. It investigates how the convergence of government and private enterprise, the rise of corporate social responsibility, and the expansion of corporate political rights have all fostered contemporary corporate social activism. Moving from origins to effects, it then examines the potential costs and benefits associated with this new dynamic. Finally, this Article offers pragmatic proposals for addressing the broader implications of contemporary corporate social activism on law, business, and society. Specifically, it discusses how such activism can impact corporate purpose, corporate governance, and public interest lawyering. Ultimately, this Article aspires to provide an original legal framework for thinking, speaking, and acting anew about corporate social activism in America.

* Professor of Law, Temple University Beasley School of Law. Many thanks to Stephen Bainbridge, Tom Baker, William Bratton, Kent Greenfield, Joan Heminway, Claire Hill, Andrew C.W. Lund, Elizabeth Pollman, Jeff Schwartz, Lynn Stout, Rory Van Loo, David Webber, Harwell Wells, and conference/workshop participants at Boston University School of Law, University of Chicago Law School, Villanova University School of Law, and the 2017 National Business Law Scholars Conference for their invaluable insights, comments, and exchanges. Additionally, I am grateful to Anjali Deshpande, Emily Litka, and Leslie Minora for their extraordinary research assistance.
CONTENTS

INTRODUCTION ........................................................................................................... 1537

I. CORPORATIONS AND SOCIAL ACTIVISM ...................................................... 1540
   A. A Brief Retrospective .................................................................................. 1540
   B. A Contemporary Perspective ..................................................................... 1544
      1. North Carolina’s House Bill 2 .............................................................. 1547
      2. Trump Administration Early Actions .................................................. 1550
      3. The Parkland Shooting ....................................................................... 1554

II. THE ROOTS OF NEW CORPORATE SOCIAL ACTIVISM .............................. 1558
   A. The Public-Private Convergence ............................................................ 1558
   B. The Rise of Corporate Social Responsibility .......................................... 1562
   C. The Expansion of Corporate Political Rights ........................................... 1567

III. PROMISES AND PERILS .............................................................................. 1573
   A. Promises .................................................................................................. 1574
      1. Deepen Social Impact ............................................................................ 1574
      2. Improve Operations of Social Change ............................................... 1576
      3. Enhance Corporate Value .................................................................... 1579
   B. Perils .......................................................................................................... 1582
      1. Politicize the Marketplace ..................................................................... 1582
      2. Marginalize Important Issues ............................................................... 1585
      3. Corrode Democratic Values .................................................................. 1588

IV. KEY IMPLICATIONS AND RECOMMENDATIONS .......................................... 1593
   A. On Corporate Purpose ............................................................................. 1593
   B. On Corporate Governance ....................................................................... 1598
   C. On Public Interest Lawyering ................................................................. 1602

CONCLUSION .......................................................................................................... 1605
INTRODUCTION

The fight for social change persists in America. It finds heart in the new and timeless struggles for racial justice, gender equality, immigrant rights, equal protection, religious freedom, gun regulation, and human dignity. This fight takes place in big cities and small towns, red states and blue states, courthouses and schoolhouses, on the streets, and online. And more and more, it is a fight that takes place in the marketplace, with consumer choices and boardroom decisions.

This Article is about the ongoing fight for social change, and a new powerful player in that fight: the American corporation. This Article offers the first comprehensive legal examination of this new corporate social activism, and the emerging consequential interplay between businesses and social activists on some of the most pressing issues of our time. It investigates why corporations are engaged in social activism today, reveals the legal and policy developments that have fueled the unprecedented contemporary corporate social activism,

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3 See 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.”); 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.”).
analyzes potential promises and perils, and offers pragmatic proposals to address important implications for law, business, and society.4

Building on a rich body of interdisciplinary research that spans law, history, business, and sociology, this Article seeks to make three contributions.5 First,

4 For the purposes of this Article, the terms “corporation,” “company,” and “business” generally refer to large 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 2007). The Article recognizes that many businesses organized as non-corporate entities such as limited liability companies, general partnerships, and limited partnerships may also engage in social activism.

this Article aims to construct an early, cogent narrative for understanding and explaining the emerging role of corporations in contemporary social activism. Second, it aims to highlight the legal and practical effects of this new corporate social activism on shareholders, executives, activists, and society. Third, it aims to recommend pragmatic principles that corporate stakeholders, social activists, and policymakers should consider to better harness the promise of this new corporate social activism, while sidestepping its perils. Ultimately, in pursuit of these three objectives, this Article aspires to provide an original, pragmatic framework for thinking, speaking, and acting anew about corporate social activism and its profound impact on public policy, business, and society.

This Article constructs this framework in four parts. Part I lays the groundwork. It explores the varying roles of corporations along a timeline of key social movements in recent American history. It first looks back to corporate actions during pivotal episodes of the Civil Rights Movement of the 1960s. Specifically, it examines how corporations played the roles of passive supporting character, active protagonist, and defiant antagonist during this period. Moving along that timeline, the Article then looks at present-day corporate and legal actions relating to social activism and social change. In particular, it uses the activism surrounding the North Carolina “Bathroom Law” of 2016, some of the controversial early actions of the Trump Administration in 2017, and the initial response to the 2018 Marjory Stoneman Douglas High School shooting in Parkland, Florida (the “Parkland Shooting”) to highlight the new dynamics of corporations and social activism.

Building on that foundation, Part II provides broader and deeper context. It investigates the roots of modern corporate social activism. It examines how the convergence of government and private enterprise, the rise of corporate social responsibility, and the expansion of corporate legal rights have all fostered the development of modern corporate social activism. It explains how legal, political, and social changes on seemingly disparate issues—like privatization, bailouts, campaign finance, political gridlock, and consumer preferences—are all linked to the changing landscape for corporations and activists. Part II provides analytical context for explaining the growth of modern corporate social activism.

Moving from origins to effects, Part III explores the promises and perils that accompany the convergence of corporate interests and social activism. It weighs some of the critical costs and benefits that come with corporations and their executives engaging in social activism via business pathways instead of traditional democratic, political pathways. In terms of promises, it analyzes how working with businesses can make social activism more efficient and impactful. Similarly, it studies how working with activists can create new markets for businesses. In terms of perils, it explores the risks of politicized marketplaces, marginalized social issues, and corroded democratic values. Part III grapples with the practical consequences for law, business, and society that could arise from this new corporate social activism.

Part IV turns from practical effects to broader ramifications and recommendations. It highlights the larger legal implications of contemporary corporate social activism, and recommends appropriate next steps for corporate stakeholders, social activists, and policymakers. In particular, it explains how such activism can impact corporate purpose, corporate governance, and public interest lawyering. Part IV then proposes key principles for corporate and social stakeholders to consider in navigating the changing terrain of business and social activism.

This Article ends with a brief conclusion. It notes the dynamic cartography of corporate social activism in contemporary America, and optimistically looks forward to what is possible within this new landscape.

I. CORPORATIONS AND SOCIAL ACTIVISM

Corporations have been on the frontlines of social activism throughout history.6 While the presence of corporations in social activism has remained constant, the methods of that activism and the role corporations have played in them have not remained the same. Over time, corporate social activism has evolved with the advent of new information technology and changing social norms.

A. A Brief Retrospective

Corporations have played a critical role in social activism in American history. Because businesses, their executives, and their consumers do not exist in a social vacuum, corporations have taken on different roles in the ebbs and flows of social change. Corporations have played the role of passive supporting character, active protagonist, and defiant antagonist in the fights for social

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change at various periods in American history. Seminal episodes from the Civil Rights Movement of the 1960s highlight these various corporate roles.

First, corporations have played the role of passive supporting character in social activism. Rather than actively supporting or opposing a cause, some corporations were key background players in the larger social fight. During the Civil Rights Movement of the 1960s, many corporations often served as secondary players in the battles between activists and government officials. Sit-ins and boycotts of corporations that refused to serve African Americans on an equal basis out of “local custom” were a common scene. In 1960, four African American students—Ezell Blair, Jr., Franklin McCain, Joseph McNeil, and David Richmond—led a sit-in at a segregated Woolworth department store lunch counter in Greensboro, North Carolina that inspired sit-ins and boycotts throughout the South, actions that ultimately led to the desegregation of many stores. The Greensboro case (and the iconic images) involving Woolworth illustrates the arguably passive but important role corporations can have in the fight for social change. Rather than explicitly support or oppose the Civil Rights Movement, Woolworth, like many businesses of the time, simply decided to passively uphold the misguided, inhumane ways of the Jim Crow South.

Second, corporations have played the role of active protagonist by openly supporting, engaging, and partnering with social activists. During the Civil Rights Movement of the 1960s, some businesses gave financial and other support to civil rights leaders and civil rights organizations like the National Urban League and the National Association for the Advancement of Colored People (“NAACP”). Many businesses in the South desegregated on their own

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8 See generally Juan Williams, Eyes on the Prize: America’s Civil Rights Years, 1954-1965 (25th Anniversary ed. 2013) (describing key moments during Civil Rights Movement).
12 See Purdum, supra note 5, at 79 (discussing widespread discrimination experienced by African Americans in marketplace during 1960s).
in opposition to historical custom, accepting African American employees and customers before it was widely accepted.\textsuperscript{14} For instance, businesses in Charlotte and Dallas desegregated their facilities while many public facilities remained segregated in those cities.\textsuperscript{15} Moreover, many businesses played a crucial role with Presidents John Kennedy and Lyndon Johnson in the run-up, passage, and enforcement of civil rights legislation that became the landmark Civil Rights Act of 1964 and Civil Rights Act of 1968.\textsuperscript{16} Major corporations like Avon, McDonald’s, and Xerox led the way in integrating African Americans into their hiring practices, marketing plans, and investment initiatives.\textsuperscript{17} Smaller Black-owned businesses and their executives also played a significant role alongside social activists during this period.\textsuperscript{18}

Third, corporations have played the role of defiant antagonist by vigorously opposing social activism, openly working against certain groups and causes.\textsuperscript{19} After the passage of the Civil Rights Act of 1964, it became unlawful to discriminate on the basis of race in public places.\textsuperscript{20} Unfortunately, many businesses, particularly in the South, publicly rejected the newly enacted federal legislation.


\textsuperscript{15} See id.


\textsuperscript{19} See, e.g., Luders, \textit{supra} note 5, at 977-81 (discussing businesses that refused to integrate during 1960s due to lack of economic pressure).

Notably in *Heart of Atlanta Motel v. United States*, the Heart of Atlanta Motel brazenly defied the law by refusing to rent rooms to Black customers. The hotel’s owner sued the federal government, challenging the validity of the Civil Rights Act of 1964 to govern a private business on the basis of interstate commerce. With a unanimous decision in *Heart of Atlanta Motel*, the Supreme Court held that Congress had the power to ban racial discrimination under the Commerce Clause of the Constitution. During this period, some business interests also worked to repeal or curb the effects of the Civil Rights Acts of 1964 and 1968 through discriminatory practices like “red-lining” in housing against African Americans.

The different roles that corporations played in social activism during the Civil Rights Movement of the 1960s were not unique to that movement. Corporations played each of those roles in almost every significant social movement in post-World War II America, including the Women’s Rights Movement, the Gay Rights Movement, the Anti-Vietnam War Movement, and the Farm Workers’ Movement. At times, some businesses helped to entrench the status quo, like during the Jim Crow era. At other times, some businesses were on the vanguard of change, like when they integrated or voluntarily offered benefits to gay
employees in advance of legal mandates requiring them to do so.\textsuperscript{29} And still, at
times, some businesses served as passive characters reluctantly thrust into the
history books.\textsuperscript{30} In sum, corporations have long played a significant, albeit not
always uniform, role in social activism.

B. A Contemporary Perspective

Contemporary corporate social activism is quite different than that of past
eras, largely due to the emergence of new information technology and changes
in social expectations about corporate behavior. The rise of new information
technology has both amplified traditional methods, and introduced new
methods, of social activism.\textsuperscript{31} At the same time, the ascent of new information
technology has also reshaped expectations about corporate social behavior.\textsuperscript{32}

First, new social media and financial technologies have dramatically changed
the means and ends of corporate social activism in ways previously
unimaginable.\textsuperscript{33} Capital for social activism is now frequently raised via

\textsuperscript{29} See KEVIN STAINBACK & DONALD TOMASKOVIC-DEVEY, DOCUMENTING
DESEGREGATION: RACIAL AND GENDER SEGREGATION IN PRIVATE SECTOR EMPLOYMENT SINCE
THE CIVIL RIGHTS ACT 84-95 (2012) (discussing advances and setbacks in integration after
passage of Civil Rights Act); David W. Dunlap, Gay Partners of I.B.M. Workers to Get
Benefits, N.Y. TIMES, Sept. 20, 1996, at A18 (reporting on I.B.M.’s extension of healthcare
coverage to same sex couples).

\textsuperscript{30} See, e.g., DAVID CARTER, STONEWALL: THE RIOTS THAT SPARKED THE GAY
REVOLUTION 1 (2010) (discussing how New York City tavern reluctantly became associated with LGBT
movement).

\textsuperscript{31} 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 in several countries.”); Farhad Manjoo, How Social Networks Stole
networks in advancing popular movements).

\textsuperscript{32} See, e.g., Aaron Chatterji & Siona Listokin, Corporate Social Irresponsibility, 2007
DEMOCRACY J. 52, 56 (discussing changes in corporate norms as exhibited by “proliferation
of responsible investing, voluntary codes, public pressure groups, and corporations with
‘social values’”); Gerald F. Davis & Christopher J. White, The New Face of Corporate
Activism, STAN. SOC. INNOVATION REV., Fall 2015, at 2, 4 (describing changing expectations
of corporations in connection with social activism); Monica Langley, Tech CEO Turns
Rabble-Rouser, WALL STREET J., May 3, 2016, at A1 (describing role of Salesforce in rallying
against North Carolina law restricting certain gay rights).

\textsuperscript{33} See MONICA ANDERSON ET AL., ACTIVISM IN THE SOCIAL MEDIA AGE 5-10 (2018),
_social-activism_FINAL.pdf [https://perma.cc/72YB-CM67] (discussing increased usage of
social media to engage in public and social discourse and belief that such discourse is
important for sustained social change); see also Citizens United v. FEC, 558 U.S. 310, 370
(2010) (Roberts, C.J., concurring) (stating that modern information technology “provide
shareholders and citizens with the information needed to hold corporations and elected
officials accountable for their positions and supporters”); How Social Media Is Shaping
Activism in America, Wired (Nov. 16, 2016, 11:00 AM), https://www.wired.com/video/
crowdfunding and other new financial technology platforms capable of reaching a global pool of potential donors and supporters.34 Boycotts, marches, and mass protests are now coordinated online among strangers across the world via Facebook and Twitter.35 Hashtag campaigns and viral videos elevate awareness of social issues.36 Images and videos advocating for social changes are now created and broadcasted using social media platforms that reach billions of people across the world for free.37 These new methods can marshal millions of people to act on an issue, and place significant and direct pressure on businesses.38 In past times, corporate executives feared a bad newspaper story; today, they dread a bad viral video or negative trending hashtag that can hurt their brands or stock prices exponentially more than a bad newspaper story.39 Furthermore, the spotlight generated by these new methods attracts the attention

35 CLAY SHIRKY, HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS 155-60 (2008) (highlighting Internet’s removal of obstacles to collective action, thus improving ability of groups to form and act).
36 See David Carr, Hashtag Activism, and Its Limits, N.Y. TIMES, Mar. 26, 2012, at B1 (finding hashtag activism may be effective in bringing about social change); Emily Steel, Viral ‘Ice Bucket Challenge’ Raises Nearly $42 Million, N.Y. TIMES, Aug. 22, 2014, at B2 (highlighting viral video challenge raising awareness for ALS, which only half of Americans knew about before challenge began); Tanya Sichynsky, These 10 Twitter Hashtags Changed the Way We Talk About Social Issues, WASH. POST (Mar. 21, 2016), https://www.washingtonpost.com/news/the-switch/wp/2016/03/21/these-are-the-10-most-influential-hashtags-in-honor-of-tвитers-birthday/?utm_term=.e4b6424b335a (demonstrating popularity of particular Twitter hashtags for social causes).
37 SHIRKY, supra note 35, at 81-90 (explaining user-generated content’s ability to reach large audience).
38 Id. at 188-95 (observing that social capital increases when people gather and that societies with large social capital do better than societies with low social capital).
39 See, e.g., Tom C.W. Lin, The New Market Manipulation, 66 EMORY L.J. 1253, 1292-94 (2017) (describing potential deleterious impact of modern mass communication platforms on businesses); Julie Creswell & Sapna Maheshwari, Dragging of Passenger Sets Off a Crisis at United, N.Y. TIMES, Apr. 12, 2017, at A1 (“United Airlines . . . faced a spiraling crisis from videos showing a passenger being dragged off an airplane, as consumers threatened a boycott of the airline and lawmakers called for an investigation.”); Sapna Maheshwari, Afraid to Offend, Brands Withdraw Support for Theater and News, N.Y. TIMES, June 14, 2017, at B1 (“Brands have been on edge in recent months as people use social media to question them about appearing on a range of websites and shows deemed, sometimes through a partisan lens, offensive.”); Farhad Manjoo, How Battling Brands Online Has Gained Urgency, and Impact, N.Y. TIMES, June 22, 2017, at B7 (“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.”).
of policymakers and regulators, who in turn place additional pressure on businesses. The broad reach and deep impact of social activism powered by new information technology means that businesses are frequently engaged in social issues whether they want to be or not.

