
INCORPORATING SOCIAL ACTIVISM

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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.

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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.¹ 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.²

This Article is about the ongoing fight for social change, and a new powerful player in that fight: the American corporation.³ 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,

¹ In recent years, these struggles for social change have resulted in several landmark Supreme Court decisions. *See, e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018) (holding that President has wide discretion over entry of aliens into United States); *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083, 1083 (2016) (affirming certain collective bargaining practices of unions); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (legalizing same-sex marriage); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (recognizing protections of religious liberties for closely-held corporations); *Michigan v. EPA*, 135 S. Ct. 702, 702 (2014) (requiring government to consider costs in exercising its powers under Clean Air Act); *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1638 (2014) (upholding state ban on affirmative action); *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (limiting federal enforcement powers under Voting Rights Act of 1965).

² *See, e.g.*, LAWRENCE B. GLICKMAN, *BUYING POWER: A HISTORY OF CONSUMER ACTIVISM IN AMERICA* 203 (2009) (studying how “Americans used their pocketbooks to achieve their social and political goals”); Sarah C. Haan, *The CEO and the Hydraulics of Campaign Finance Deregulation*, 109 NW. U. L. REV. 269, 269 (2015) (“Voters increasingly view their consumer activities, not their campaign contributions, as the most meaningful way to participate in politics.”); Carissa J. Morgan, Candace C. Croney & Nicole J. Olynk Widmar, *Exploring Relationships Between Ethical Consumption, Lifestyle Choices, and Social Responsibility*, 6 ADVANCES IN APPLIED SOC. 199, 200 (2016) (describing how consumers and corporations consider “a wide array of ethical concerns [and] values” in their decisions).

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.

⁵ See TAYLOR BRANCH, PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963-65, at 80-81, 90 (1999) (describing pressure Civil Rights Movement placed on businesses, and response from businesses and government); FRANK H. EASTERBROOK & DANIEL R. FISCHER, THE ECONOMIC STRUCTURE OF CORPORATE LAW 10 (1991) (characterizing “firm as an extra-market, team method of production” and corporations as “subset of firms”); ALICE KORNGOLD, LEVERAGING GOOD WILL: STRENGTHENING NONPROFITS BY ENGAGING BUSINESSES 15-19 (2005) (arguing that nonprofit governance and organization may benefit from leveraging business talent); JOHN MACKEY & RAJ SISODIA, CONSCIOUS CAPITALISM 8 (2014) (proposing “to inspire the creation of more conscious businesses: businesses galvanized by higher purposes that serve and align the interests of all their major stakeholders”); TODD S. PURDUM, AN IDEA WHOSE TIME HAS COME: TWO PRESIDENTS, TWO PARTIES, AND THE BATTLE FOR THE CIVIL RIGHTS ACT OF 1964, at 79 (2014) (noting “‘vast change’ that had occurred since the nineteenth century in the nature of business organization”); Kenneth T. Andrews & Michael Biggs, *The Dynamics of Protest Diffusion: Movement Organizations, Social Networks, and News Media in the 1960 Sit-Ins*, 71 AM. SOC. REV. 752, 753-54 (2006) (describing role that movement organizations, social networks, and newspaper coverage had on sit-ins in South during early 1960); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 550 (2003) (“[D]irector primacy treats the corporation as a vehicle by which the board of directors hires various factors of production.”); Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 97-111 (2010) (discussing choices available to lawmakers in regulating corporate speech to protect shareholder interests); A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1067-68 (1931) (showcasing equitable limitations on managerial power in corporations); Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1679 (2015) (discussing when constitutional protections are applicable to corporations); Aaron K. Chatterji & Barak D. Richman, *Understanding the “Corporate” in Corporate Social Responsibility*, 2 HARV. L. & POL’Y REV. 33, 34 (2008) (arguing that some progressives do not fully understand corporate decision-making in advancing progressive causes); Janie A. Chuang, *Giving as Governance? Philanthrocapitalism and Modern-Day Slavery Abolitionism*, 62 UCLA L. REV. 1516, 1518 (2015) (discussing rise of philanthrocapitalism in addressing antitrafficking policymaking); Melissa J. Durkee, *Astroturf Activism*, 69 STAN. L. REV. 201, 229-32 (2017) (tracing role of corporations in using “front-groups” to engage in corporate activism); Justin Fox & Jay W. Lorsch, *What Good Are Shareholders?*, HARV. BUS. REV., July-Aug. 2012, at 48 (noting difficulties that persist in short-term shareholders exerting influence over corporate management); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 546-48 (2000) (illuminating effects of private actors on administrative law); Marcel Kahan & Edward B. Rock, *When the Government Is the Controlling Shareholder*, 89 TEX. L. REV. 1293, 1301-07 (2011)

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 Majory 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.