Second, changes in social expectations about corporate behavior have also altered corporate social activism. Many in society and within corporations now expect businesses and executives, particularly those at large public companies, to engage with the critical social issues of today. Silence and indifference are becoming less and less the norm. The days of simply ignoring social issues or writing a check are gone for many large businesses. Corporations are now frequently expected to engage in social issues through public statements, sponsorships, partnerships, and policies supporting a position or a cause.

40 See, e.g., Creswell & Maheshwari, supra note 39 (describing politicians’ calls for review of airline overbooking rules after video of passenger being dragged off plane went viral).

41 See, e.g., McDonnell, supra note 5, at 55 (finding firms tread carefully when selecting initiatives that firm supports due to concern for alienating disapproving stakeholders); Tim Cook, Opinion, Dangerous Laws, WASH. POST, Mar. 29, 2015, at A15 (“America’s business leaders recognized a long time ago that discrimination, in all its forms, is bad for business. At Apple, we are in business to empower and enrich our customers’ lives.”); Ben DiPietro, The Morning Risk Report: CEO Activism Comes with Risks, WALL STREET J.: RISK & COMPLIANCE J. (June 27, 2016, 7:20 AM), https://blogs.wsj.com/riskandcompliance/2016/06/27/the-morning-risk-report-ceo-activism-comes-with-risks/ (finding forty percent of people polled were more likely to buy company’s products when they agreed with company’s CEO’s public statements and forty-five percent were less likely to support company whose CEO takes positions with which they disagree).

42 See Aaron K. Chatterji & Michael W. Toffel, The Power of C.E.O. Activism, N.Y. TIMES, Apr. 3, 2016, at SR10 (“[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.”); Tracey Lien & James F. Peltz, Tech Firms Fight Travel Ban, L.A. TIMES, Feb. 7, 2017, at C1 (reporting on expectation that corporate executives will speak out on important public policy issues).

43 See Lien & Peltz, supra note 42 (remarking that public perception and business interests are reasons companies are speaking out on social issues); Robert Safian, Facebook, Airbnb, Uber, and the Struggle to Do the Right Thing, FAST COMPANY (Apr. 11, 2017), https://www.fastcompany.com/40397294/facebook-airbnb-uber-and-the-struggle-to-do-the-right-thing [https://perma.cc/9XF9-A426] (“[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.”).

44 See, e.g., Lien & Peltz, supra note 42 (remarking on amicus brief signed by one hundred technology companies “mark[ing] a noticeable departure from the sector’s long-held desire to appear apolitical for fear of alienating customers”); James B. Stewart, C.E.O.s Long Avoided Politics. Trump Is Changing the Calculus., N.Y. TIMES, Aug. 17, 2017, at B1 (discussing concerns of CEOs being identified with President Trump following President Trump’s comments on Charlottesville violence).

45 See, e.g., Langley, supra note 32 (remarking that CEOs create risk by not speaking up in regards to social issues today, whereas in past, CEOs refrained from involvement); “We Are Still In” Declaration, WE ARE STILL IN (June 5, 2017), https://www.wearestillin.com/we-are-still-declaration [https://perma.cc/54M5-XQZ4] (presenting open letter signed by
Increasingly, businesses are expected by their communities, consumers, employees, and executives to engage in social activism on issues directly or indirectly related to their core operations.46

Recent episodes involving the North Carolina “Bathroom Law” of 2016, some of the controversial early actions of the Trump Administration in 2017, and the response to the Parkland Shooting in 2018 highlight the new dynamics of contemporary corporate social activism.

1. North Carolina’s House Bill 2

In March 2016, North Carolina enacted the Public Facilities Privacy & Security Act, better known as House Bill 2 (“HB2”), with the support of then-Governor Pat McCrory.47 The law explicitly established classes of individuals protected against discrimination in North Carolina, prohibited municipalities within the state from expanding that standard, and required transgendered individuals to use the public restrooms that corresponded to the biological sex identified on their birth certificates.48 Proponents of the law justified it as a matter of public safety and suggested that it reflected good family and religious

hundreds of business leaders in support of Paris Agreement after Trump Administration announced withdrawal from Agreement).


48 Id.
values.\textsuperscript{49} Dan Forest, then-Lieutenant Governor of North Carolina, said, “If our action in keeping men out of women’s bathrooms and showers protected the life of just one child or one woman from being molested or assaulted, it was worth it.”\textsuperscript{50} Opponents of the law saw HB2 as state-sanctioned discrimination against the lesbian, gay, bisexual, and transgender (“LGBT”) community.\textsuperscript{51}

Shortly after HB2 became law, opposition to it was swift and strong.\textsuperscript{52} Thousands of people organized and voiced their outrage on social media. Celebrities and businesses also joined in the opposition. Hashtag campaigns like #BoycottNC and #WeAreNotThis were trending on all of the major social media platforms like Twitter, Facebook, and Instagram.\textsuperscript{53} Many celebrities, including Bruce Springsteen and Ringo Starr, canceled events in North Carolina in protest.\textsuperscript{54} The National Basketball Association (“NBA”) canceled its 2017 All-Star Game in Charlotte; and the National Collegiate Athletics Association (“NCAA”) canceled major events in the basketball-loving state and relocated seven championship events out of North Carolina during the 2016-17 academic year.\textsuperscript{55} Prominent businesses, like Apple, Bank of America, Facebook, General

\textsuperscript{49} David Phillips, \textit{North Carolina Limits Bathroom Use by Birth Gender}, N.Y. TIMES, Mar. 24, 2016, at A15 (“Republicans [argued] that the bill was passed . . . to protect women and children from unwanted and potentially dangerous intrusions by biological males . . . .”).


\textsuperscript{51} Id. ("[C]ritics say it left gay, bisexual and transgender people worse off because it does not include specific protections based on sexual orientation or gender identity, and precludes towns and cities from passing their own anti-discrimination ordinances.").

\textsuperscript{52} Elena Schneider, \textit{The Bathroom Bill That Ate North Carolina}, POLITICO (Mar. 23, 2017), http://www.politico.com/magazine/story/2017/03/the-bathroom-bill-that-ate-north-carolina-214944 [https://perma.cc/3TRD-TSMM] (“The backlash was swift, redefining North Carolina in the year that has elapsed since the bill’s passage, as critics and lawsuits have taken aim at what opponents view as an overly broad law that mandates discrimination against the LGBT community.").

\textsuperscript{53} See, e.g., Christopher Mele, \textit{In North Carolina and Mississippi, Backlash Grows Over Rights Law}, N.Y. TIMES (Apr. 12, 2016), https://www.nytimes.com/2016/04/13/us/north-carolina-mississippi-gay-rights-boycott.html?smid=tw-nytimes&smtyp=cur (“On Twitter, a hashtag, #WeAreNotThis, and an account calling for a boycott of the state appeared.”); #boycottNC, TWITTER, https://twitter.com/search?q=%23boycottNC&src=typd [https://perma.cc/7BAM-JHHK] (last visited Nov. 18, 2018) (showing thousands of “boycottNC” tagged tweets); #WeAreNotThis, TWITTER, https://twitter.com/search?q=%23wearenotthis [https://perma.cc/DXD8-T4DN] (last visited Nov. 18, 2018) (showing thousands of “WeAreNotThis” tagged tweets).

\textsuperscript{54} Mele, \textit{supra note 53} (“When Bruce Springsteen canceled a concert in Greensboro, N.C., last weekend to protest a state law that many said curbed gay and transgender rights, it was only the latest fallout from the measure. Like similar legislation in Mississippi, it has drawn criticism across the country.").

Electric, Google, Lyft, Merck, and Starbucks, also joined the effort by publicly opposing HB2. Over two hundred major corporations co-signed a letter with the Human Rights Campaign, the largest LGBT advocacy organization in the world, calling for the law’s repeal because “HB 2 is not a bill that reflects the values of our companies, of our country, or even the overwhelming majority of North Carolinians.” These businesses also lobbied and pressured legislators. PayPal, for instance, said it would scrap plans for a major operations development in North Carolina. Similarly, Deutsche Bank, the investment bank, froze all hiring in North Carolina. The Associated Press estimated that the response to HB2 would cost the state about $3.76 billion in lost business and jobs over a dozen years. In the face of this activism, Pat McCrory was narrowly voted out of office in November 2016, and in March 2017 North Carolina’s new governor, Roy Cooper, signed into law an act that partially repealed HB2.

Carolina for 2016-17 (Sept. 12, 2016), http://www.ncaa.org/about/resources/media-center/news/ncaa-relocate-championships-north-carolina-2016-17 [https://perma.cc/E8WB-3HXMX] (“Based on the NCAA’s commitment to fairness and inclusion, the Association will relocate all seven previously awarded championship events from North Carolina during the 2016-17 academic year. The NCAA Board of Governors made this decision because of the cumulative actions taken by the state concerning civil rights protections.”).


Letter from Business Leaders to Pat McCrory, supra note 56.

See, e.g., Reuters, supra note 56 (highlighting business cofounder’s plans to “call the governor daily to lobby for the law’s repeal”).

Fausset & Blinder, supra note 50.

Peter Eavis, Frozen in North Carolina, N.Y. TIMES, Apr. 13, 2016, at B3 (“Deutsche Bank . . . said on Tuesday that it would freeze its plans to add jobs in North Carolina, a response to the passage last month of a state law that, among other things, eliminates antidiscrimination protections based on sexual orientation.”).


Richard Fausset, Governor’s Concession to Democrat Ends Bitter North Carolina Campaign, N.Y. TIMES, Dec. 6, 2016, at A16 (describing McCrory’s one term as “buffeted by nationwide anger over a law he signed that curbed anti-discrimination protections for lesbian, gay, bisexual and transgender people,” which led to his concession).


In the years since the introduction and repeal of HB2, North Carolina continues
to work to fix the reputational damage done by the law.64

2. Trump Administration Early Actions

President Donald Trump’s first year in office was filled with a number of
actions that were met with vigorous responses from corporations and social
activists. Three are particularly notable: the initial travel ban issued in January
2017, President Trump’s comments about the white nationalist protests in
Charlottesville in August 2017, and President Trump’s decision to end the
Deferred Action for Childhood Arrivals (“DACA”) program in September 2017.

First, in January 2017, President Trump signed Executive Order 13,769,
colloquially known as the “Trump Travel Ban.”65 The executive order (the
“Order”), formally titled “Protecting the Nation from Foreign Terrorist Entry
into the United States,” suspended the U.S. Refugees Admissions Program and
temporarily banned entry into the country by foreign nationals from Iran, Iraq,
Libya, Somalia, Sudan, Syria, and Yemen.66 It was revised by subsequent
executive orders to change the countries subject to the ban, and the means of
implementation.67 Supporters of the Order deemed it necessary for the national
security of the country.68 Opponents deemed it a discriminatory “Muslim ban”
that ran counter to core American values.69

Shortly after President Trump issued the Order, opponents organized protests
online, in the streets, and in the courts.70 Social media campaigns against the
discrimination ordinances in cities and counties. Gov. Roy Cooper signed the measure into
law.”).

64 Alan Blinder, Besmirched North Carolina Tries to Shake a Law’s Bitter Legacy, N.Y.
TIMES, Nov. 5, 2017, at A18 (“[North Carolinian] leaders cut a deal in March to repeal a law
that had restricted restroom access for transgender people. But North Carolina is finding that
it is easier to plunge into a culture war than it is to leave one behind.”).

allowed to enter United States in 2017 to fifty thousand people).

66 Id.

(updating actions taken pursuant to Exec. Order No. 13,780).

68 See, e.g., Adam Liptak & Peter Baker, Trump Imperils Travel Ban Case in Twitter Burst,
N.Y. TIMES, June 6, 2017, at A1 (mentioning President Trump’s belief that vetting of
immigrants keeps country safe).

69 See, e.g., Editorial, Muslim Ban Lite, N.Y. TIMES, Mar. 7, 2017, at A26 (asserting
President Trump’s immigration executive orders make country less safe).

70 Eli Rosenberg, Protest at Kennedy Airport Grows ‘Out of Nowhere’ After Iraqis Are
Detained, N.Y. TIMES, Jan. 29, 2017, at A20 (“Everybody in NYC area - head to JFK
Terminal 4 NOW!” Michael Moore said on Twitter. ‘Big anti-Trump protest forming out of
nowhere!’ ”); Timeline of the Muslim Ban, ACLU WASH., https://www.aclu-wa.org/pages/
timeline-muslim-ban [https://perma.cc/T2S7-SDSF] (last visited Nov. 18, 2018) (“A federal
judge in New York granted the American Civil Liberties Union’s request for a nationwide
Order started trending immediately, and continued for months afterward. Order started trending immediately, and continued for months afterward. Online boycott campaigns targeted Trump-branded products and affiliated retailers. Companies perceived as sympathetic to the Order faced the power of the new corporate social activism as well. Uber, for instance, was the target of the #DeleteUber campaign as many saw the company as sympathetic to the Trump Administration. Online donations poured into the American Civil Liberties Union (“ACLU”), which garnered about $24 million in donations the weekend the Order was signed, a sum greater than all of its donations in 2016. Thousands gathered at airports around the country to protest and assist those who were detained because of the Order. Major corporations and their leaders lent their voices and resources to help social activists working against the ban.

71 Manjoo, supra note 31 (describing velocity and ferocity of social media campaign against Order); MoveOn (@MoveOn), TWITTER (Mar. 8, 2017, 6:01 PM), https://twitter.com/MoveOn/status/83965724388996354 [https://perma.cc/YHB2-H2JD] (“#NoBanNoWall #ImmigrantsWelcome #RefugeesWelcome #NoMuslimBan @realDonaldTrump, take note.”).


73 Mike Isaac, What You Need to Know About #DeleteUber, N.Y. TIMES (Jan. 31, 2017), https://www.nytimes.com/2017/01/31/business/delete-uber.html (describing how Uber continued to provide service to Kennedy Airport after union representing taxi cab drivers of New York City halted its service in opposition to Order).


75 See, e.g., James Dourke, PHOTOS: Thousands Protest at Airports Nationwide Against Trump’s Immigration Order, NPR (Jan. 29, 2017 5:30 AM), https://www.npr.org/sections/thetwo-way/2017/01/29/51250469/photos-thousands-protest-at-airports-nationwide-against-trumps-immigration-order [https://perma.cc/K7T2-8ED9] (“Thousands of protesters gathered at airports across the country Saturday to denounce President Trump’s recent executive order . . . .”); Rosenberg, supra note 70 (“By sundown, the crowd had grown into the hundreds or more . . . .”).

More than one hundred tech firms jointly filed an amicus brief in a lawsuit against the Order.77 Howard Schultz, the then-CEO of Starbucks, even wrote a letter to Starbucks employees announcing plans to hire ten thousand refugees.78 Small New York bodegas owned by Yemeni immigrants also joined the protests by temporarily closing their shops.79 As a coda, in the summer of 2018, the U.S. Supreme Court would uphold the validity of one of the subsequently amended travel ban orders.80

Second, on August 11, 2017, white nationalists carrying burning torches and chanting racist and hateful messages rallied in Charlottesville, Virginia as part of the “Unite the Right” rally; counter-protestors confronted them.81 The violent protests and confrontations became deadly on the second day when a white nationalist drove a car into a crowd and killed a counter-protestor; two police officers also died in a helicopter crash.82 President Trump spoke out against the violence in Charlottesville, and blamed “many sides” for the disturbance.83 There was much outcry after this initial statement as many felt that President Trump was suggesting a moral equivalence between the white nationalists and those protesting them.84 In the days that followed, President Trump explicitly

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77 Lien & Peltz, supra note 42 (stating that over one hundred tech companies, “including industry big guns Apple, Google, Facebook, and Microsoft,” filed amici brief against travel ban in Ninth Circuit appeal).
78 Message from Howard Schultz to Starbucks Partners: Living Our Values in Uncertain Times, STARBUCKS (Jan. 29, 2017), https://news.starbucks.com/news/living-our-values-in-uncertain-times [https://perma.cc/Y5B3-3C68] (“There are more than 65 million citizens of the world recognized as refugees by the United Nations, and we are developing plans to hire 10,000 of them over five years in the 75 countries around the world where Starbucks does business.”).
79 Liam Stack, Yemenis Shut Stores and Hold Rally to Protest Trump Ban, N.Y. TIMES, Feb. 3, 2017, at A22 (“‘This order goes against everything we came here for and everything America stands for,’ said Abdul Salam Mubaraz, a bodega owner . . . .”).
81 Joe Heim, Recounting a Day of Rage, Hate, Violence and Death, WASH. POST, Aug. 15, 2017, at A1 (reporting that white nationalist marchers chanted “Jews will not replace us!” and “White lives matter!”).
82 Joe Heim et al., Charlottesville Protest Takes a Deadly Turn, WASH. POST, Aug. 13, 2017, at A14 (reporting that chaos and violence prompted Virginia Gov. Terry McAuliffe to declare state of emergency).
83 Glenn Thrush & Maggie Haberman, Critics Slam Trump’s Tepid Condemnation of Violence on ‘Many Sides’ in Virginia, N.Y. TIMES, Aug. 13, 2017, at A14 (describing President Trump’s attempts to “portray the violence . . . as a chronic, bipartisan plague”).
84 Glenn Thrush, Trump Condemns Racists but Creates Fresh Upheaval, N.Y. TIMES, Aug. 15, 2017, at A1 (remarking that “several of [President Trump’s] top advisers” pressed him “to issue a more forceful rebuke”).
stated that the violence in Charlottesville should be attributed to “both sides,” and that blame should be cast on both the white nationalists and those protesting them.85

Following those statements, many citizens, politicians, and business executives strongly condemned the President’s views. Executives, like the CEOs of Merck and Under Armour, rebuked the President’s statements and resigned from various presidential advisory councils.86 A few days later other executives on the White House’s elite Strategic and Policy Forum, as well as those on the Manufacturing Jobs Initiative, joined in multiple calls that resulted in the executives resigning en masse from those two councils in protest of President Trump’s statements.87 These executives are some of the foremost business leaders in the world, representing companies like General Electric, IBM, J.P. Morgan Chase, Pepsi, and Wal-Mart.88 But before the executives could publicly announce their mass protest resignation, President Trump disbanded both councils over Twitter.89

Third, after the travel ban and the fallout of Charlottesville, President Trump announced plans to end DACA in September of 2017, purportedly in order to protect Americans and American jobs from illegal immigrants.90 DACA allowed undocumented immigrants who were brought into the country as children to remain and work in the country without the specter of deportation.91 At the time of the announcement, approximately eight hundred thousand young people were protected by DACA.92

85 Michael D. Shear & Maggie Haberman, Trump Again Says Two Sides at Fault in Rally Violence, N.Y. TIMES, Aug. 16, 2017, at A1 (“[President Trump] criticized ‘alt-left’ groups that he claimed were ‘very, very violent’ when they sought to confront the white nationalist and neo-Nazi groups that had gathered in Charlottesville.”).  
86 Thrush, supra note 84 (“Kevin Plank, the head of Under Armour, said he was resigning to focus on ‘the power of sport which promotes unity, diversity and inclusion.’”).  
87 David Gelles et al., Rebellion by Business Leaders Spelled End of Trump Councils, N.Y. TIMES, Aug. 17, 2017, at A1 (“‘In American history, we’ve never had business leaders decline national service when requested by the president,’ said [Yale professor] Jeffrey Sonnenfeld . . . .”).  
88 Id.  
89 Id.  
90 Michael D. Shear & Julie Hirschfeld Davis, U.S. Ends Program Giving ‘Dreamers’ Legal Protection, N.Y. TIMES, Sept. 6, 2017, at A1 (“Mr. Trump said in a statement that he was driven by a concern for ‘the millions of Americans victimized by this unfair system.’”).  
92 Shear & Hirschfeld Davis, supra note 90 (noting that some DACA-qualified invididuals would become eligible for deportation only six months after program’s rescission).
Echoing the aftermath of the two previous controversies, the outcry against ending DACA was strong and swift. Corporate executives like Mark Zuckerberg of Facebook and Tim Cook of Apple condemned the action and vowed to fight for the immigrants affected by DACA, deploying their voices, prestige, and resources—both personal and corporate—in the battle.93 Hundreds of business leaders wrote an open letter to the President and congressional leaders, imploring them to act on behalf of the young people affected by DACA.94

3. The Parkland Shooting

On February 14, 2018, an expelled student killed seventeen people with a semiautomatic AR-15 rifle at Marjory Stoneman Douglas High School (“Stoneman Douglas”) in Parkland, Florida.95 It was one of the most horrific mass shootings in recent memory. In the aftermath of that tragedy, students of Stoneman Douglas organized to prevent another mass shooting by demanding new gun legislation.96 On the coattails of those students, other people and

93 Zach Wichter, C.E.O.s See a 'Sad Day' After Trump’s DACA Decision, N.Y. TIMES (Sept. 5, 2017), https://www.nytimes.com/2017/09/05/business/chief-executives-see-a-sad-day-after-trumps-daca-decision.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=b-lede-package-region&region=top-news&WT.nav=top-news (“It is particularly cruel to offer young people the American dream, encourage them to come out of the shadows and trust our government, and then punish them for it.” (quoting Mark Zuckerberg)).


95 Audra D.S. Burch & Patricia Mazzei, Horror at Florida School; Ex-Student Held, N.Y. TIMES, Feb. 15, 2018, at A1 (“The dead included students and adults, some of whom were shot outside the school and others inside the sprawling three-story building.”); Richard Fausset, Serge F. Kovaleski & Patricia Mazzei, Barricaded Behind Doors, Thinking of Death and of Fighting Back, N.Y. TIMES, Feb. 17, 2018, at A17 (“Second by second, lives at Stoneman Douglas were transformed, broken and stolen.”).

96 Julie Turkewitz & Anemona Hartocollis, Highlights: Students Call for Action Across Nation; Florida Lawmakers Fail to Take Up Assault Rifle Bill, N.Y. TIMES (Feb. 20, 2018), https://www.nytimes.com/2018/02/20/us/gun-control-florida-shooting.html (“The students felt they had the ‘best voices to listen to right now,’ along with other survivors of shootings, and that Twitter had allowed them to reach more people than they would have thought possible . . . .”).
businesses around the country also moved to demand legislative action to prevent another mass shooting.97

In the midst of the tragedy, grieving students from Stoneman Douglas started a national social movement, calling for tougher gun regulation using traditional means of politicking and new information technologies.98 Just a few days after the shooting, Stoneman Douglas students traveled to Tallahassee, Florida’s capital, to demand action on an assault weapons ban, which the Florida House rejected.99 However, in March of 2018, Florida Governor Rick Scott signed a law that raised the minimum age to purchase a firearm to twenty-one and extended the waiting period to three days.100 This was an incredible political feat because Florida is viewed as a state with very powerful pro-gun political stakeholders, like the National Rifle Association (“NRA”).101

The efforts of the students, amplified and accelerated by social media, drew national and international attention to their cause.102 The students had “#NeverAgain” trending on Twitter and promised numerous acts of activism, including a nationwide protest called the March for Our Lives, demanding gun control actions.103 On March 14, 2018, nearly a million students walked out of their classrooms for the “National School Walkout.”104 On March 24, 2018, the Stoneman Douglas students, with the help of social media, came together with supporters across the country and the world for the March for Our Lives, which included hundreds of protests in every state in the United States and on six

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97 Charlotte Alter, The Young and the Relentless, TIME, Apr. 2, 2018, at 24, 28 (“Companies from Delta Airlines to Hertz to MetLife cut ties with the NRA.”).
98 Id. at 27-28.
99 Turkewitz & Hartocollis, supra note 96 (reporting that assault rifle ban motion failed “along party lines”).
100 Patricia Mazzei, “Gunshine State” Enacts Controls, N.Y. TIMES, Mar. 10, 2018, at A1 (describing law as “most aggressive action on gun control taken in [Florida] in decades . . . .”).
101 Mike Spies, The Arms Dealer, NEW YORKER, Mar. 5, 2018, at 24, 25 (“According to court documents filed by the N.R.A. in 2016, the group has roughly three hundred thousand members in Florida.”).
102 Vivian Yee & Alan Blinder, Thousands Walk out of Class, Urging Action on Gun Control, N.Y. TIMES, Mar. 15. 2018, at A1 (“[F]or one day at least, the students commanded the country’s airwaves, Twitter feeds and Snapchat stories.”); Alia Wong, The Parkland Students Aren’t Going Away, ATLANTIC (Feb. 24, 2018), https://www.theatlantic.com/education/archive/2018/02/the-parkland-students-arent-going-away/554159/ [https://perma.cc/R3Q5-NBWG] (noting that Parkland students are “inspiring satellite protests not just across the U.S. but also across the globe”).
104 Alter, supra note 97, at 28 (“[N]ews that was once met with sad resignation now drives teenagers to march in the streets.”).
continents, with a main event in Washington, D.C. The Washington, D.C. rally drew hundreds of thousands of people and received global media coverage.

Amidst the newly animated activism surrounding the issue of guns, major American corporations with businesses directly and tangentially related to guns were moved to respond to the issue. Dick’s Sporting Goods announced that it was immediately ending sales of all assault-style rifles in its stores and that they would no longer sell high-capacity magazines. Dick’s also required gun buyers at its stores to be at least twenty-one years old. Walmart, the nation’s largest gun seller, raised the age restriction for the purchase of firearms and ammunition to twenty-one years old and removed items that resembled assault-style rifles, including toy guns, from its website. Citigroup restricted its client retailers from offering bump stocks and high-capacity magazines, and restricted the sale of guns to people who have not passed a background check or who are younger than twenty-one. Citigroup’s restriction applies to clients who offer credit cards backed by the company, borrow money, use banking services, or raise capital through the company. Bank of America instituted a policy that prohibited the bank from making loans to gun manufacturers that make military-inspired firearms for civilian use, like the AR-15 style rifles used in the Parkland shooting and in other mass shootings. BlackRock, the largest asset manager in the world, decided to offer its clients a choice of index funds that exclude firearms manufacturers and retailers so that they do not have to invest in those companies, and to engage with gun manufacturers and retailers to address how

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106 Peter Jamison et al., In Grief, Marching for Change, WASH. POST, Mar. 25, 2018, at A19 (“Hundreds of thousands of demonstrators gathered in the nation’s capital and cities across the country . . . to demand action against gun violence, vividly displaying the strength of the political movement led by [the Parkland] survivors.”); Shear, supra note 105.


108 Id.


111 Id.

112 Tiffany Hsu, Gunmakers Facing Limits from Another Major Lender, N.Y. TIMES, Apr. 11, 2018, at B3.
they support the safe and responsible use of weapons. Furthermore, spurred by the 
“#BoycottNRA” movement that trended on Twitter after the shooting, corporations such as United Airlines, Delta Airlines, Hertz, and Avis announced that they would no longer offer discount programs for the NRA’s five million members. These corporations added an incredibly influential voice to the discourse concerning guns in America.

Ultimately, the lasting political and social impact of the activism following the tragedy at Stoneman Douglas remains to be seen at the time of this writing in the winter of 2018. Nevertheless, the actions of the students and businesses highlight the changing reality of social activism in contemporary America, even on issues as politically difficult and fraught as gun regulation.

In sum, corporate social activism today is quite different than its historical analogs due largely to new information technology and changes in social expectations about corporate behavior. Granted, corporate social activism is not always successful in creating change in social policy. Although some corporate influence added to the pressure to repeal HB2, which can be characterized as a


114 See Laura M. Holson, Dick’s Will Destroy Unsold Military-Style Weapons, N.Y. TIMES, Apr. 19, 2018, at B3; Tiffany Hsu, Protests Are Common. The Boycott of the N.R.A. Is Different, N.Y. TIMES, Feb. 28, 2018, at A12 (detailing corporate response to internet social media campaigns, including #BoycottNRA hashtag); Avi Selk, NRA Lashes Out at Boycott Movement as United, Delta and Other Corporations Cut Ties, WASH. POST (Feb. 25, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/02/24/united-and-delta-cutties-to-nra-as-boycott-movement-spreads-to-global-corporations/?noredirect=on&utm_term=.4dce737972a7 (noting that “United Airlines, Best Western, MetLife and at least a dozen other companies” were pressured into doing away with discount and perks for NRA members as result of #BoycottNRA movement).

win for progressives, the impact of corporate social activism has been less clear in blunting the early controversial actions of the Trump Administration, or on the issue of gun regulation. Regardless of one’s political preferences, it is important to note that the new corporate social activism is a nonpartisan phenomenon. It can affect causes on both the Left and the Right, with many corporations taking crosscutting positions along the political spectrum. For instance, some corporations may support progressive positions on issues relating to LGBT rights and racial diversity, but oppose progressive positions on issues relating to income inequality and healthcare access. Regardless of the political positions of corporations on one social issue or another, as we live during these frequently socially and politically divisive times, contemporary corporate social activism will continue to play an important role in shaping the critical social issues and debates confronting our society.

II. THE ROOTS OF NEW CORPORATE SOCIAL ACTIVISM

The new corporate social activism, highlighted by the recent episodes involving North Carolina’s “Bathroom Law,” some of the controversial early actions of the Trump Administration, and the aftermath of the Parkland Shooting, finds its roots in three larger, interrelated developments in the interplay between corporations and the public. In particular, the convergence of government and private enterprise, the rise of corporate social responsibility efforts, and the expansion of corporate political rights have collectively fostered contemporary corporate social activism.

A. The Public-Private Convergence

The convergence of government and business is a critical contributing factor to the rise of contemporary corporate social activism. The traditionally distinct pathways of public institutions and private enterprises, with divergent but complementary objectives, frequently merge in present-day society. Conventionally, it was expected that businesses should focus on profit-generation using private market mechanisms, while government should focus on public concerns that cannot readily be addressed by the marketplace.


117 See, e.g., Stephen M. Bainbridge, Corporation Law and Economics 429 (2002) (acknowledging general welfare legislation meant to address protections not achieved by marketplace mechanisms); Anupam Chander, Facebookistan, 90 N.C. L. Rev. 1807, 1813 (2012) (“The elision between state and corporation is to some extent understandable. Each provides a good or service that individual persons would lack the capital to supply by themselves, with the state largely supplying public goods and the corporation largely supplying private goods.”).
Incorporating Social Activism

President Abraham Lincoln stated, “The 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.”\[118\] 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.\[119\] Given this public-private convergence, activists seeking social change will pursue not only traditional public channels of government but also the new private channels of corporations to achieve their goals. Moreover, contemporary political gridlock and obstructionist partisanship have made these new corporate channels of social change more appealing relative to the traditional public channels of government.

Contemporary corporations and businesses exert their influence on traditional, public government functions like never before.\[120\] Privately-owned for-profit schools, prisons, utilities, and military forces—once hard to imagine—are now common.\[121\] The U.S. government regularly uses private contractors affiliated with major corporations for combat missions, intelligence affairs, and diplomatic efforts.\[122\] Furthermore, large corporations today operate akin to private nation-states.\[123\] Exxon, in recent years, has had more than 2.5 million


\[120\] See DAVID ROTHKOPF, POWER, INC.: THE EPIC RIVALRY BETWEEN BIG BUSINESS AND GOVERNMENT—AND THE RECKONING THAT LIES AHEAD 195 (2013) (“[C]orporations have grown in influence worldwide and in every instance have played a role in paring away key prerogatives of the state.”); ALLISON STANGER, ONE NATION UNDER CONTRACT: THE OUTSOURCING OF AMERICAN POWER AND THE FUTURE OF FOREIGN POLICY 1-11 (2011) (discussing how trend toward government contracting has outsourced many traditionally public functions to private-sector).

\[121\] See, e.g., MICHAEL J. SANDEL, WHAT MONEY CAN’T BUY: THE MORAL LIMITS OF MARKETS 7 (2013).

\[122\] See id. (describing large numbers of private contractors who fought in Iraq and Afghanistan, and “the eclipse of public police forces by private security firms—especially in the United States and Britain”); TIM SHORROCK, SPIES FOR HIRE: THE SECRET WORLD OF INTELLIGENCE OUTSOURCING 1-8 (2009) (highlighting rise of private contractors in intelligence sector in wake of September 11, 2001 terrorist attack, and their key roles in ensuing War on Terror); Allison Stanger, Addicted to Contractors, FOREIGN POL’y (Dec. 1, 2009, 6:58 PM), https://foreignpolicy.com/2009/12/01/addicted-to-contractors/ (“In 2008, 82 percent of the Defense Department’s budget went out the door in contracts and grants. About 83 percent of the State Department’s requested budget did the same. At USAID, contracts and grants represented 96 percent of the net cost of operations.”).

\[123\] See, e.g., STEVE COLL, PRIVATE EMPIRE: EXXONMOBIL AND AMERICAN POWER 19-20 (2013) (detailing Exxon’s rise to international prominence, and political and economic sway it
shareholders, operations in almost every country, and annual sales of around four hundred billion dollars, which rivals the gross domestic product of Sweden. BlackRock, the world’s largest asset manager, oversees a $6.28 trillion portfolio that rivals the total currency reserves of China and Japan combined. Walmart employs more than two million individuals and “supports an employee/family community of eight to ten million, which is about the size of Austria, Switzerland, or Israel, and larger than a hundred other countries.” Facebook and other major technology companies oversee communities that number in the billions, rendering them nation-like in their population, power, and influence. This public-private convergence has become so pronounced that the President of the United States is often considered the CEO of the country. With the election of Donald Trump, America has its first-ever corporate CEO as a president, and since his election, many business executives with presidential aspirations have emerged.

Just as corporations and businesses have moved into the traditional province of government, the government has similarly encroached into the traditional space of private enterprise. During the financial crisis in 2008 and 2009, the holds as result); ROTHKOPF, supra note 120, at 30 (highlighting corporate “mechanisms of international persuasion” that are superior to those of many nation-states); Chander, supra note 117, at 1808 (“Facebook has become so powerful and omnipresent that some have begun to employ the language of nationhood to describe it.”).

ROTHKOPF, supra note 120, at 314 (acknowledging Exxon’s global reach, its enormous shareholder basis, and its 2009 total sales of $442 billion, as compared to Sweden’s 2009 GDP of $406 billion).

See id. at 311; About Us, BLACKROCK, https://www.blackrock.com/au/individual/about-blackrock (last visited Nov. 18, 2018) (valuing BlackRock’s assets under management at $6.28 trillion as of December 31, 2017).


See Chander, supra note 117, at 1817-23 (examining how Facebook is like nation-state).

See, e.g., IVO H. DAALDER & JAMES M. LINDSAY, AMERICA UNBOUND: THE BUSH REVOLUTION IN FOREIGN POLICY 74 (2005) (commenting on vision of “president-as-CEO”); Epstein, supra note 119, at 282 (comparing Congress and President to board of directors and CEO); Tom C.W. Lin, CEOs and Presidents, 47 U.C. DAVIS L. REV. 1351, 1356-61 (2014) (describing conceptual interplays between government and presidents with businesses and CEOs); Christopher S. Yoo, Foreword, Symposium: Presidential Power in Historical Perspective: Reflections on Calabresi and Yoo’s The Unitary Executive, 12 U.PA. J. CONST. L. 241, 247 (2010) (comparing operational frameworks of presidents and CEOs); America’s Next CEO?, ECONOMIST, Jan. 2012, at 9, 9 (terming American President as America’s CEO).