(discussing role and implication of federal government as majority shareholder of public companies); Joseph Luders, *The Economics of Movement Success: Business Responses to Civil Rights Mobilization*, 111 AM. J. SOC. 963, 965-70 (2006) (highlighting role of disruption costs in social movements); Mary-Hunter McDonnell, *Radical Repertoires: The Incidence and Impact of Corporate-Sponsored Social Activism*, 27 ORG. SCI. 53, 55 (2016) (arguing that “repertoire of overt corporate-sponsored activism is inherently riskier than evasive, diversionary, or covert tactics”); Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV. 639, 640, 669 (2016) (observing dynamic and interplay between federal corporate rights and state corporate law); Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335, 377 (2015) (discussing corporate governance implications in wake of *Citizens United*).

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

⁶ See DAVID CHANDLER, STRATEGIC CORPORATE SOCIAL RESPONSIBILITY: SUSTAINABLE VALUE CREATION 9 (2016).

change at various periods in American history.⁷ Seminal episodes from the Civil Rights Movement of the 1960s highlight these various corporate roles.⁸

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.⁹ 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.¹⁰ 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.¹¹ 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.¹²

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”).¹³ Many businesses in the South desegregated on their own

⁷ See, e.g., MARK PRENDERGRAST, *FOR GOD, COUNTRY AND COCA-COLA: THE UNAUTHORIZED HISTORY OF THE WORLD’S MOST POPULAR SOFT DRINK* 280-87 (2000) (discussing evolving positions of Coca-Cola during Civil Rights Movement); Luders, *supra* note 5, at 965-70 (studying varying relationships between business interests and civil rights activists).

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).

⁹ See, e.g., Andrews & Biggs, *supra* note 5, at 753-54 (highlighting growth of sit-ins throughout North Carolina in 1960); Aldon Morris, *Black Southern Student Sit-in Movement: An Analysis of Internal Organization*, 46 AM. SOC. REV. 744, 745 (1981) (noting that sit-in movement of 1960 grew through pre-existing institutions and relationships).

¹⁰ See WILLIAM H. CHAFE, *CIVILITIES AND CIVIL RIGHTS: GREENSBORO, NORTH CAROLINA, AND THE BLACK STRUGGLE FOR FREEDOM* 71-79 (1980) (explaining historical significance of Greensboro sit-in). See generally MILES WOLFF, *LUNCH AT THE FIVE AND TEN* (1970) (offering detailed account of Greensboro sit-in and its legacy).

¹¹ See CHAFE, *supra* note 10, at 117-20.

¹² See PURDUM, *supra* note 5, at 79 (discussing widespread discrimination experienced by African Americans in marketplace during 1960s).

¹³ See Herbert H. Haines, *Black Radicalization and the Funding of Civil Rights: 1957-1970*, 32 SOC. PROBS. 31, 39-40 (1984) (highlighting growth in corporate donations to National Urban League and NAACP during Civil Rights Movement); Jim Burrell, *The Time*

in opposition to historical custom, accepting African American employees and customers before it was widely accepted.¹⁴ For instance, businesses in Charlotte and Dallas desegregated their facilities while many public facilities remained segregated in those cities.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 1968.¹⁶ Major corporations like Avon, McDonald's, and Xerox led the way in integrating African Americans into their hiring practices, marketing plans, and investment initiatives.¹⁷ Smaller Black-owned businesses and their executives also played a significant role alongside social activists during this period.¹⁸

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

Coca-Cola Got White Elites in Atlanta to Honor Martin Luther King, Jr., NPR (Apr. 4, 2015, 9:12 AM), <http://www.npr.org/sections/codeswitch/2015/04/04/397391510/when-corporations-take-the-lead-on-social-change> [<https://perma.cc/RCH7-DM4R>] (celebrating role of Coca-Cola in ensuring Atlanta's elite honored Martin Luther King for his Nobel Prize).