David Gelles, A Candidate from the Coffeehouse, N.Y. TIMES, June 5, 2018, at B1 (detailing rumors of business leaders considering candidacy, including Mark Cuban, Bob Iger, and Oprah Winfrey).


As the spheres of government and business converge, social activists will understandably seek change not only through the traditional avenues of government and public policy, but also through the private boulevards of business and corporate policy.\footnote{134 See, e.g., David P. Baron, Private Politics, Corporate Responsibility, and Integrated Strategy, 10 J. ECON. & MGMT. STRATEGY 7, 7-10 (2001) (theorizing about activism that targets corporations); Chatterji & Richman, supra note 5, at 38 (explaining shift from government to “‘private politics,’ where private entities—corporations, industry associations, and other commercial entities—are the targets of political activity”).} One can effectuate change on important social issues like green energy, religious freedom, or gender equality by changing laws and public policies, and by changing the institutional practices and priorities at major corporations. For instance, advocates for prisoners’ rights can try to work through Congress to achieve their goals, and they can also work through for-profit private prison companies. Given the gridlock in the federal government, change via corporate social activism can prove to be much more appealing and
effective. Furthermore, activists can leverage the power and influence of businesses to help them make their case to public policymakers. In sum, the choice for social activists is no longer an either/or proposition, but is now a both/and proposition; they can work through both public and private channels of government and business to effectuate social change, legal reform, and new policies in contemporary society.

B. The Rise of Corporate Social Responsibility

In addition to the convergence of business and government, the maturation of corporate social responsibility efforts is another key contributing factor in the rise of contemporary corporate social activism. As businesses profess and position themselves to be socially conscious, social activists will more readily try to leverage the tools and resources of businesses towards achieving their aims.

Contemporary understandings of corporate social responsibility in America can be traced back to a pair of seminal articles by Adolf A. Berle and E. Merrick Dodd in the 1930s. Berle, in *Corporate Powers as Powers in Trust,* argued that corporations should act for the benefit of shareholder-owners, and that law should protect against managerial overreach by corporate directors. In contrast, Dodd, in *For Whom Are Corporate Managers Trustees?*, argued that the corporation was a distinct legal person, and that its directors should act in its interests, mindful of responsibilities to shareholders and other constituencies that may be affected by corporate actions. According to Dodd, an unreasonably narrow focus on shareholder interests would stifle corporate efforts to act for social welfare in addition to profit. In fairness to both Berle and Dodd, their respective positions were not in stark, irreconcilable opposition. While they disagreed about the guiding means and ends of corporate law, both

136 See Berle, supra note 5; E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?,* 45 HARV. L. REV. 1145 (1932); see also Wells, supra note 3, at 78 (“Legal debates over corporate social responsibility stretch from the 1930s to the twenty-first century.”).
137 Berle, supra note 5, at 1050 (indicating that corporations must be required “to protect the ratable interests of existing and prospective shareholders”).
138 Dodd, supra note 136, at 1157 (“Power over the lives of others tends to create on the part of those most worthy to exercise it a sense of responsibility.”).
139 See id. at 1148 (arguing that corporation is “economic institution, which has a social service as well as a profit-making function”).
were mindful of the dangers accompanying managerial overreach, the need for shareholder protection, and the social responsibilities of corporations.140

After the groundbreaking Berle-Dodd debate, corporate social responsibility endured as a concept of interest in corporate law and corporate governance.141 Following World War II and the New Deal, the social responsibility of corporations re-emerged as a major issue in the 1950s, 1960s, and 1970s.142 Leading figures in law and business supported the view that corporations have obligations beyond those related to shareholders and profits.143 David Rockefeller, heir to the Rockefeller fortune and chairman of Chase Manhattan Bank (the precursor to today’s JPMorgan Chase), opined that “the old concept that the owner of a business had a right to use his property as he pleased to maximize profits, has evolved into the belief that ownership carries certain binding social obligations.”144 In fact, during this period, Berle came to believe, like Dodd, that corporate powers were “held in trust for the entire community,” not just for shareholders.145

During the 1960s and 1970s, in addition to businessmen and legal scholars, labor unions, social activists, elected officials, consumer advocates, and others began to push corporations to do more for the public interest.146 As a result of


142 Wells, supra note 3, at 99.


145 Adolf A. Berle, Jr., *The 20th Century Capitalist Revolution* 169 (1954) (indicating that argument over corporate responsibilities was settled in Dodd’s favor).


The views supportive of broader corporate social responsibility during this period, while influential, were not uniform. Important voices in opposition were also present during this time.\footnote{See e.g., Theodore Levitt, The Dangers of Social Responsibility, Harv. Bus. Rev., Sept.-Oct. 1958, at 41, 44 (arguing that if social responsibility becomes main driver of corporate activity, the corporation will become “the equivalent of the medieval Church”).} These dissenting views often highlighted the potentially profound adverse consequences of corporate social responsibility on democratic society and free markets.\footnote{See e.g., Bayless Manning, Corporate Power and Individual Freedom: Some General Analysis and Particular Reservations, 55 Nw. U. L. Rev. 38, 38-39 (1960) (noting growth of corporate power, against which “individual is powerless; his freedom stands in jeopardy”).} Most notably, Milton Friedman, the Nobel Prize winning free-market economist, believed that “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.”\footnote{Milton Friedman, The Social Responsibility of Business Is to Increase Its Profits, N.Y. Times Mag., Sept. 13, 1970, at 32.} Friedman warned that deviation of corporate focus from shareholder profit to social responsibility could “clearly harm the foundations of a free society” as collective social considerations subvert individual freedoms.\footnote{Id.} Similarly, leading academics, like Henry Manne and Eugene Rostow, then Dean
of Yale Law School, expressed concerns that shifting corporate focus away from profits and shareholders would lead to a breakdown of the free market system.\textsuperscript{152}

The election of President Ronald Reagan in 1980 ushered in an era of smaller government and bigger business.\textsuperscript{153} Meanwhile, the corporate social responsibility discussion continued to evolve.\textsuperscript{154} The 1980s boom of mergers, acquisitions, and leveraged buy-outs raised new issues concerning the social obligations of corporations beyond shareholders to constituencies like employees, creditors, customers, and local communities.\textsuperscript{155} Numerous states passed “corporate constituency statutes” to permit corporations to consider the impact of deals on non-shareholder constituents.\textsuperscript{156}

Within the legal academy, the corporate social responsibility debate also evolved during this period with the emergence of the contractarian and progressive views of corporate law.\textsuperscript{157} The contractarian approach to corporate law viewed the corporation as a “nexus of contracts” between and among its various constituencies—its shareholders, employees, creditors, customers, and managers.\textsuperscript{158} Leading contractarian scholars, like Frank Easterbrook and Daniel

\textsuperscript{152} See, e.g., Henry G. Manne & Henry C. Wallich, The Modern Corporation and Social Responsibility 32-33 (1972) (questioning benefits of extending corporations’ focus beyond profits and shareholders to social activism); Henry G. Manne, The “Higher Criticism” of the Modern Corporation, 62 Colum. L. Rev. 399, 430 (1962) (“When the day arrives that all important activities of individuals or private associations must meet some nebulous standard of ‘social purpose,’ freedom as we have known and yearned for it will have disappeared.”); Eugene V. Rostow, To Whom and for What Ends Is Corporate Management Responsible?, in The Corporation in Modern Society 46, 63-65 (Edward S. Mason ed., 1960) (discussing how corporate morality may sabotage market).


\textsuperscript{155} See Eichar, supra note 153, at 269-71 (describing wave of corporate takeovers); Wells, supra note 3, at 126-27 (noting shift in state corporate law in allowing corporations to consider factors beyond shareholder interests in response to corporate raiders).


\textsuperscript{157} See generally Easterbrook & Fischel, supra note 5 (highlighting centrality of contracts and contractual relationships to corporate venture); Progressive Corporate Law, supra note 141 (collecting arguments for corporate social responsibility from various authors).

\textsuperscript{158} See Henry N. Butler & Larry E. Ribstein, The Corporation and the Constitution, at viii (1995) (describing “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.”).
Fischel, saw the corporation as a body of contracts constituting a “financing device” with no distinct powers or obligations beyond those prescribed by law and contract to its shareholders and its contractual counterparties.159 This view found support in the notion that shareholders invest in companies because they seek profits, not some social objective.160 In contrast, the progressive approach to corporate law viewed the corporation as a distinct legal entity with social obligations beyond those prescribed by law and contract to its shareholders.161 Leading progressive scholars, like Lyman Johnson and David Millon, saw the corporation as a community of constituents with shared and competing interests.162 As such, in this view, corporations have social obligations to shareholders as well as other non-shareholder stakeholders, like employees, customers, and local residents.163

As the United States has entered the 21st century, discussions surrounding corporate social responsibility have endured within business and law.164 The interesting questions today are not about whether corporate social responsibility should exist, but about how it should exist. Today, many prominent corporations, from established ones like General Electric to upstarts like Airbnb, recognize the business benefits of formal corporate social responsibility programs, and issue corporate social responsibility annual reports and information touting their socially beneficial efforts.165 Business software giant Salesforce even includes

159  EASTERBROOK & FISCHEL, supra note 5, at 10 (describing corporations as financing devices and not otherwise distinctive in their functions).
160  Id. at 5 (asserting that those companies that promise high returns and profits “will obtain the largest investments” from investors).
161  See Lawrence E. Mitchell, Preface to PROGRESSIVE CORPORATE LAW, supra note 141, at xiii (describing the corporation as having “become a significant social and, to some extent, political institution”); Lyman Johnson, Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood, 35 SEATTLE U. L. REV. 1135, 1143 (2012) (recognizing that corporations have “enormous potential to affirmatively advance societal expectations” beyond their obligations to their shareholders and managers).
164  See BRENT D. BEAL, CORPORATE SOCIAL RESPONSIBILITY: DEFINITION, CORE ISSUES, AND RECENT DEVELOPMENTS 75-84 (2013) (discussing new and recent developments in corporate social responsibility (“CSR”)).
social activism and responsibility disclosures in its annual report on Form 10-K, which traditionally contains primarily business and financial information.\textsuperscript{166} The Fortune Global 500 companies alone have spent billions of dollars annually in their social responsibility efforts in recent years.\textsuperscript{167}

Given the evolution and maturation of corporate social responsibility practices over the past century, it should be of little surprise that advocates for social issues have sought to use the powers and platforms of businesses to help them achieve their goals. If corporations had consistently presented themselves as largely amoral profit-generating machines, engaging them in social activism would likely have been less understandable and less appealing. In contrast, because businesses have long promoted themselves to their shareholders and the world as moral and socially-conscious entities engaged in the community, social activists naturally try to engage corporations in their causes. Thus, the evolution of corporate social responsibility has served as a critical catalyst for contemporary corporate social activism.

C. The Expansion of Corporate Political Rights

Like the convergence of government and business, and the evolution of corporate social responsibility efforts, the expansion of corporate political rights has played a significant role in fostering contemporary corporate social activism. Following the landmark cases of \textit{Citizens United v. FEC}\textsuperscript{168} and \textit{Burwell v. Hobby}...
Lobby Stores, Inc., business interests are playing an ever-growing role in politics, policymaking, and social activism. Consequently, social activists have made greater efforts to leverage the expanding political means and influence of corporations to serve their ends.

The understanding of a corporation as a legal person with certain, but not all, rights of natural persons, is a longstanding hallmark of American law. Chief Justice Marshall famously characterized the corporation as “an artificial being, invisible, intangible, and existing only in contemplation of law.” Often dictated by facts and circumstances, rather than clear doctrine, the Supreme Court has constructed an expanding, if not always coherent, corporate-rights jurisprudence. Since the 1880s, the Court has recognized corporations as distinct legal persons that possess contract and property rights. Over time, the Court has also recognized that corporations possess certain Fourth Amendment

170 Leo E. Strine, Jr., Corporate Power Ratchet: The Court’s Role in Eroding “We the People’s” Ability to Constrain Our Corporate Creations, 51 HARV. C.R.-C.L. L. REV. 423, 433 (2016) (“[T]he Supreme Court’s 2010 decision in Citizens United gave corporations the ability to influence the political process more directly . . . .”).
171 See Kent Greenfield, In Defense of Corporate Persons, 30 CONST. COMMENT. 309, 321 (2015) (discussing how corporations possess some but not all constitutional rights); Pollman, supra note 5, at 640 (“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.”).
174 See Minneapolis & St. Louis Ry. Co. v. Beckwith, 129 U.S. 26, 28 (1889) (“[C]orporations can invoke the benefits of provisions of the Constitution and laws which guarantee to persons the enjoyment of property, or afford to them the means for its protection, or prohibit legislation injuriously affecting it.”); Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 189 (1888) (holding that corporations are persons for Fourteenth Amendment purposes); Santa Clara Cty. v. S. Pac. R.R. Co., 118 U.S. 394, 409 (1886) (suggesting that corporations are persons for Fourteenth Amendment purposes); Trs. of Dartmouth Coll., 17 U.S. at 650 (granting corporations protections under Contracts Clause of Constitution); Adam Winkler, We the Corporations: How American Businesses Won Their Civil Rights, at xv-xviii (2018) (discussing corporations’ push to gain constitutional protections); Blair & Pollman, supra note 5, at 1677 (finding that Supreme Court “accorded constitutional rights based on a view of corporations as associations of persons”).
rights against searches and seizures and certain First Amendment rights related to free speech and free press, but no Fifth Amendment protections against self-incrimination or personal privacy protections. More recently, in Citizens United and Hobby Lobby, the Court held that corporations possess free speech protections for political contributions and religious liberties. These two relatively recent landmark cases have had important consequences in the development of contemporary corporate social activism.

In the 2010 Citizens United case, Citizens United—a nonprofit political organization—challenged the Bipartisan Campaign Reform Act, a federal law that prohibited corporations and other associations from using general corporate funds to make political expenditures in connection with electioneering communications during restricted periods of a federal election cycle. Citizens United wanted to broadcast a film about Hillary Clinton during the 2008 election cycle, and had received funds for its efforts through a few corporations. In a 5-4 opinion, the Supreme Court held that the campaign finance restriction was unconstitutional when it imposed limitations on the political expenditures of corporations. The opinion declared: “The Court has thus rejected the argument that political speech of corporations or other associations should be

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176 See Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775-77 (2014) (finding that Religious Freedom Act would not tolerate putting “family-run businesses to the choice of violating their sincerely held religious beliefs or making all of their employees lose their existing healthcare plans”); Citizens United v. FEC, 558 U.S. 310, 334 (2010) (holding that corporations are protected by First Amendment in contributing to political campaigns).

177 See Citizens United, 558 U.S. at 312 (“Austin is so overruled, so it provides no basis for allowing the Government to limit corporate independent expenditures.”); Strine & Walter, supra note 5, at 363 (“Under Citizens United, a corporation may make unlimited political expenditures. It is important to note that these expenditures will be made by the management of the corporation . . . .”).


179 Id. at 342 (“[P]olitical speech does not lose First Amendment protection ‘simply because its source is a corporation.’”).
treated differently under the First Amendment simply because such associations are not ‘natural persons.’”

The *Citizens United* decision has had profound consequences for the political process, many of which are still unfolding and being studied. The Court effectively lifted any limitations on American corporations to make political expenditures. Following the decision, super PACs emerged as key players in elections. Corporate interests have expanded upon their previously outsized influence in the political system by injecting millions of dollars into the political process, both directly to campaigns and indirectly through intermediaries, without being subject to stringent disclosure rules about their expenditures.

180 *Id.* at 342-43.


182 Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 Geo. L.J. 923, 930-37 (2013) (“Public companies can, and do, engage in political spending that is never disclosed . . . .”)

183 See Richard Briffault, *Super PACs*, 96 Minn. L. Rev. 1644, 1644-46 (2012) (“Super PACs spent an estimated $65 million in independent expenditures in 2010, and were significant players in more than a dozen Senate and House races.”).

2018] INCORPORATING SOCIAL ACTIVISM 1571

the 2008 election cycle, outside spending by parties other than the candidates totaled around $574 million.185 In the 2012 election cycle, the first presidential election cycle after Citizens United, outside spending spiked to nearly $1.3 billion.186 And more recently, in the 2016 election cycle, outside spending was around $1.7 billion,187 and super PACs raised nearly $1.8 billion.188 This growth in outside spending following Citizens United in 2010 happened on a bipartisan basis. Conservative and liberal outside groups ramped up their fundraising and spending, with business executives, like Sheldon Adelson, Charles Koch, and George Soros, playing a significant role relative to the ordinary citizen.189 Studies and figures from the non-partisan Center for Responsive Politics highlight the incredible growth of outside spending across the political spectrum following Citizens United.

**Figure 1.** Total Spending by Outside Groups by Election Cycle through Election Day 2018 (November 6, 2018), excluding Party Committees.190

[Image of bar chart showing total spending by outside groups by election cycle, excluding party committees, through election day 2018.]

organizations that can spend millions of dollars without being subject to the disclosure requirements that apply to candidates”.


186 Id.

187 Id.


189 Greenfield, *supra* note 171, at 326-27 (highlighting extent to which “rich individuals” are source of spending in elections).