¹⁴ See James Surowiecki, *Unlikely Alliances: When North Carolina's Legislators Tried to Limit L.G.B.T. Rights, Big Business Was Their Toughest Opponent*, NEW YORKER (Apr. 25, 2016), <http://www.newyorker.com/magazine/2016/04/25/the-corporate-fight-for-social-justice> (discussing history of corporations engaged in social activism from 1960 to present-day).

¹⁵ See *id.*

¹⁶ See TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63, at 32-33, 395 (1989) (highlighting role of corporations in passage of Civil Rights Act); CLAY RISEN, THE BILL OF THE CENTURY: THE EPIC BATTLE FOR THE CIVIL RIGHTS ACT 63-73, 247 (2014) (highlighting political battle to pass Civil Rights Act and role of Southern businesses in demanding end to Jim Crow era); JULIAN E. ZELIZER, THE FIERCE URGENCY OF NOW: LYNDON JOHNSON, CONGRESS, AND THE BATTLE FOR THE GREAT SOCIETY 295-97 (2015) (discussing role of King's assassination in Congress passing Civil Rights Act).

¹⁷ Lindsey Feitz, *Creating a Multicultural Soul: Avon, Corporate Social Responsibility, and Race in the 1970s*, in THE BUSINESS OF BLACK POWER: COMMUNITY DEVELOPMENT, CAPITALISM, AND CORPORATE RESPONSIBILITY IN POSTWAR AMERICA 116, 116-17 (Laura Warren Hill & Julia Rabig eds., 2012) (highlighting growth of corporate social responsibility programs during Civil Rights era).

¹⁸ See, e.g., BRANCH, *supra* note 5, at 80-81, 90; CAROL JENKINS & ELIZABETH GARNER HINES, BLACK TITAN: A.G. GASTON AND THE MAKING OF A BLACK AMERICAN MILLIONAIRE 176-80 (2005) (highlighting role of Black business "dealmakers" who advanced demands for incremental change throughout 1960s).

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

²⁰ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000a (2000)) (providing for injunctive relief to address acts of discrimination in places of public accommodation).

law.²¹ Notably in *Heart of Atlanta Motel v. United States*,²² the Heart of Atlanta Motel brazenly defied the law by refusing to rent rooms to Black customers.²³ 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.²⁴ 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.²⁵ 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.²⁶

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.²⁷ At times, some businesses helped to entrench the status quo, like during the Jim Crow era.²⁸ At other times, some businesses were on the vanguard of change, like when they integrated or voluntarily offered benefits to gay

²¹ See, e.g., TAYLOR BRANCH, *AT CANAAN'S EDGE: AMERICA IN THE KING YEARS, 1965-68*, at 231-32 (2007) (discussing holdout businesses that refused to integrate after passage of Civil Rights Act of 1964); Luders, *supra* note 5, at 977-81 (highlighting businesses that were indifferent to civil rights activism).

²² 379 U.S. 241 (1964).

²³ *Id.* at 243-45 (discussing refusal of motel to rent rooms to Black customers).

²⁴ *Id.* at 243-44 (listing appellant's constitutional challenges to Civil Rights Act of 1964).

²⁵ *Id.* at 261 ("[T]he action of the Congress in the adoption of the Act as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause . . .").

²⁶ See, e.g., BRANCH, *supra* note 21, at 442 (discussing discriminatory practices in banking during 1960s); RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 116-30 (2017) (discussing discriminatory practices in housing during 1960s).