190 Center for Responsive Politics, *Outside Spending, OPENSECRETS.ORG*, https://www.opensecrets.org/outsidespending/fes_summ.php?cycle=2016 [https://perma.cc/SQ54-SUAD] (last visited Nov. 18, 2018). Figure 1 reflects approximately one billion dollars in spending by outside groups, excluding party committees, through election day 2018. This Figure does not reflect the total amount of spending by outside groups, excluding party committees, during
In 2014, the Supreme Court further expanded the legal understanding of corporate rights in *Hobby Lobby*. In *Hobby Lobby*, shareholders of three family-owned closed corporations—Conestoga Wood Specialties, Hobby Lobby, and Mardel—challenged a provision of the Patient Protection and Affordable Care Act of 2010 that required their companies to provide health insurance, including coverage for contraceptive methods for women. Shareholders of the three businesses claimed that compliance with the provisions would force them to violate their deeply-held Christian beliefs. The Department of Health and Human Services (“HHS”) had provided an exemption for religious employers like churches, but the exemption did not extend to for-profit businesses. The businesses claimed, in part, that the provision and related exemption violated the Religious Freedom Restoration Act (“RFRA”), which prohibited the “[g]overnment [from] substantially burden[ing] a person’s exercise of religion.” In a 5-4 decision, the Court held that for-profit closely held corporations were persons that could exercise religion, and as such are protected under RFRA.

In *Hobby Lobby*, the Court opined that for-profit corporations may have concerns beyond profit—that their focus on profit need not exclude these other concerns:

> 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

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193 Hobby Lobby Stores, Inc., 134 S. Ct. at 2775 (“By requiring the Hahns and Greens and their companies to arrange for such coverage, the [Health and Human Services] mandate demands that they engage in conduct that seriously violates their religious beliefs.”).

194 Id. at 2763 (noting HHS “effectively” exempted certain religious nonprofits termed “eligible organizations,” but limited “eligible organizations” to organizations that certify themselves as religious organizations).


196 Hobby Lobby Stores, Inc., 134 S. Ct. at 2785 (“The contraceptive mandate, as applied to closely held corporations, violates RFRA. Our decision on that statutory question makes it unnecessary to reach the First Amendment claim raised by Conestoga and the Hahns.”).
wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives.197

Furthermore, the Court reasoned that any conflicts or issues arising from how a corporation chooses to pursue its objectives, for profit or not, should be left to the “ready means” of “state corporate law” and the “governing structures” of corporations.198 Like in Citizens United, the Court again expanded the legal understandings of corporate rights relating to pursuing political, social, and religious aims, while giving great deference to corporations to regulate their own affairs in these areas, despite these aims being arguably tangential to a business’s core profit-generating purpose.199

Given the expansion of corporate rights and powers, especially after Citizens United and Hobby Lobby, advocates for social issues have increasingly sought to use the resources and influence of businesses to their advantage. Because the law has given corporations such great freedom and deference to engage in issues of social, political, and religious significance, it is only natural that advocates for such issues try to leverage the resources and reach of corporate interests. Similarly, corporate actors seeking to effectuate social change understandably try to leverage their own business platforms to aid them in achieving their social ends. Corporate executives with strong personal interests in social causes that they believe align well with the best interests of their companies would be remiss to not reach for the many powerful corporate tools at their disposal.

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The ascent of new corporate social activism is due in large part to a confluence of three larger, interconnected changes in business, law, and society. More specifically, the convergence of government and private enterprise, the maturation of corporate social responsibility efforts, and the expansion of corporate political rights have all advanced the growth of contemporary corporate social activism. Each of these factors is interrelated and reinforcing. Collectively, they have created fertile conditions for corporations and social activists to engage one another on some of the large, pressing issues confronting contemporary society.

III. PROMISES AND PERILS

The rise of contemporary corporate social activism presents both promising opportunities as well as perilous pitfalls. This new corporate social activism, thoughtfully conducted, can change society for the better, while simultaneously

197 Id. at 2771.
198 Id. at 2775 (“State corporate law provides a ready means for resolving any conflicts by, for example, dictating how a corporation can establish its governing structure.”).
199 See Pollman, supra note 5, at 669 (“Like Citizens United before it, Hobby Lobby thus looked to state corporate law as a ‘ready means’ for resolving issues related to federal rights.”).
creating greater returns for shareholders. At the same time, such activism, heedlessly conducted, can also have corrosive effects for law, business, and society.

A. Promises

Contemporary corporate social activism offers the promise of simultaneously improving both social value and shareholder value. In particular, corporate social activism could broaden and deepen the impact of activism, improve efficiencies of activism, and enhance corporate value.

1. Deepen Social Impact

Contemporary corporate social activism could deepen the impact of traditional activism. By using the resources and expertise of businesses, activists can have a broader, more diverse reach and a more effective impact than they otherwise could on their own. Rather than fighting with businesses, who admittedly cause some of the problems that animate activism, social activists can work with businesses to help solve these problems. Activists can broaden the reach and impact of their efforts by leveraging the communication resources, political influence, and operational expertise of businesses.

First, by using the communication resources and political influence of corporations, social activists can amplify their voices to reach key decision-makers and communities, breaking through political obstacles and gridlock that frequently can stand in the path of social change. Through the influential communication platforms of individual corporations or corporate trade associations, social issues can reach the masses and key decision-makers like never before, creating pressure to change laws and make new policies. For

200 See, e.g., Kevin Hula, Lobbying Together: Interest Group Coalitions in Legislative Politics 74 (1999) (noting how corporations are “better positioned financially” to lobby for issues like civil rights or education in Washington).

201 See, e.g., Alice Korngold, A Better World, Inc. 73-75 (2014) (studying successful collaboration between former adversaries, Kimberly Clark and Greenpeace, on environmental issues).

202 See Korngold, supra note 5, at 15-19 (describing how non-profits can operate in most effective manner, in part by focusing on organizational capacity and revenue structure); 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.”).
example, through the collaborative work of social activists and corporate interests, the issue of human trafficking was effectively reconceptualized as “modern-day slavery” to better capture “all forced labor, trafficking, and slavery practices” and to appeal to key policymakers.205 Similarly when Tim Cook, the CEO of Apple, wrote a powerful, widely read op-ed in 2015 about the dangers of “religious freedom” laws, his contribution helped shape the larger conversation about those laws.206 In the last few years alone, Arkansas, Georgia, Indiana, and South Dakota all vetoed or amended religious freedom and “bathroom laws” because of pressure from corporate interests that deemed such laws discriminatory to the LGBT community.207 By working smartly with corporations, social activists can help ensure that well-known social issues benefit from wider understanding and thoughtful discussion, and that less well-known issues benefit from reaching larger, key audiences.

Second, by building on the operational expertise of businesses, activists can create a corporate force multiplier for their efforts. Corporations, particularly large global ones, can help activists work through or bypass complex domestic and international barriers in ways that government officials simply cannot, due to the realities of contemporary politics and international relations.208 Global corporations can serve as powerful private channels to address large problems in ways that are difficult for governments, given domestic and international political concerns.209 Western Union, for example, has assisted numerous non-governmental organizations (“NGOs”) with their payment systems to transfer funds to remote parts of the world to aid those in need, without having to negotiate with governments that are frequently unfriendly to such organizations.210 Furthermore, social activists can leverage the operational

205 Chuang, supra note 5, at 1518.
207 See Alan Blinder, Southern Lawmakers Put Culture Wars on Hold, N.Y. TIMES, Jan. 23, 2018, at A10 (reporting on how lawmakers are responding to corporate pressure on social issues); Surowiecki, supra note 14 (noting largest companies in United States pushing back against anti-LGBT laws).
208 See, e.g., KORNGOLD, supra note 201, at ix (“Only global corporations have the vast resources, international scope, global workforces, and incentives of the marketplace to truly bring about the changes that are necessary in order to achieve global peace and prosperity.”); Chuang, supra note 5, at 1518 (discussing how corporate interests influenced domestic and international stakeholders on issue of human trafficking); Charisse Jones, State Street Using Investment Power to Get More Women on Boards, USA TODAY (Mar. 7, 2017, 10:55 AM), https://www.usatoday.com/story/money/2017/03/07/state-street-using-investment-power-get-more-women-boards/98846306/ [https://perma.cc/8ACF-4UBD] (discussing efforts State Street has made to increase diversity in boards of directors).
209 Kuo & Means, supra note 202, at 1296.
210 KORNGOLD, supra note 201, at 29-30.
expertise of businesses to deepen the impact of their efforts by solving operational problems that have confounded them and governments. For instance, Coca-Cola’s expertise in storing and distributing beverages globally can be incredibly beneficial to organizations working to distribute food and medicine to remote parts of the world. In fact, the Gates Foundation partnered with Coca-Cola in 2010 to use its “logistic, supply chain and marketing expertise” to distribute critical medicine to areas in Africa, which was previously a particularly frustrating problem for many nonprofit organizations and local governments.211

In sum, the rise of corporate social activism could greatly broaden and deepen the impact of traditional activism. By working with businesses, social activists may be able to extend their reach and deepen their impact to address large social problems.

2. Improve Operations of Social Change

In addition to deepening social impact, contemporary corporate social activism could lead to improved operations of social activism, particularly in the nonprofit sector.212 Through working and partnering with corporations, activists frequently adopt, by necessity or choice, the best business practices engendered in values like greater accountability, smart investment, and meaningful growth. Organizations engaged in social activism thus take on more of a business-oriented, investment posture and less of a charity-oriented, nonprofit posture. This new approach has been characterized by some as “philanthrocapitalism,” “social entrepreneurship,” or “creative capitalism.”213

First, contemporary corporate social activism can cause social activists, particularly those working at nonprofit organizations, to embrace greater

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212 See KORNGOLD, supra note 5, at 9-15 (discussing need for business expertise in nonprofit sector and desire of businesses to get involved in community); J. Gregory Dees, Enterprising Nonprofits, HARV. BUS. REV., Jan.-Feb. 1998, at 54, 56 (discussing efforts nonprofit organizations have made to behave like for-profit organizations and benefits that come from those efforts).

accountability and data-driven processes in their operations. Nonprofits and social advocates (like many businesses) can benefit by reducing their administrative costs so that more resources go directly to their causes. Because good businesses efficiently maximize shareholder returns, they are likely to take that same data-driven, market-oriented mindset to their social activism efforts. For example, the Rockefeller Foundation, one of the most influential philanthropic organizations in the world, worked with Google and Salesforce, two of the leading tech companies, to improve its transparency and accountability systems for its grants.

Second, contemporary corporate social activism can lead social activists to consider how better to use their limited capital to achieve the greatest impact and return for their efforts. Social activism thus becomes less akin to charity or volunteerism, and more akin to social entrepreneurship or venture philanthropy. With more emphasis on thoughtful capital management, social
activism can take on more of an investment mindset—an approach that may be more effective than traditional conventions, where businesses donate funds with no active engagement as to how those funds are operationalized or managed.\footnote{\textsuperscript{220}} This shift is partially due to the fact that many preeminent philanthropists that are tackling large social issues today are current and former corporate technology titans, like Mark Zuckerberg of Facebook and Bill Gates of Microsoft, who have thrived during this period of rising corporate social activism.\footnote{\textsuperscript{221}} They consider their contributions and efforts less as gifts and more as investments and social risk capital.\footnote{\textsuperscript{222}} They carefully track investments, measure results, and study how best to generate better returns, so as to attract even more capital to tackle big social problems in creative ways.\footnote{\textsuperscript{223}} As a sign of the rise of this new business mindset in the non-profit sector, in 2017 the Ford Foundation announced an unprecedented commitment of one billion dollars of its endowment for “mission-related investments” that seek “not only attractive financial returns but concrete social returns as well.”\footnote{\textsuperscript{224}}

Third, contemporary corporate social activism can help social activists create more meaningful, sustainable growth for their causes. Generally speaking, nonprofits have not always been very effective at raising sufficient funds and sustaining growth.\footnote{\textsuperscript{225}} Successful businesses grow and last over time because they are able to raise more capital, increase their market share, and attract talented individuals.\footnote{\textsuperscript{226}} Thus, by working with corporations who have expertise in capital development, marketing, and recruiting, social activists could improve corporate executives utilize their business skills and mindsets in connection with social causes).

\footnote{\textsuperscript{220}} See Bishop & Green, supra note 213, at 91 (describing how venture philanthropists monitor and nurture their investments for social change).

\footnote{\textsuperscript{221}} See, e.g., Chuang, supra note 5, at 1518 (“[P]hilanthrocapitalism is a relatively new form of philanthropy, born of a new generation of the ultra-rich who aspire to use their business skills to fix the world’s social problems.”).

\footnote{\textsuperscript{222}} See Bishop & Green, supra note 213, at 6 (noting philanthrocapitalists see “themselves as social investors, not traditional donors”); Callahan, supra note 135, at 9 (“T]oday’s philanthropists are zeroing in on precisely those problems that our political system has fumbled or shied away from.”).

\footnote{\textsuperscript{223}} See Bishop & Green, supra note 213, at 6 (“Their philanthropy is ‘strategic,’ ‘market conscious,’ ‘impact oriented,’ ‘knowledge based,’ often ‘high engagement,’ and always driven by the goal of maximizing the ‘leverage’ of the donor’s money.”).


\footnote{\textsuperscript{225}} Korgold, supra note 5, at 4-5 (noting economic issues that tend to plague nonprofits).

\footnote{\textsuperscript{226}} See David Bosworth, The Cultural Contradictions of Philanthrocapitalism, 48 SOCIETY 382, 383 (2011) (noting society requires entrepreneurs, like Bill Gates, who are able to unite workers to work toward company’s success).
the sustainability and growth of their operations. Bill Gates, the founder and CEO of Microsoft, applied many of the corporate lessons learned about capital raising and sustainable growth from Microsoft to the social efforts of his nonprofit, the Gates Foundation. In fact, many contemporary philanthropic organizations are set up as flexible investment vehicles aimed at tackling large social issues through both traditional philanthropic grants and equity investments. For instance, the Chan Zuckerberg Initiative—created by Mark Zuckerberg and his wife, Dr. Priscilla Chan—is organized as a limited liability company, with billions of dollars in assets, and is designed, in part, to make investments in research and businesses that help cure the world’s diseases.

In sum, activists, nonprofits, and the like could leverage the best business practices of the corporate world by working with corporations to develop more meaningful and efficient operations to further their noble goals.

3. Enhance Corporate Value

In addition to benefiting social activists, social activism could benefit corporations by enhancing corporate value and creating new markets for their business. By working on important issues that are at the forefront of society’s concerns, instead of focusing solely on profit, corporations could enhance their value to consumers, employees, recruits, and shareholders. Being socially

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227 KORNGOLD, supra note 5, at 9-12 (discussing how business expertise could benefit nonprofit sector).
228 See BISHOP & GREEN, supra note 213, at 57-58 (“The Gates Foundation tries to find organizations whose methods it likes and then scales them up.”).
229 See, e.g., Chuang, supra note 5, at 1518 (“Unlike earlier generations of philanthropists, who focused on funding third party initiatives, philanthrocapitalists are creating and actively managing their own ventures to show they have big ideas for shaping the world.”); Company Overview of Emerson Collective LLC, BLOOMBERG, https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=263956917 (last visited Nov. 18, 2018) (showing corporate structure of philanthropic organization, Emerson Collective); Impact Investing, OMIDYAR NETWORK, https://www.omidyar.com/our-work/impact-investing [https://perma.cc/GTF8-EUH7] (last visited Nov. 18, 2018) (“Leaving the markets out of our efforts to tackle society’s most intractable problems ignores a powerful force for identifying viable solutions that can scale to help millions.”).
231 See, e.g., KORNGOLD, supra note 201, at 15 (“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.”).
232 See KORNGOLD, supra note 5, at 45-47 (enumerating corporate benefits of engaging in nonprofit social pursuits); Carroll & Shabana, supra note 165, at 92-99 (summarizing
responsible does not mean being financially irresponsible. Through thoughtful social activism, corporations could create direct benefits for shareholders and society.

Contemporary social activism that partners corporations with social activists to solve large social problems could create win-win opportunities for firms and activists. Firms can enhance their brand value and create new markets for their businesses, while simultaneously helping to solve persistent social problems. For instance, Walmart’s partnership with the Environmental Defense Fund to tackle environmental issues has helped the company launch new sources of revenue via environmentally-friendly products and cost-savings via smarter energy practices, while simultaneously furthering the objectives of environmentalists. Similarly, in 2015, JPMorgan Chase committed to investing one hundred million dollars into Detroit, Michigan to help jumpstart a faltering, once-great American city, while at the same time creating a new market of clients for JPMorgan Chase.

Recent research suggests that socially responsible businesses generate stronger returns for their shareholders and have greater brand value in the marketplace. In fact, one of the growing areas in investment management in reputational benefits for corporations that engage in social responsibility activities); Hao Liang & Luc Renneboog, Corporate Donations and Shareholder Value, 33 OXFORD REV. ECON. POL’Y 278, 280-81 (2017) (finding positive relationship between corporate charitable donations and firm value).

See BISHOP & GREEN, supra note 213, at 7, 131 (demonstrating that large businesses are looking at societal benefit as part of their business strategies); Carroll & Shabana, supra note 165, at 92-99, 100 (explaining “win-win outcomes” within corporate philanthropy).


See MACKEY & SISOUDIA, supra note 5, at 276-83 (reviewing recent studies that highlight superior returns of socially conscious companies); Shuili Du, C.B. Bhattacharya & Sankar Sen, Maximizing Business Returns to Corporate Social Responsibility (CSR): The Role of CSR Communication, 12 INT’L J. OF MGMT. REV. 8, 9 (2010) (summarizing research that touts business benefits of corporate social responsibility programs); Fox & Lorsch, supra note 5, at 48, 57 (“There’s a growing body of evidence . . . that the companies that are most successful
recent years has been impact or social investing. Impact or social investing refers to investments that seek positive financial returns while aiming to make a positive social impact, particularly on environmental, social, and governance (“ESG”) factors. Today, all major mutual fund companies and money managers, like Vanguard, BlackRock, and Fidelity, offer some vehicle for social or impact investment in response to the demands of this changing marketplace. Furthermore, many companies have publicly pledged to promote ESG factors in their business and disclosure practices so as to better attract the capital of more socially conscious investors, among an ever expanding and diversifying population of investors.

In sum, by engaging in social activism, corporations could become better attuned to the concerns of their nonshareholder constituencies—like their employees, customers, suppliers, and communities—which in turn could allow them to become better and more profitable corporate citizens, to the benefit of shareholders and society.
The rise of corporate social activism in contemporary society presents an incredible opportunity that could be mutually beneficial to social activists and businesses. More specifically, social activism could gain wider reach, deeper impact, and improved operational efficiencies by working with corporations. At the same time, corporations could enhance their value by improving their image and creating new business opportunities in the face of changing social and investment norms.

B. Perils

While contemporary corporate social activism offers great promise for social activists and businesses, it also poses perils for them. In particular, contemporary corporate social activism could further politicize the marketplace, marginalize certain social issues, and corrode core democratic values.

1. Politicize the Marketplace

The rise of contemporary corporate social activism could further politicize the marketplace and polarize an already balkanized society. This could cause serious harms for businesses and society as politicians, policymakers, and consumers react to corporate social activism.

As corporations become more engaged in social issues, they are likely to draw greater scrutiny from policymakers and politicians. While some of this political attention is inevitable because businesses touch so many aspects of society, as businesses become more prominent in social activism, they could also become more prominent targets for regulation, investigation, and counter-activism.

Following Citizens United, some leading legal scholars and

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242 See, e.g., David Ng, Advertisers in Hot Seat, L.A. TIMES, June 14, 2017, at C1 (“After a media firestorm, usually related in some way to President Trump, advertisers face calls to sever ties with the company at the center of the outrage du jour or else suffer a publicity crisis.”).


shareholder advocates have suggested that corporate political expenditures should be subject to stringent disclosures and scrutiny. Politicians could subject businesses that take social positions adverse to their political interests to greater scrutiny, negative commentary, and possibly punitive actions, like cancellations of tax subsidies and government contracts. And likewise, those politicians could heap favors onto those that adhere to social positions aligned with their own in a corrupt manner, leading to cronyism in the marketplace.

President Donald Trump, for instance, has directly criticized and praised individual companies and executives on Twitter. Additionally, businesses wading into contentious social issues could lead to further consumer scrutiny and social fragmentation in the marketplace. As businesses position themselves as good social citizens, any failing—real or perceived—could be exploited by activist groups and the media.

(Major American companies are increasingly willing to take on the new president publicly—despite the risk of a backlash.)


See COMM. FOR ECON. DEV. OF THE CONFERENCE BD., CRONY CAPITALISM: UNHEALTHY RELATIONS BETWEEN BUSINESS AND GOVERNMENT 5-7 (2015) (discussing crony capitalism, defined 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”); Lynn A. Stout, Bad and Not-So-Bad Arguments for Shareholder Primacy, 75 S. CAL. L. REV. 1189, 1197-98 (2002) (highlighting that corporations often receive government subsidies and preferential tax treatments).

See e.g., Nelson D. Schwartz, Mix of Threat and Incentive Sealed a Deal, N.Y. TIMES, Dec. 1, 2016, at A1 (examining President Trump’s methods in pressuring corporations to adopt particular corporate policies); Michael D. Shear & Cecilia Kang, Firms Shudder as Trump’s Tweets Mean Business, N.Y. TIMES, Apr. 4, 2018, at A1 (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”); Katie Thomas, Novartis Bows to Trump, Delaying Price Increases, N.Y. TIMES, July 19, 2018, at B3 (detailing Novartis’s decision to delay price increases following their public shaming by President Trump); William D. Cohan, It’s Time to Pull the Plug on Trump’s Tweets, N.Y. TIMES: DEALBOOK (Jan. 26, 2017), https://www.nytimes.com/2017/01/26/business/dealbook/its-time-to-pull-the-plug-on-trumps-tweets.html (describing President Trump’s use of Twitter to publicly criticize and praise individual corporations and corporate leaders).

See Kevin Draper, Julie Creswell & Sapna Maheshwari, Take a Big Risk on an Activist? Nike Just Did It, N.Y. TIMES, Sept. 5, 2018, at A1 (discussing risks entailed in Nike’s decision to feature quarterback and activist Colin Kaepernick in its advertising); Sapna Maheshwari, Onion Rings and a Side of Social Progress, N.Y. TIMES, Jan. 16, 2018, at B1 (highlighting caution taken by fastfood chain Sonic when speaking out politically).
perceived—will receive wide consumer and public scrutiny. For instance, Starbucks and Facebook, two companies that tout themselves to be socially responsible businesses, received serious negative consumer and public attention in 2018 for controversies related to the social issues of racial discrimination and privacy, respectively. This new attention frequently takes on a political dimension during an era of hyper-partisanship. As such, just as politics have divided the country into red states and blue states, and red counties and blue counties, corporate social activism could fragment the marketplace into red businesses and blue businesses. This politicization of commerce could harm businesses because they will likely alienate many customers and investors, and energize activists with opposing views. For instance, in 2012, Chick-fil-A, a Southern fried chicken fast food chain, faced highly-publicized protests and boycotts around the country at its outlets in response to its owners’ support of organizations that opposed same-sex marriage. More recently, in 2018, businesses received unwanted attention for simply serving or refusing to serve officials of the Trump Administration. This political balkanization of the

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249 See Rachel Abrams, Starbucks Will Close 8,000 Stores for Training, N.Y. TIMES, Apr. 18, 2018, at A11 (“Starbucks said . . . that it would close its more than 8,000 stores in the United States for one day to conduct anti-bias training . . . .”); Nicholas Confessore, Cecilia Kang & Sheera Frenkel, Facebook Tries to Fend Off New Privacy Uproar, N.Y. TIMES, June 5, 2018, at B2 (“Facebook endured a new wave of criticism from lawmakers and regulators in the United States and Europe . . . after disclosures that the social media giant had allowed dozens of hardware manufacturers access to its trove of personal user data.”); Matt Stevens, C.E.O. Apologizes After the Arrests of 2 Black Men Sitting at Starbucks, N.Y. TIMES, Apr. 16, 2018, at B5 (reporting Starbucks’s CEO apology for incident where two Black men were reported to police for trespassing while sitting in Starbucks).


251 See, e.g., EVAN OSBORNE, THE RISE OF THE ANTI-CORPORATE MOVEMENT: CORPORATIONS AND THE PEOPLE WHO HATE THEM 209 (2009) (highlighting public action against corporations believed to have controversial political or social leanings); Dirk Matten & Andrew Crane, Corporate Citizenship: Toward an Extended Theoretical Conceptualization, 30 ACAD. MGMT. REV. 166, 173 (2005) (defining “corporate citizenship” within business-society relations); Rachel Abrams, Target Steps Out in Front on Transgender Choice, N.Y. TIMES, Apr. 28, 2016, at B1 (“A new policy over bathroom choice has thrust the retailer Target into the center of a nationwide debate over gender identity, civil rights and privacy.”); Ng, supra note 242 (highlighting corporate advertisers’ relationship with politically driven news programs).


253 See Emily Cochrane, Sanders Said She Was Asked to Leave Virginia Restaurant over White House Work, N.Y. TIMES, June 23, 2018, at A26 (“Sarah Huckabee Sanders, the White House press secretary, said she was asked to leave a Virginia restaurant . . . because of her work in the Trump administration, becoming the latest official to be singled out for her support
marketplace is harmful for business, but it may also be harmful for social activists as it could provoke irrational reaction to their causes as debates in the policy arena bleed into the commercial arena. Furthermore, because of the outsized political influence of corporations, working with corporations could complicate the mission of social activists, particularly when the causes of activists do not align well with the profit-drive objectives of businesses.254

2. Marginalize Important Issues

The ascent of contemporary corporate social activism could marginalize important but insular issues as a super-elite corporate class rises to dominate decisions concerning social causes.255 If corporate social activism becomes the primary source of support, or the primary agenda-setter, for social change, there is a legitimate fear that some issues—particularly smaller, discrete, or currently unpopular issues—could become shortchanged in the process, as a corporate plutocracy picks and prioritizes social-political causes.256

Because businesses are not selfless entities, they will likely try to work on issues where they can garner the most positive publicity or on pet causes of senior executives, thus causing certain social issues to be orphaned or marginalized.257 As such, executives may understandably shy away from

254 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) (examining history of U.S. corporations and their role in shaping modern society); Strine & Walter, supra note 5, at 383 (“[B]ecause corporate expenditures will be made with the singular objective of stockholder profit in mind, and therefore will be likely to favor policies that leave the corporation with the profits from their operations, while shifting the costs of those operations (including of excessive risk taking or safety shortcuts) to others.”).


256 See, e.g., Bishop & Green, supra note 213, at 239-40 (questioning potential danger of plutocracy of rich business executives driving social and political change via their philanthropy); Rogers, supra note 214, at 376-77 (critiquing outsized agenda-setting power of rich capitalists in modern society).

speaking out on issues that could alienate key stakeholders and constituencies, like customers, suppliers, or markets, in favor of issues that have broader appeal for fear of boycotts and backlash from the public.\textsuperscript{258} For instance, a company that receives a significant amount of revenue from China may be reticent to engage in a social cause dedicated to improving human rights conditions in China. As such, activists working on prominent progressive issues, like environmental sustainability, gender equality, workforce diversity, or LGBT rights, will likely receive more attention and have greater impact with the rise of corporate social activism. Activists for some issues that are not aligned with those of powerful progressive corporate interests—issues like religious and conservative social causes—probably feel like their voices and views are already marginalized in contemporary society, and this movement has the potential to further crystalize that marginalization.\textsuperscript{259}

In \textit{Citizens United}, the Court noted that concerns about the political choices of corporations should be corrected “through the procedures of corporate democracy,” instead of through government regulation.\textsuperscript{260} Going beyond prior legal principles that conferred deference to corporations for business decisions,\textsuperscript{261} \textit{Citizens United} conferred deference to corporations for political

\textsuperscript{258} See, e.g., \textit{HULA}, supra note 200, at 74 (“[I]ndividual corporations often try to avoid participating in the civil rights debates directly where doing so might have lasting side effects. In an era of boycotts, corporate representatives note that it is generally safer to rely on a trade association to speak for the industry than to take a chance on being perceived as opposing civil rights.”).


decisions that may be unrelated to the core purposes of the business. In the seminal corporate political expenditures case, *First National Bank of Boston v. Bellotti*, the Court reasoned, “Ultimately shareholders may decide... whether their corporation should engage in debate on public issues.” Rhetorically, this makes much sense. Practically, however, this is not workable for many large corporations. Many shareholders own only a small number of shares and frequently move in and out of their positions, and thus lack the incentive, initiative, and information to participate in the governance of a corporation. Additionally, increasing numbers of Americans are invested in the stock market indirectly through mutual funds offered by their employer-sponsored 401(k) plans. Because the shareholder population of large modern corporations is constantly in flux, passive, and largely institutionalized, the issues that a corporation decides to support or oppose frequently reflect the values of its senior executives, not its shareholders.

Furthermore, given the lack of diversity in boardrooms of corporate America, there is a credible concern that certain issues will simply be overlooked or marginalized by a largely homogenous group of powerful senior corporate executives. It may be difficult for the millionaire or billionaire corporate

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262 See Pollman, supra note 5, at 667 (“Citizens United was different because it concerned rights to political expression, which are not incidental to the purpose of business corporations and for which there is no reason to believe that the interests of corporate participants would be aligned in all types of corporations.”); Larry E. Ribstein, *The First Amendment and Corporate Governance*, 27 GA. ST. U. L. REV. 1019, 1021 (2011) (“Citizens United shifted the debate over corporate speech from corporations’ power to distort political debate to the corporate governance processes that authorize this speech.”).


264 Id. at 795.

265 See Blair & Pollman, supra note 5, at 1722 (explaining that shareholders of modern corporations are “frequently rationally apathetic, without information or a voice in the corporation”); Min, supra note 181, at 470-76 (arguing that “procedures of corporate democracy” fail to adequately protect shareholders and nonshareholders from potentially harmful corporate political activity).

266 See Strine & Walter, supra note 5, at 340 (“Increasingly, Americans are required as a practical matter to save for retirement by putting aside much of their wealth in eligible investments under their employer’s tax-advantaged 401(k) plan.”).

267 See *Citizens United v. FEC*, 558 U.S. 310, 477 (2010) (Stevens, J., concurring in part and dissenting in part) (“Most American households that own stock do so through intermediaries such as mutual funds and pension plans, which makes it more difficult both to monitor and to alter particular holdings.” (citation omitted)); Blair & Pollman, supra note 5, at 1722 (“[T]he stock ownership of modern, publicly traded corporations changes minute by minute and it is impossible to pinpoint a fixed group of individuals for whom the corporation would be speaking.”); Strine & Walter, supra note 5, at 341 (discussing difficulties investors face in influencing corporate political decisions).

executive to understand or empathize with the concerns of their working-class employees, customers, or shareholders. As such, the voice of corporations often communicates the views of the powerful few, which may not reflect the views of the ordinary many.269

In sum, the rise of contemporary corporate social activism could marginalize important issues from the socio-political agenda as corporate decision-makers make circumspective choices that sidestep controversy and negative consequences for their businesses to the detriment of society.

3. Corrode Democratic Values

The rise of contemporary corporate social activism could lead to a corrosion of core democratic, moral values that cannot be readily mitigated by the mechanisms of “corporate democracy,”270 as suggested by the Supreme Court in Citizens United and Hobby Lobby.271 As more social activism efforts shift to private business institutions, this could weaken our democratic institutions and processes, along with the public’s faith in them. This potential corrosive effect could harm both corporations and social activists, as corporations, which are designed for profit generation, are not democracies and do not necessarily reflect the choices and values of a moral, democratic society.271

which, for example, white males are 64.1% and 69.2% of board members of Fortune 100 and 500 companies respectively).

269 See, e.g., LARRY BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 5 (2010) (“The opinions of millions of ordinary citizens in the bottom third of the income distribution have no discernible impact on the behavior of their elected officials.”); ROBERT A. DAHL, ON DEMOCRACY 182 (2d ed. 1998) (“Unequal ownership and control of major economic enterprises in turn contribute massively to the inequality in political resources . . . and thus to extensive violations of political equality among democratic citizens.”); Greenfield, supra note 241, at 970 (“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.”); Tom C.W. Lin, The Corporate Governance of Iconic Executives, 87 NOTRE DAME L. REV. 351, 355-57 (2011) (discussing business and public policy influence of powerful corporate executives).


271 See Aaron Horvath & Walter W. Powell, Contributory or Disruptive: Do New Forms of Philanthropy Erode Democracy?, in PHILANTHROPY IN DEMOCRATIC SOCIETIES: HISTORY, INSTITUTIONS, VALUES 87, 89 (Rob Reich, Chiara Cordelli & Lucy Bernholz eds., 2016) (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”); Strine & Walter, supra note 5, at 355 (“[I]t is best that managers stick to the most obvious purpose of the for-profit corporation, which is generating profits, and leave to actual human beings the pursuit of noneconomic social ends.”).
As business interests become more entrenched in contentious social issues, the market values of businesses could supplant the moral values of society.272 While corporations exist for the primary pursuit of profit, social activism generally exists for higher, democratic moral pursuits that are not always profitable.273 While many corporations have become more socially responsible, corporations and the laws that govern them do not focus on social externalities but on profits for shareholders. This focus will naturally constrain some of their most noble social impulses.274 This amoral focus on profits may also lead corporations to work with counterparties that do not reflect the best American democratic values. For instance, as a stark hypothetical, a society guided by our higher moral values will shy away from aiding tyrannical regimes; a society governed by amoral market values may readily and openly work with such regimes.275 Additionally, the rising power of business interests in the interrelated arenas of politics and social activism could further corrode core democratic, moral values by conflating popular perceptions of policymakers and society with the largess of corporate resources.276 Given their power and influence,

272 See Greenfield, supra note 171, at 309-12 (“Unlike persons, corporations are expected to act if they have only one goal—the production of shareholder value.”); Kuo & Means, supra note 202, at 1294 (“Critics contend that corporations subvert democracy by using their economic resources to lobby for corporate-friendly policies and to elect accommodating politicians.”).


274 See Chatterji & Richman, supra note 5, at 34 (“Corporations are constrained by shareholders and market competition in their ability to allocate funds for social causes, and the ‘win-win’ scenarios in which firms maintain a competitive advantage while also advancing social causes may be less common than we would hope.”); Steven L. Schwarcz, Miscalignment: Corporate Risk-Taking and Public Duty, 92 NOTRE DAME L. REV. 1, 2-5 (2016) (arguing that corporate decision-making and corporate law frequently fail to properly account for social externalities); Leo E. Strine, Jr., Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit, 47 WAKE FOREST L. REV. 135, 136 (2012) (“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.”).


276 See, e.g., Eduardo Porter, When Corporate Giving Is More About Getting, N.Y. TIMES, Apr. 4, 2018, at B1 (arguing that corporate activism is tool corporations use to sanitize their public image, and using as example Exxon Mobile’s contributions to women in developing countries, which serve to mask its role in denying climate change); Marianne Bertrand et al., Tax-Exempt Lobbying: Corporate Philanthropy as a Tool for Political Influence 3 (NBER, Working Paper No. 24451, 2018), http://www.nber.org/papers/w24451.pdf [https://perma.cc/
businesses—working directly or in concert with nongovernmental organizations—could whitewash their own misdeeds, covertly activate “astroturf activism,” or create the misleading perception that there is strong, genuine grassroots support of certain issues for their own profit-seeking benefit.277

While businesses and social activists can learn and benefit from one another, a wholesale replacement of market values for moral values would cause serious social harms to democratic society.278 Corporate aims of efficiency and profit may contradict and corrupt moral values, such as justice and equal protection, to the detriment of society.279 Corporatizing social issues can lead to corrosions of civility and virtue as corporate values become the core values of society and government.280 Caring for the sick, the weak, and the poor may be unprofitable

E9DP-8U2U] (arguing that corporate charitable giving is tax-exempt means of political influence seeking).