²⁷ See, e.g., CHRISTIAN G. APPY, *AMERICAN RECKONING: THE VIETNAM WAR AND OUR NATIONAL IDENTITY* 111-17, 136 (2016) (highlighting role of corporations in anti-war campaigns); DOROTHY SUE COBBLE, *THE OTHER WOMEN'S MOVEMENT: WORKPLACE JUSTICE AND SOCIAL RIGHTS IN MODERN AMERICA* 3-10 (2005) (discussing contribution of labor feminism to progressive organizations, including corporations, during Women's Rights Movement); LILLIAN FADERMAN, *THE GAY REVOLUTION: THE STORY OF THE STRUGGLE* 124, 564-80 (2016) (discussing passage and role of corporations and activists in advocating for and against federal workplace protections for lesbian, gay, bisexual, and transgender ("LGBT") employees); MIRIAM PAWEL, *THE UNION OF THEIR DREAMS: POWER, HOPE, AND STRUGGLE IN CESAR CHAVEZ'S FARM WORKER MOVEMENT* 265-66 (2010) (highlighting role of corporations in salary increases for farm workers during 1970s Farm Workers' Movement).

²⁸ JERROLD M. PACKARD, *AMERICAN NIGHTMARE: THE HISTORY OF JIM CROW* 164-71 (2013) (discussing role of corporations in perpetuating customary restrictions, as opposed to statutory restrictions, during Jim Crow era).

employees in advance of legal mandates requiring them to do so.²⁹ And still, at times, some businesses served as passive characters reluctantly thrust into the history books.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.³¹ At the same time, the ascent of new information technology has also reshaped expectations about corporate social behavior.³²

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

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).

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).

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 Trump’s Limelight*, N.Y. TIMES, Feb. 2, 2017, at B1 (describing power of decentralized social networks in advancing popular movements).

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).

³³ See MONICA ANDERSON ET AL., ACTIVISM IN THE SOCIAL MEDIA AGE 5-10 (2018), http://assets.pewresearch.org/wp-content/uploads/sites/14/2018/07/11095520/PI_2018.07.11_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

2016/11/the-power-of-live-streaming-in-america/ (reviewing social media's role in covering police shootings and shaping social activism).

³⁴ See DEVIN D. THORPE, *CROWDFUNDING FOR SOCIAL GOOD: FINANCING YOUR MARK ON THE WORLD* 3-6 (2013) (describing social entrepreneurship, crowdfunding, and connection between them); Tom C.W. Lin, *Infinite Financial Intermediation*, 50 WAKE FOREST L. REV. 643, 652-54 (2015) (describing various new forms of financial technology).

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-twitters-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.⁴⁰ 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.⁴¹ 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.⁴² Silence and indifference are becoming less and less the norm.⁴³ The days of simply ignoring social issues or writing a check are gone for many large businesses.⁴⁴ Corporations are now frequently expected to engage in social issues through public statements, sponsorships, partnerships, and policies supporting a position or a cause.⁴⁵

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).

⁴⁶ See Brief for *Amici Curiae* Apple, IBM Corp., Microsoft and 50 Other Companies in Support of Respondent, Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S. Ct. 1239 (2017) (No. 16-273) (presenting example of businesses speaking out against transgender discrimination); WEBER SHANDWICK, EMPLOYEES RISING: SEIZING THE OPPORTUNITY IN EMPLOYEE ACTIVISM 8-9 (2017), <https://www.webershandwick.com/uploads/news/files/employees-rising-seizing-the-opportunity-in-employee-activism.pdf> [<https://perma.cc/PBY7-8ZCZ>] (demonstrating corporate social responsibility is important factor in employees’ support of their employer); Dirk Matten & Andrew Crane, *Corporate Citizenship: Toward an Extended Theoretical Conceptualization*, 30 ACAD. MGMT. REV. 166, 172 (2005) (“[C]orporations . . . could be said to have provided an additional conduit . . . through which citizens could exercise their political rights.”); McDonnell, *supra* note 5, at 53-55 (describing social activists increasingly targeting corporations directly for social change); David Gelles, *Executive Powers*, N.Y. TIMES, Aug. 20, 2017, at BU1 (stating that chief executives face many pressures to speak in support of social causes, including “employees who expect or encourage their company to stake out positions on numerous controversial social or economic causes, and from board members concerned with reputational issues”); Brian Fung, *Watch AT&T’s CEO Give a Forceful Defense of Black Lives Matter*, WASH. POST (Sept. 30, 2016), https://www.washingtonpost.com/news/the-switch/wp/2016/09/30/watch-atts-ceo-give-a-forceful-defense-of-black-lives-matter/?utm_term=.8bd91473c0dd (presenting example of chief executive speaking about personal concern with racially charged violence); Jon Mertz, *A New Era of Corporate Social Leader Activism*, THIN DIFFERENCE (Oct. 6, 2016), <https://www.thindifference.com/2016/10/new-era-corporate-social-leader-activism/> [<https://perma.cc/63R2-N5U2>] (calling for increased corporate social activism in light of political leaders failing to be social leaders).

⁴⁷ Public Facilities Privacy & Security Act, 2016 N.C. Sess. Laws 12, *repealed by* Act to Reset S.L. 2016-3, 2017 N.C. Sess. Laws 81 (requiring local boards of education and public agencies to require multiple occupancy bathrooms “to be designated for and only used by persons based on their biological sex”).

⁴⁸ *Id.*

values.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.”⁵⁰ Opponents of the law saw HB2 as state-sanctioned discrimination against the lesbian, gay, bisexual, and transgender (“LGBT”) community.⁵¹

Shortly after HB2 became law, opposition to it was swift and strong.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.⁵³ Many celebrities, including Bruce Springsteen and Ringo Starr, canceled events in North Carolina in protest.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.⁵⁵ Prominent businesses, like Apple, Bank of America, Facebook, General

⁴⁹ David Phillips, *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 . . .”).

⁵⁰ Richard Fausset & Alan Blinder, *Bias Law Deepens Rifts in North Carolina*, N.Y. TIMES, Apr. 12, 2016, at A12.

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.”).

⁵² Elena Schneider, *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.”).

⁵³ See, e.g., Christopher Mele, *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).

⁵⁴ Mele, *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.”).

⁵⁵ Press Release, Nat’l Basketball Ass’n, NBA Statement Regarding 2017 NBA All-Star Game (July 21, 2016), <http://www.nba.com/2016/news/07/21/nba-statement-all-star-game-relocation-from-charlotte/> [<https://perma.cc/64Y8-ZXGL>] (announcing NBA would be relocating All-Star game in response to North Carolina passing anti-LGBT legislation); Press Release, Nat’l Collegiate Athletic Ass’n, NCAA to Relocate Championships from North

Electric, Google, Lyft, Merck, and Starbucks, also joined the effort by publicly opposing HB2.⁵⁶ 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."⁵⁷ These businesses also lobbied and pressured legislators.⁵⁸ PayPal, for instance, said it would scrap plans for a major operations development in North Carolina.⁵⁹ Similarly, Deutsche Bank, the investment bank, froze all hiring in North Carolina.⁶⁰ 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.⁶¹ In the face of this activism, Pat McCrory was narrowly voted out of office in November 2016,⁶² and in March 2017 North Carolina's new governor, Roy Cooper, signed into law an act that partially repealed HB2.⁶³

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-3HXM>] ("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.").

⁵⁶ See, e.g., Letter from Business Leaders to Pat McCrory, Governor of N.C., http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/NC_CEO_Letter_%283%29.pdf [<https://perma.cc/497L-MGVC>] (last visited Sept. 20, 2018); Reuters, *North Carolina Business Leaders Join the Call to Repeal Transgender Bathroom Law*, FORTUNE (Apr. 20, 2016), <http://fortune.com/2016/04/20/north-carolina-business-bathroom-law/> [<https://perma.cc/UL3G-WPHZ>] ("More than 160 business leaders have signed on to a letter coordinated by the Human Rights Campaign and Equality NC asking McCrory to repeal the law known as HB2.").

⁵⁷ Letter from Business Leaders to Pat McCrory, *supra* note 56.

⁵⁸ See, e.g., Reuters, *supra* note 56 (highlighting business cofounder's plans to "call the governor daily to lobby for the law's repeal").

⁵⁹ Fausset & Blinder, *supra* note 50.

⁶⁰ 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.").

⁶¹ Emery P. Dalesio, *Price Tag of North Carolina's LGBT Law: \$3.76B*, AP NEWS (Mar. 27, 2017), <https://apnews.com/fa4528580f3e4a01bb68bcb272f1f0f8/ap-exclusive-bathroom-bill-cost-north-carolina-376b> [<https://perma.cc/6MCE-WUGR>].

⁶² 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).