277 See Durkee, supra note 5, at 204, 229-32 (describing “astroturf activism” as “[businesses . . . work[ing] covertly through nonprofit groups to exploit the special access those organizations enjoy”); Ben Elgin & Zachary Mider, Who’s That Hiding Under the Astroturf?, BLOOMBERG BUSINESSWEEK, Nov. 20, 2017, at 43, 43-44 (reporting that corporations obscure their involvement with political causes, enlisting members who are indifferent to objective to “provide an appearance of public support that doesn’t exist”); see also DANA R. FISCHER, ACTIVISM, INC.: HOW THE OUTSOURCING OF GRASSROOTS CAMPAIGNS IS STRANGLING PROGRESSIVE POLITICS IN AMERICA 67-73 (2006) (chronicling for-profit endeavors in grassroots activism).

278 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.”); J. W. SCHULTE NORDHOLT, WOODROW WILSON 87 (1991) (“The government which was designed for the people has got into the hands of the bosses and their employers, the special interests. An invisible empire has been set up above the forms of democracy.” (quoting Woodrow Wilson)); SANDEL, supra note 121, at 202-03 (discussing degrading effect of wholesale impositions of market values on society); Einer Elhauge, Sacrificing Corporate Profits in the Public Interest, 80 N.Y.U. L. REV. 733, 738-56 (2005) (discussing negative externalities created by singular pursuit of shareholder wealth maximization); Mickey Edwards, The Difference Between Business and Government, ATLANTIC (June 13, 2010), http://www.theatlantic.com/politics/archive/2010/06/the-difference-between-business-and-government/58085/ [https://perma.cc/F4LF-NLBJ] (opining that skills necessary for business success do not equate to those required for success in public service).

279 See SANDEL, supra note 121, at 110-13 (suggesting that imposing market values on all human interactions will lead to corruption and unfairness); Kent Greenfield & D. Gordon Smith, Debate: Saving the World with Corporate Law?, 57 EMORY L.J. 947, 951 (2008) (“[Corporations] produce costly externalities; they are amoral; they fail to sustain implicit or explicit commitments to communities; they privilege some stakeholders (shareholders) at the expense of others (for example, employees.”).

280 See ANAND GIRIHARADAS, WINNERS TAKE ALL: THE ELITE CHARADE OF CHANGING THE WORLD 260-63 (2018) (contending that many private initiatives to solve public ills undermine democratic institutions); SANDEL, supra note 121, at 113-14 (arguing that market norms, such as “financial incentives and other market mechanisms can backfire by crowding out nonmarket norms”).
and unglamorous, but these are nevertheless worthy pursuits of a compassionate, democratic society. Similarly, social initiatives, like disaster relief, disease control, and access to education, should never be driven entirely by revenues or profits.

While courts have placed their faith in “the procedures of corporate democracy” to mitigate these potential corrosive harms, that faith may have been misplaced because corporate democracy does not operate like political democracy, and can in fact be undemocratic. Political democracy, in the American legal context, adheres to a “one person, one vote” principle. In contrast, corporate democracies adhere to a “one share, one vote” principle. Whereas the “one person, one vote” doctrine of political democracy strives to treat all voters equally and give them equal voice, the “one share, one vote” principle of corporate democracy explicitly benefits large shareholders. As such, large, active shareholders with short-term agendas that may be inconsistent with either a corporation’s values or a community’s core social values may dictate the agenda and actions in a corporate democracy.


282 See DAHL, supra note 269, at 182 (describing corporations as “typically undemocratic; sometimes, indeed, they are virtually managerial despotisms”); KORNGOLD, supra note 201, at x (“[C]orporations are not democratically elected, and their ultimate purpose is profits, not mission.”); Pamela S. Karlan, Politics by Other Means, 85 VA. L. REV. 1697, 1709 (1999) (highlighting how political vote is “antithesis of the market”); Robert B. Thompson & Paul H. Edelman, Corporate Voting, 62 VAND. L. REV. 129, 130 (2009) (“Voting plays a limited role in corporate decisionmaking, much more limited than in the public sphere.”).

283 See Bd. of Estimate of N.Y. v. Morris, 489 U.S. 688, 692 (1989) (holding that one representative per unequally populated borough in New York City was in violation of Fourteenth Amendment right to fair representation); Wesberry v. Sanders, 376 U.S. 1, 8 (1964) (“To say that a vote is worth more in one district than in another would . . . run counter to our fundamental ideas of democratic government . . .”); Gray v. Sanders, 372 U.S. 368, 381 (1963) (“The conception of political equality . . . can mean only one thing — one person, one vote.”); cf. Reynolds v. Sims, 377 U.S. 533, 562 (1964) (holding that apportionment of state legislatures needs to reflect “one person, one vote” policy); Baker v. Carr, 369 U.S. 186, 237 (1962) (holding that denial of equal protection from voter dilution is justiciable constitutional cause).


285 Rodrigues, supra note 284, at 1391 (“By virtue of the one-vote-per-share principle, larger shareholders inevitably have a greater say in corporate governance than do smaller shareholders . . . in striking contrast to the operation of our modern political system, which is built on the principle of ‘one person, one vote.’”).

286 See Iman Anabtawi, Some Skepticism About Increasing Shareholder Power, 53 UCLA L. REV. 561, 577-83 (2006) (presenting various schisms among shareholders, including those with divergent time interests); Roberta Romano, Public Pension Fund Activism in Corporate
Furthermore, just as political voting and corporate voting are fundamentally different, shareholders of a corporation are fundamentally different from citizens of a society. Shareholders frequently choose to be part of a corporation; many citizens do not choose to be part of a country. Shareholders in a corporate democracy that disagree with the corporation’s actions and values can readily sell their shares; citizens of a democratic society cannot readily leave their countries without incurring significant costs. Given the differences between political democracies and corporate democracies, democratic moral values should not be supplanted by corporate market values.

In sum, the market values of business frequently make imperfect matches for social aims, and could actually be harmful for both businesses and society. Some social issues cannot be redressed by the private sector and corporate social activism alone—public action is necessary as well.

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*Governance Reconsidered*, 93 *COLUM. L. REV.* 795, 803 (1993) (arguing that “[social] investments’ use pension assets for broader social purposes at the expense of fund beneficiaries . . . ”); 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 all kinds—of typical American investors.”).

287 See Anupam Chander, *Minorities, Shareholder and Otherwise*, 113 *YALE L.J.* 119, 160 (2003); Rodrigues, *supra* note 284, at 1390 (“Shareholders are not citizens; their investments are voluntary and relatively liquid . . . ”).

288 Leo E. Strine, Jr., *Toward a True Corporate Republic: A Traditionalist Response to Bebchuk’s Solution for Improving Corporate America*, 119 *HARV. L. REV.* 1759, 1762-64 (2006) (highlighting that higher risk tolerance in corporate world may be desireable, but citizens cannot diversify away risk of poor judgment of state leaders).

289 See, e.g., *Landrieu*, *supra* note 278, at 126 (“No disrespect to men and women of commerce, but government is not a business and the idea of ‘running government as a business,’ while a great line for TV spots, does not work as a political reality.”); Chander, *supra* note 287, at 160-61 (“The weaker voluntariness of entry in political society should lead us to heightened concern for members of politics than for members of corporations—either because of the moral valence of choice itself or because of the inability of some to protect themselves by refusing to enter unattractive situations.”); Strine, *supra* note 286, at 1970 (“The current corporate governance system, however, gives the most voice and the most power to those whose perspectives and incentives are least aligned with that of ordinary American investors.”).

290 See, e.g., Chatterji & Listokin, *supra* note 32, at 62 (“[G]overnment action is sometimes the best solution to large social problems, because the scope of private actions will always be limited by the principle of profit maximization and by the fact that corporations are individual, nonsovereign entities.”); Levitt, *supra* note 148, at 41, 44 (arguing that businesses are not well designed to solve social problems).
While the rise of corporate social activism in contemporary society presents incredible opportunities for social change, legal reform, and policymaking, this ascendency also poses perilous pitfalls for businesses, activists, and society. Specifically, this rise could further politicize an already balkanized marketplace, marginalize important social issues, and corrode core democratic values.

IV. KEY IMPLICATIONS AND RECOMMENDATIONS

The emergence of contemporary corporate social activism has broad implications for law, business, and society. In particular, corporate stakeholders, social activists, lawyers, and policymakers should examine and respond to the impact of such activism on corporate purpose, corporate governance, and public interest lawyering as they navigate the changing terrain of business and social activism.

A. On Corporate Purpose

Contemporary corporate social activism complicates traditional understandings of corporate purpose. It shifts businesses from their traditional singular, amoral purpose of profit maximization to a new multivariate aim that takes into greater consideration social impact and social value on an equivalent or nearly equivalent basis as profit maximization.291 This shift in the understanding of corporate purpose could have profound effects on corporate behavior.

Traditionally, it has been understood by many that a corporation’s chief objective is to maximize shareholder value.292 As famously stated in the canonical corporate law case, *Dodge v. Ford Motor Co.*,293 “[A] business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The

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293 170 N.W. 668 (Mich. 1919).
discretion of the directors is to be exercised in the choice of means to attain that end . . . ”294 Leading business law scholars, like Henry Hansmann and Reiner Kraakman, have declared that corporate law has reached its end of history since “[t]here is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.”295

But, while the chief aim of the corporation is well-defined, it is nevertheless subject to legitimate debate.296 Different corporate stakeholders could have contrasting means, timelines, and metrics for shareholder returns and success.297 For some, maximizing shareholder returns means maximizing return in the present.298 Others may use a longer timeline. Similarly, some stakeholders may measure returns by stock price, revenues, and profits while others may use alternative metrics.299 Nevertheless, many corporate stakeholders and shareholders continue to understand a company’s objective as maximizing shareholder returns through a combination of stock price, financial results, and market sentiments.300

294 Id. at 684 (finding merit in plaintiff’s argument that corporation could not withhold expected dividends to lower cost of product or pay better wages). But see Lynn A. Stout, Why We Should Stop Teaching Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 165-66 (2008) (arguing court’s assertion that “[a] business corporation is organized and carried on primarily for the profit of the stockholders” is both dicta and fundamentally bad law).

295 Hansmann & Kraakman, supra note 292, at 439 (arguing that emerging international consensus of shareholder-centered corporate ideology has changed corporate governance practices and will eventually lead to reform of corporate law).

296 See DRUCKER, supra note 292, at 30-31 (questioning profit and profit maximization as chief motivations of businesses); LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMs INVESTORS 6-7 (2012) (challenging 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. The literature is replete with different theories or models, each of which attempts to reduce the pattern of legal rights, responsibilities, duties, and privileges typically found in corporations into a single coherent description.”).

297 See, e.g., 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, such as giving charitable contributions or paying higher wages, that do not maximize profits currently. They may do so, however, because such activities are rationalized as producing greater profits over the long-term.” (citations omitted)).

298 See Anabtawi, supra note 286, at 579-83 (discussing heterogeneity among shareholders in term of investment); Sirine, supra note 288, at 1771 (explaining that traditional economists believe that powerful “institutional investor community fixates on certain ideas of the moment and presses them at a large swath of companies”).

299 See, e.g., Friedman, supra note 150, at 33 (arguing that executives routinely exercise social responsibility, for example, by keeping prices low in order to prevent inflation).

300 See William T. Allen, Our Schizophrenic Conception of the Business Corporation, 14 CARDOZO L. REV. 261, 265 (1992) (“The corporation’s purpose is to advance the purposes of these [stockholder-owners], and the function of directors, as agents of the owners, is faithfully to advance the financial interests of the owners.”); William W. Bratton, The Separation
The rise of corporate social activism has led to more complicated, nuanced understandings and articulations of corporate purpose, giving credence to those who have long been critical of shareholder primacy and profit-maximization as the primary means and ends of corporations. The articulation of a larger corporate social purpose does not mean an abandonment or subordination of profits or benefits of shareholders. In fact, recent research suggests that firms with a clear, broader purpose exhibit superior financial performance. Some of the most financially successful companies in the world have publicly stated purposes that have nothing to do with revenues or profits. Google’s stated purpose is “to organize the world’s information and make it universally accessible and useful.” Similarly, Facebook’s stated purpose is “to make the world more open and transparent, which we believe will create greater understanding and connection.”

As a result of this evolving conception of corporate purpose, many established and startup businesses have changed their practices; and some policymakers and laws have also reacted to these changes. Many established businesses, such as Apple, have invested more resources into their corporate social responsibility programs and have proudly engaged the public and policymakers on contentious social issues. Many entrepreneurs of startup businesses have legally positioned themselves as social enterprises, seeking both private profit and...
public gain.\textsuperscript{306} In fact, some startups have even organized their businesses as benefit corporations, legal entities designed to generate profits as well as social good.\textsuperscript{307} Benefit corporations, according to the Model Benefit Corporation Legislation, are required to have a stated “public benefit” and enhanced transparency, among other features.\textsuperscript{308} As of 2017, thirty-three states recognized benefit corporations.\textsuperscript{309} Furthermore, in 2018, Senator Elizabeth Warren introduced the Accountable Capitalism Act, which would require companies with over one billion dollars in revenue to acquire a federal corporate charter stating a “general public benefit,” and to take into account additional interests in connection with their business besides profits and shareholder prosperity.\textsuperscript{310} Such interests could include the interests of employees, local communities, and the environment.\textsuperscript{311} Regardless of one’s views on the recent debates and policy ideas on corporate purpose, it appears that these debates and policies will continue to persist in the years to come and be an issue of serious discussion among both executives and the public.

In light of these developments concerning corporate purpose, this Article recommends that corporate boards thoroughly review and refine their internal policies to ascertain whether their company’s internal policies reflect the purpose and identity that they seek to project to their employees, customers, suppliers, community, and the world at large. Executives and entrepreneurs should give serious consideration to their company’s purpose and how they choose to authentically communicate that purpose to better connect with the public and key stakeholders.\textsuperscript{312} They should do this not as a matter of superficial

\textsuperscript{306} DANA BRAKMAN REISER & STEVEN A. DEAN, SOCIAL ENTERPRISE LAW: TRUST, PUBLIC BENEFIT, AND CAPITAL MARKETS 2 (2017) (noting proliferation of “medium-sized, small, and microbusinesses blending profit and purpose to varying degrees”).

\textsuperscript{307} Greenfield, supra note 241, at 966 (“Benefit corporations are for-profit corporations that are also required to create “a material positive impact on society and the environment and to meet higher standards of accountability and transparency.””).

\textsuperscript{308} See Benefit Corporation Reporting Requirements, BENEFIT CORP., http://benefitcorp.net/businesses/benefit-corporation-reporting-requirements [https://perma.cc/JJ2L-LHEA] (last visited Nov. 18, 2018) (listing statutory requirements of benefit corporations, including transparency reporting and fulfillment of “public benefit purpose”).


\textsuperscript{311} Id.

\textsuperscript{312} See GEORGE A. AKERLOF & RACHEL E. KRANTON, IDENTITY ECONOMICS: HOW OUR IDENTITIES SHAPE OUR WORK, WAGES, AND WELL-BEING 59 (2010) (concluding successful organizations have managers that clearly articulate organization’s goals and purpose); DAINA MAZUTIS & AILEEN IONESCU-SOMERS, KEEPING IT REAL: HOW AUTHENTIC IS YOUR
public relations, but as a matter of establishing a core identity. In particular, they should be able to tell a corporate purpose narrative that goes beyond the amoral pursuit of profit and that authentically articulates their core values and missions. This authentic narrative of firm purpose and identity could prove incredibly powerful in motivating employees to be more productive, customers to be more loyal, and investors to be more patient with the company.\footnote{313} In fact, in 2018, BlackRock, one of the largest and most influential institutional investors in the world, asked corporations to publicly articulate a long-term corporate purpose that accounts for their social and economic impact beyond just profits.\footnote{314} Individuals, in their professional and personal capacities, frequently seek to contribute to a greater purpose beyond mere profit or financial gain alone.\footnote{315} Jeff Bezos, the CEO of Amazon, for instance, treats his company’s business as a mission, not motivated exclusively by profit:

I strongly believe that missionaries make better products. They care more. For a missionary, it’s not just about the business. There has to be a business, and the business has to make sense, but that’s not why you do it. You do it because you have something meaningful that motivates you.\footnote{316}

In sum, the current—and likely future—terrain of business and social activism suggests that a singular narrative centered exclusively on amoral profit-seeking would be unsatisfactory for many corporate stakeholders, social

\footnote{313} See \textit{SCOTT GALLOWAY, THE FOUR: THE HIDDEN DNA OF AMAZON, APPLE, FACEBOOK, AND GOOGLE} 33-34 (2017) (attributing Amazon’s success to its ability to tell compelling story about its purpose and business); \textit{DONALD HISLOP, KNOWLEDGE MANAGEMENT IN ORGANIZATIONS} 230 (2013) (explaining how strong firm identities can lead to greater employee loyalty); \textit{MACKAY & SISODIA, supra} note 5, at 42-44 (highlighting importance of well-defined purposes for businesses); \textit{DANIEL H. PINK, DRIVE: THE SURPRISING TRUTH ABOUT WHAT MOTIVATES US} 23 (2009) (discussing important role of purpose in motivating people at work); Henri Servaes & Ane Tamayo, \textit{The Impact of Corporate Social Responsibility on Firm Value: The Role of Customer Awareness}, 59 MGMT. SCI. 1045, 1046 (2013) (finding that customer awareness of corporate social activity may lead to higher firm values under certain conditions).