⁶³ See Act to Reset S.L. 2016-3, 2017 N.C. Sess. Laws 81; Craig Jarvis & Colin Campbell, *HB2 Off the Books as Gov. Roy Cooper Signs Compromise into Law*, CHARLOTTE OBSERVER (Mar. 30, 2017, 4:17 PM), <http://www.charlotteobserver.com/news/politics-government/article141658044.html> [<https://perma.cc/LQ6W-FSS8>] ("The General Assembly on Thursday approved a compromise bill that repeals House Bill 2 but restricts anti-

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.").

⁶⁵ Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (limiting number of refugees allowed to enter United States in 2017 to fifty thousand people).

⁶⁶ *Id.*

⁶⁷ Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) (revoking and replacing Exec. Order No. 13,769); Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017) (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.⁷¹ Online boycott campaigns targeted Trump-branded products and affiliated retailers.⁷² 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.⁷³ 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 2016.⁷⁴ Thousands gathered at airports around the country to protest and assist those who were detained because of the Order.⁷⁵ Major corporations and their leaders lent their voices and resources to help social activists working against the ban.⁷⁶

temporary injunction blocking the deportation of all people stranded in U.S. airports under President Trump’s new Muslim 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/839657243888996354> [https://perma.cc/YHB2-H2JD] (“#NoBanNoWall #ImmigrantsWelcome #RefugeesWelcome #NoMuslimBan @realDonaldTrump, take note.”).

⁷² See, e.g., Rachel Abrams, *The Anti-Trump Activist Taking On Retailers*, N.Y. TIMES, Feb. 26, 2017, at BU1 (“I attribute [the spike in Trump-related complaints to Nordstrom] directly to the Muslim ban,” Ms. Coulter said.”); GRAB YOUR WALLET, <https://grabyourwallet.org/> [https://perma.cc/WZD5-QCC5] (last visited Nov. 18, 2018) (listing Trump-affiliated companies in Excel spreadsheet).

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).

⁷⁴ Alia E. Dastagir, *Outrage over Trump’s Immigrant Ban Helps ACLU Raise More Money Online in One Weekend Than in All of 2016*, USA TODAY, <https://www.usatoday.com/story/news/nation/2017/01/29/aclu-fundraising-records-muslim-immigrant-ban/97218098/> [https://perma.cc/ER5V-HLS5] (last updated Jan. 30, 2017, 3:43 PM) (noting ACLU raised almost six times its average annual online funds in two-day span).

⁷⁵ See, e.g., James Doubek, *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/2017/01/29/512250469/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”).

⁷⁶ See, e.g., Tony Connelly, *Nike’s Mark Parker Condemns Trump’s Muslim Travel Ban in Staff Email Rallying Support for Sir Mo Farah*, THE DRUM (Jan. 30, 2017, 9:31 AM), <https://www.thedrum.com/news/2017/01/30/nikes-mark-parker-condemns-trumps-muslim-travel-ban-staff-email-rallying-support-sir> [https://perma.cc/Z6LR-YY9P] (providing that Nike CEO’s internal email stated travel ban threatened Nike’s “values of celebrating diversity”); Vanessa Fuhrmans, *A Watershed Moment in CEO Activism*, WALL STREET J. (Apr. 4, 2017, 9:00 AM), <https://www.wsj.com/articles/a-watershed-moment-in-ceo-activism-1491310803?tesla=y> (“‘There’s been nothing like this travel ban that has created such a furor before’ among companies”); T.C. Sottek, *Netflix CEO: ‘Trump’s Actions Are So Un-*

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

American It Pains Us All, VERGE (Jan. 28, 2017, 5:14 PM), <https://www.theverge.com/2017/1/28/14426536/netflix-reed-hastings-trump-immigration-executive-order> [<https://perma.cc/LK57-WX5Y>] (quoting Netflix CEO as claiming “Trump’s actions are hurting Netflix employees around the world” and “mak[ing] America less safe”).

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 . . .”).

⁸⁰ *Trump v. Hawaii*, 138 S. Ct. 2392, 2415 (2018) (holding that President had statutory authority to issue travel ban).

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 Uproar*, 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.’”).

⁹¹ Memorandum from Janet Napolitano, Sec’y, Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs., John Morton, Dir., U.S. Immigration & Customs Enf’t (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/C8C3-VKM5>] (opining that “these individuals lacked the intent to violate the law”).

⁹² Shear & Hirschfeld Davis, *supra* note 90 (noting that some DACA-qualified individuals 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®ion=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)).

⁹⁴ Letter from Leaders of American Indus., to Paul Ryan, Speaker, U.S. House of Representatives, Nancy Pelosi, Minority Leader, U.S. House of Representatives, Mitch McConnell, Majority Leader, U.S. Senate, Charles E. Schumer, Minority Leader, U.S. Senate (Sept. 20, 2017), <https://www.businessleadersdreamletter.com/> [<https://perma.cc/MG9F-D7ZW>] (“Congressional action and a permanent legislative solution is the only path forward to prevent these devastating consequences.”); Tony Romm, *Apple, Facebook, Google and Scores of Businesses Are Imploring President Trump to Protect the Dreamers*, RECODE (Aug. 31, 2017, 11:31 PM), <https://www.recode.net/2017/8/31/16237074/apple-facebook-google-president-trump-protect-dreamers-daca> [<https://perma.cc/923U-Z698>] (describing businesses’ efforts to pressure President Trump into keeping DACA prior to policy change).

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. Kovalski & 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

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").

¹⁰³ Emily Witt, *How the Survivors of Parkland Began the Never Again Movement*, NEW YORKER (Feb. 19, 2018), <https://www.newyorker.com/news/news-desk/how-the-survivors-of-parkland-began-the-never-again-movement> (describing how movement came together within only four days of Parkland shooting).

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.¹⁰⁵ The Washington, D.C. rally drew hundreds of thousands of people and received global media coverage.¹⁰⁶

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.¹⁰⁷ Dick's also required gun buyers at its stores to be at least twenty-one years old.¹⁰⁸ 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.¹⁰⁹ 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.¹¹⁰ 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.¹¹¹ 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.¹¹² 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

¹⁰⁵ Michael Shear, *With Passion and Fury, Students March on Guns*, N.Y. TIMES, Mar. 25, 2018, at A1 ("Aerial video captured seas of people—in front of Trump International Hotel in New York; in a central square in Tokyo; along the streets of Boston; at a rally in downtown Fort Worth, Tex.; and crammed into a park less than a mile from Stoneman Douglas High."); MARCH FOR OUR LIVES, <https://marchforourlives.com/> [<https://perma.cc/H6SY-A2YQ>] (last visited Sept. 13, 2018) (displaying photos and video footage from march).

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.

¹⁰⁷ Julie Creswell & Michael Corkery, *Walmart and Dick's Sporting Goods Tighten Rules on the Guns They Sell*, N.Y. TIMES, Mar. 1, 2018, at A16.

¹⁰⁸ *Id.*

¹⁰⁹ *Walmart Statement on Firearms Policy*, WALMART, <https://news.walmart.com/2018/02/28/walmart-statement-on-firearms-policy> [<https://perma.cc/G93K-BD28>] (last visited Nov. 18, 2018) (outlining Walmart's new corporate policies on selling firearms).

¹¹⁰ Tiffany Hsu, *Where Others Fear to Tread, Bank Imposes Gun Measures*, N.Y. TIMES, Mar. 23, 2018, at B1.

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.¹¹³ 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.¹¹⁴ 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.¹¹⁵

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

¹¹³ See *BlackRock’s Approach to Companies that Manufacture and Distribute Civilian Firearms*, BLACKROCK (Mar. 2, 2018), <https://www.blackrock.com/corporate/newsroom/press-releases/article/corporate-one/press-releases/blackrock-approach-to-companies-manufacturing-distributing-firearms> [https://perma.cc/AVF6-4327] (announcing BlackRock’s commitment to addressing issue of firearms companies in index portfolios); Sabrina Willmer & Polly Mosendz, *BlackRock Plans to Exclude Gun Makers, Sellers from Some Funds*, BLOOMBERG (Apr. 5, 2018, 12:34 PM), <https://www.bloomberg.com/news/articles/2018-04-05/blackrock-to-offer-new-etfs-excluding-investments-in-gun-makers> (“BlackRock Inc., the world’s largest asset manager, plans to start two exchange-traded funds that will exclude civilian firearm makers and large sellers . . . [I]t opened discussions with gun makers and retailers to engage them on the steps they are taking to support the safe and responsible use of weapons.”).