\footnote{314} \textit{Larry Fink’s Annual Letter to CEOs: A Sense of Purpose}, BLACKROCK, \url{https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter} \footnote{last visited Nov. 18, 2018} (encouraging companies to ask themselves, “What role do we play in the community?” among other questions).

\footnote{315} See \textit{PINK, supra} note 313, at 208 (“Humans, by their nature, seek purpose—to make a contribution and to be part of a cause greater and more enduring than themselves.”).

activists, and policymakers. To be clear, this does not mean that for-profit businesses should abdicate the pursuit of profits or the metrics of financial success. Instead, this means that businesses should be able to articulate their profit-seeking purposes in a comprehensive manner that better accounts for the social interests and norms expected of today’s best businesses, which in turn may actually lead to superior financial performance.317

B. **On Corporate Governance**

Contemporary corporate social activism is having profound implications on legal doctrines and practices of corporate governance. It complicates the dynamic interplay among managers, directors, and shareholders over control of the corporation by injecting social activists into the arena of corporate governance.

Four leading, competing legal theories are at the heart of many corporate governance discussions: shareholder primacy, director primacy, managerialism, and team production.318 Each of the four has strong and brilliant supporters, with leading legal luminaries, like Stephen Bainbridge, Lucian Bebchuk, Margaret

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Blair, Bill Bratton, Lyman Johnson, David Millon, and Lynn Stout, among others, weighing in on this debate over the last few decades.

Each theory attempts to explain the governance powers and objectives of a corporation by examining the roles of its key functionaries. First, shareholder primacy holds that the shareholders are of utmost importance in thinking about the aims and governance of a corporation.\textsuperscript{319} As such, corporate law should empower shareholders with more tools to govern the corporation for their own benefit.\textsuperscript{320} Second, director primacy holds that control of a corporation should rest with the directors, who should act as fiduciaries for the benefit of shareholders.\textsuperscript{321} As such, corporate law should empower directors with more freedom and protection to exercise their duties for shareholder wealth maximization.\textsuperscript{322} Third, managerialism maintains that senior managers are the key functionaries of a corporation.\textsuperscript{323} As such, corporate law and directors should entrust managers with much discretion in the governance of corporations given the efficiency and expertise that can be derived from centralized management, particularly for large corporations.\textsuperscript{324} Fourth, the team production theory supposes that shareholders, directors, managers, employees, and other corporate stakeholders work together as a team in the governance of the corporation.\textsuperscript{325} As such, corporate law should help mediate and coordinate the

\textsuperscript{319} See D. Gordon Smith, The Shareholder Primacy Norm, 23 J. CORP. L. 277, 277-78 (1998) (“Shareholders exercise control over corporations by electing directors, approving fundamental transactions, and bringing derivative suits on behalf of the corporation.”).

\textsuperscript{320} See Lucian Arye Bebchuk, The Case for Increasing Shareholder Power, 118 HARV. L. REV. 833, 835-36 (2005) (“While I support making shareholder power to replace directors more viable, I argue that it is important to increase shareholder power with respect to other issues as well.”).

\textsuperscript{321} See Bainbridge, supra note 5, at 550 (“[D]irector primacy asserts that...[n]either shareholders nor managers control corporations—boards of directors do.”).

\textsuperscript{322} Id. at 551 (noting importance of board’s “considerable discretion powers” as means to provide more efficient decision-making).


\textsuperscript{324} See ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 7-8 (1977) (noting important benefits that centralized, manager-based control brings to corporations); Bratton, supra note 173, at 1476 (“The managerialist picture put corporate management groups at the large corporation’s strategic center.”); Thompson, supra note 318, at 384 (“Centralized managers in a hierarchy provide efficiencies in information gathering, decision making, and implementation that dispersed and numerous shareholders (or employees or creditors) simply cannot match.”).

\textsuperscript{325} See Blair & Stout, supra note 273, at 272 (“[T]eam production requires each member of the team to make an irrevocable commitment of resources to the joint enterprise.”).
competing interests of these various players.\textsuperscript{326} Each of the four aforementioned legal theories carries varying levels of explanatory power for the governance of contemporary corporations, in particular large public corporations.\textsuperscript{327}

Contemporary corporate social activism complicates each of these core corporate governance legal theories by injecting numerous interdependent socioeconomic variables into corporate decision-making like never before.\textsuperscript{328} Regardless of whether an executive believes in the primacy of the shareholder, director, manager, or team, that executive needs to better account for the role of social activists and activism in corporate governance, and not treat it as an occasional and ancillary governance factor.\textsuperscript{329} It is hard for corporations, particularly large public ones, to operate in contemporary society without giving due consideration to the social activism surrounding them. For many corporations, activism comes from both outside the corporation via shareholders and customers, as well as from inside the corporation via executives and employees.\textsuperscript{330} In this sense, the barbarians are not just at the corporate gates, many of them are already in the city. For instance, in 2018, Google employees around the world staged a walkout to protest the company’s sexual harassment policies and practices, and forced the company to change some of them.\textsuperscript{331}

\textsuperscript{326} Id. at 323 (“Scholarly and popular debates about corporate governance need to recognize that corporations mediate among the competing interests of various groups and individuals that risk firm-specific investments in a joint enterprise.”).

\textsuperscript{327} See Thompson, supra note 318, at 385-400 (discussing relative merits of shareholder-, director-, and management-primacy theories).

\textsuperscript{328} See, e.g., Andrzej Rapaczynski, Impact Investing as a Form of Lobbying and Its Corporate-Governance Effects, 11 Capitalism & Soc’y 1, 3-5 (2016) (explicating complicating corporate governance effects of socially conscious investors and stakeholders).


\textsuperscript{330} Davis & White, supra note 32, at 2 (“Although boycotts and other protests organized by outsiders have been around for years, today employees are among the most vocal activists for change.”).

\textsuperscript{331} See Kate Conger & Daisuke Wakabayashi, Google Bows to Demands to Overhaul Abuse Policy, N.Y. Times, Nov. 9, 2018, at B1 (“Google said on Thursday that it would end its practice of forced arbitration for claims of sexual harassment or assault after more than 20,000 employees staged a walkout last week to protest how the internet company handles cases of sexual misconduct.”); Farhad Manjoo, When Tech Workers Raise Their Voices, N.Y. Times, Nov. 8, 2018, at B1 (“Protests by workers are an important new avenue for pressure; the very people who make these companies work can change what they do in the world.”); Daisuke Wakabayashi et al., Google Workers Worldwide Walk Out Over Handling of Harassment, N.Y. Times, Nov. 2, 2018, at B3 (describing walkouts by Google employees
While many corporations have long had to consider the social effects of their actions, they have not been expected to weigh in on social issues unrelated to their core business or to fear recriminations from policymakers and the public for their response or nonresponse like they do today. Some legal scholars like Hillary Sale have argued that corporations, particularly large public ones, have received so much power and benefit from society that they should be expected to engage responsibly with the public on concerns beyond those related to their profits and shareholders. Regardless of one’s views on the merits of corporate social activism, it is a growing and complicating reality for corporations and their executives today.

In light of these developments, this Article recommends that corporate directors and senior managers establish clear protocols for how their companies will respond to activism on pressing social issues, particularly those most directly related to their core businesses and operations. These protocols should help directors and managers respond more thoughtfully to sensitive social issues so as to enhance firm value while minimizing bad publicity, reputational damage, and economic harm to the company. Rather than simply writing checks and outsourcing social activism efforts on a wide range of issues, corporations should thoughtfully focus their capital and expertise on efforts where they offer a comparative advantage, mindful that every social engagement could bring about goodwill but also animus against the business. For instance, internationally in order to protest company quietly paying exit packages to executives accused of misconduct).

332 See Mary-Hunter McDonnell & Brayden King, Keeping Up Appearances: Reputational Threat and Impression Management After Social Movement Boycotts, 58 ADMIN. SCI. Q. 387, 409-12 (2013) (discussing corporate reputational and economic harms that arise from social movement boycotts); Maheshwari, supra note 39 (“Companies face a seemingly daily challenge as they grapple with boycott-ready consumers on the left and right . . . .”).

333 See Hillary A. Sale, The New “Public” Corporation, 74 LAW & CONTEMP. PROBS. 137, 139-41 (2011) (broadening meaning of “public” in connection with corporate governance and social responsibility); Strine & Walter, supra note 5, at 339 (“For-profit corporations, in this view, are too powerful and have been accorded too many rights similar to those given to actual humans for them not to behave in a socially responsible manner that reflects the full range of concerns that actual humans consider important—concerns that go beyond a desire for lucre.”).

334 See, e.g., Davis & White, supra note 32, at 5-7 (advocating for internal corporate “playbook” to deal with social activism); McDonnell, King & Soule, supra note 329, at 654 (advocating for adoption of “social management devices: structures or practices meant to help a firm manage and promote its social image”); Servaes & Tamayo, supra note 313, at 1046 (finding links between firm value and certain corporate social activities).

UPS’s social efforts should leverage their expertise in delivery and logistics; Airbnb’s efforts should focus on housing; and Lyft’s efforts should focus on transportation. Furthermore, boards should also consider regular discussions of corporate social activism as part of the ordinary business agenda. These discussions should become a core aspect of modern corporate governance, as contemporary social activism is likely to become the new normal for business.

C. On Public Interest Lawyering

Contemporary corporate social activism could influence the future perception, population, and paths of public interest lawyering. It can help diversify the types of individuals that pursue public interest law, and expand the vocational paths that one classifies as public interest lawyering.336 In particular, contemporary corporate social activism can attract a wider, more diverse pool of law students and lawyers to work for corporations and corporate law firms as a means to help effectuate positive social change.

The legal profession frequently perpetuates a vocational dichotomy between working for the public interest or working for private gain.337 One can choose to work for the public interest by entering government service or the nonprofit world. Alternatively, one can choose to work for private gain by going to work for large law firms representing corporate clients or for the corporations themselves. Furthermore, the public interest path is seen by many as more noble and socially positive.338 Year after year, law students enter and exit law school making career decisions based on this dichotomy. While this dichotomy may contain a kernel of truth, it is largely false in light of many changing expectations, policies, and practices in the business world.339 This falsehood is more obvious now than ever given the rise of contemporary corporate social activism.

favoring collaborations with campaigns whose values are aligned with those of the firm’s core stakeholders.”); Michael E. Porter & Mark R. Kramer, Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility, HARV. BUS. REV., Dec. 2006, at 78, 80 (“Nestlé, for example, the world’s largest purveyor of bottled water, has become a major target in the global debate about access to fresh water . . . .”).


338 See Bainbridge, supra note 337, at 21.

339 See MACKEY & SISODIA, supra note 5, at 135 (“Conscious businesses and conscious nonprofits both create value for their stakeholders. The wall separating them needs to be taken down. We need both to create a prosperous and flourishing world.”).
Corporations have long remained among the most innovative and powerful engines of economic progress, and they are increasingly becoming vehicles for social progress. Not without their many and serious flaws, corporations operating in free markets, through the hard work and ingenuity of the people working for them, have fostered unparalleled wealth creation, economic growth, and technological innovation. Through jobs, goods, and services, corporations have directly created many economic benefits for society. With the rise of corporate social activism, corporations can also improve the public’s interest socially, whether by helping activists or acting as activists themselves to preserve core democratic values or push society to better reflect those values.

Given the rise of corporate social activism, public interest lawyering should mean more than working for the government or a nonprofit organization. The language and rules of social change are becoming more synonymous with the language and rules of business. Law students and lawyers interested in working for the public’s interests should also consider working at large corporate law firms and at large corporations because businesses are at the forefront of many of the leading social issues of our time, to say nothing of the direct economic benefits that they create for society, or the valuable pro bono contributions of

340 See 1 William Meade Fletcher, Fletcher Cyclopaedia of the Law of Private Corporations 43 (1917) ("[T]he limited liability corporation is the greatest single discovery of modern times." (quoting Nicholas Murray Butler, President, Colum. Univ., Address at the 143rd Annual Banquet of the Chamber of Commerce of the State of New York (Nov. 16, 1911))); John Micklethwait & Adrian Wooldridge, The Company: A Short History of a Revolutionary Idea, at xv (2003) ("[The corporation is] the basis of the prosperity of the West and the best hope for the future of the rest of the world."); Greenfield, supra note 171, at 314 ("[I]t is not an overstatement to say that corporate separateness has been one of the legal innovations most important to the development of national wealth.").

341 See Berle & Means, supra note 140, at 116 ("The concentration of economic power separate from ownership has, in fact, created economic empires, and has delivered these empires into the hands of a new form of absolutism, relegating ‘owners’ to the position of those who supply the means whereby the new princes may exercise their power."); Eugene F. Fama, Agency Problems and the Theory of the Firm, 88 J. Pol. Econ. 288, 288-89 (1980) (highlighting agency costs created by organization of corporate firm); Wells, supra note 3, at 139-40 ("[C]orporations create great wealth and opportunities, but often deliver them unevenly; they frequently use their power in ways that benefit shareholders and managers, but harm the rest of us.").

342 See, e.g., Mackey & Sisodia, supra note 5, at 11 ("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.").

343 Mackey & Sisodia, supra note 5, at 11 (describing economic benefits provided by corporations).
their lawyers. For instance, if you care about the environment, you should consider working at the Sierra Club or the Environmental Protection Agency, but you should also consider working on the sustainability efforts at Apple or Walmart, two large global corporations that are making huge commitments to sustainable energy.

Old perceptions of public interest lawyers must fade away in light of new realities, so that the public interest is served from every vantage point, and so that society is not deprived of some of the most promising law students and lawyers year after year. The problems of society that lawyers can directly help solve are too many and too large to be left only to the hardworking attorneys in government and the nonprofit sector. These are problems that require lawyers from the private sector as well as the public sector; those working for nonprofit clients, as well as those working for very profitable clients.

In light of these developments, this Article recommends that law schools and corporations work better together to promote a broader understanding of public interest lawyering. Law schools should promote business law courses like corporations, federal income tax, and partnership to a new generation of students interested in working in the public interest. Narrow understandings of so-called “business law” and “public interest” courses must be reimagined to better capture the new realities reflected in contemporary corporate social activism. Along the same lines, corporations should offer more opportunities in-house and at their outside law firms for law students to work on issues pertaining to their

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344 See Bainbridge, supra note 337, at 23 (“You want to help make society a better place? You want to eliminate poverty? Become a corporate lawyer. Help businesses grow, so that they can create jobs and provide goods and services that make people’s lives better.”); Scott L. Cummings, The Politics of Pro Bono, 52 UCLA L. Rev. 1, 36-39 (2004) (describing pro bono efforts of large law firms); Wells, supra note 3, at 139 (“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.”).

345 Environment, Apple, https://www.apple.com/environment/ [https://perma.cc/UA27-9623] (last visited Nov. 18, 2018) (“We strive to create products that are the best in the world and the best for the world. And we continue to make progress toward our environmental priorities.”); Sustainability, supra note 234 (listing Walmart’s environmental goals).


347 See Bliss, supra note 337, at 2029-32 (proposing changes to law school curriculums to assist students in exploring their vocational options), Greenfield & Smith, supra note 279, at 951-53 (arguing for broader view of corporate form that captures their significant public benefits).

348 See Kent Greenfield, There’s a Forest in Those Trees: Teaching About the Role of Corporations in Society, 34 GA. L. Rev. 1011, 1011-13 (2000) (arguing for more expansive view of corporate law that better captures social impact of corporations); WEBER SHANDWICK, supra note 335, at 10 (finding that millennials are inclined to favor corporate social activism).
social responsibility and activism efforts. This type of bilateral promotion between law schools and businesses can greatly expand the talent pool interested in public interest work and business law, and can help lawyers and law students reorient their careers towards more meaningful vocational paths.

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The rise of contemporary corporate social activism, for better or worse, will impact many aspects of law, business, and society in large and small ways. Particular attention should be paid to its implications on corporate purpose, corporate governance, and public interest lawyering, as corporate stakeholders, social activists, lawyers, and policymakers thoughtfully respond to the corporate and social changes unfolding around them.

CONCLUSION

The emergence and evolution of contemporary corporate social activism is one of the most consequential developments for businesses, law, and society, and will remain so for years to come. The conflicts and collaborations between and amongst businesses and activists will present some of the most fruitful opportunities and dangerous obstacles for meaningful social progress in our time. Every business executive, social activist, public official, and ordinary citizen will be directly or indirectly affected by contemporary corporate social activism in the near future.

This Article provides the first comprehensive legal study of this new corporate social activism. It examines why corporations are engaged in social activism today, explores the legal and policy root causes that have fueled this development, highlights potential promises and perils, and offers pragmatic next steps for law, business, and society. While cautiously optimistic about the long term prospects of contemporary corporate social activism, this Article appreciates the potential corrosive effects that such activism can have on our politics, our markets, and our society. Throughout its analysis, this Article is mindful that corporations are not selfless entities that cause no social harm, but it also recognizes that corporate power, expertise, and resources can help lighten the heavy burdens confronting society. Many of the social challenges of our time are simply too important, too large, and too complex to be left to governments and nonprofits to face alone. Businesses have played, and can continue to play, an important role in helping to confront these challenges, consistent with the law and their profit-seeking objectives. In the end, this Article aspires to provide an early, hopeful, and workable framework for thinking about, speaking about, and acting on the new corporate social activism and its role in changing our businesses, our laws, and our communities.

349 See, e.g., Jessica Silver-Greenberg & Ben Protess, Gun Control Groups Find a Wealthy Ally in Big Law, N.Y. TIMES, Dec. 11, 2016, at BU1 (reporting on coalition consisting of top corporate law firms focused on issue of gun control).