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-cut-ties-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).

¹¹⁵ Amber Phillips, *Hey, Marchers, Here’s What Congress Just Did on Guns—and What It Probably Won’t Do Anytime Soon*, WASH. POST: THE FIX (Mar. 23, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/03/23/hey-marchers-heres-what-congress-just-did-on-guns-and-what-it-probably-wont-do-anytime-soon/?utm_term=.c0d55671f12b (highlighting bipartisan efforts for greater gun regulation, in response to “a simmering sense in this country that much more needs to be done”).

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.¹¹⁶ 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

¹¹⁶ See MARTHA MINOW, PARTNERS NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD 6 (2003) (noting that, across public-private spectrum, "[s]o many activities cross the conventional boundaries that the boundaries themselves start to shift and blur"); ERIC W. ORTS, BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM 109-11 (2013) (describing public/private distinction in law); Freeman, *supra* note 5, at 546-48 (challenging "fundamental public/private distinction in administrative law").

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.").

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

¹¹⁸ Abraham Lincoln, Fragment On Government, in 1 ABRAHAM LINCOLN: COMPLETE WORKS, COMPRISING HIS SPEECHES, LETTERS, STATE PAPERS, AND MISCELLANEOUS WRITINGS 180, 180 (John G. Nicolay & John Hay eds., 1894).

¹¹⁹ See, e.g., CHRISTOPHER MCMAHON, PUBLIC CAPITALISM: THE POLITICAL AUTHORITY OF CORPORATE EXECUTIVES 1-3 (2012) (discussing social powers of corporations and their executives); Richard A. Epstein, *Executive Power in Political and Corporate Contexts*, 12 U. PA. J. CONST. L. 277, 281 (2010) (“It is a commonplace observation that there is much overlap between public and private systems of governance.”).

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.¹²⁴ BlackRock, the world's largest asset manager, oversees a \$6.28 trillion portfolio that rivals the total currency reserves of China and Japan combined.¹²⁵ 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."¹²⁶ Facebook and other major technology companies oversee communities that number in the billions, rendering them nation-like in their population, power, and influence.¹²⁷ This public-private convergence has become so pronounced that the President of the United States is often considered the CEO of the country.¹²⁸ 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.¹²⁹

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.¹³⁰ 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.").

¹²⁴ 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).

¹²⁵ 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).

¹²⁶ See ROTHKOPF, *supra* note 120, at 310; see also *Company Facts*, WALMART, <http://corporate.walmart.com/newsroom/company-facts> [<https://perma.cc/X5U7-QWQQ>] (last visited Nov. 18, 2018) ("Walmart employs 2.2 million associates around the world.").

¹²⁷ See Chander, *supra* note 117, at 1817-23 (examining how Facebook is like nation-state).

¹²⁸ 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).

¹²⁹ 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).

¹³⁰ See Kahan & Rock, *supra* note 5, at 1301-07 (highlighting federal government's participation in private money and securities markets); Jon D. Michaels, *Sovereigns, Shopkeepers, and the Separation of Powers*, 166 U. PA. L. REV. 861, 862 (2018) ("Federal,

government acquired controlling interests in some of the country's largest and most influential corporations, like AIG, Citigroup, and General Motors.¹³¹ In addition to direct ownership stakes in private businesses, the government has also exercised more oversight of individual companies and business practices. For instance, in 2009, exercising its prerogative as majority shareholder, the government fired General Motors's CEO, Rick Wagoner.¹³² More recently, Congress directly examined the pricing policies of the allergy medicine EpiPen and United Airlines's treatment of a single passenger.¹³³

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.¹³⁴ 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

state, and municipal governments are pervasive and increasingly relentless market participants. They run businesses, operate banks, own companies, license intellectual property, trade in private securities, and buy and sell goods and services for themselves and for their beneficiary communities . . ."); J.W. Verret, *Treasury Inc.: How the Bailout Reshapes Corporate Theory and Practice*, 27 YALE J. ON REG. 283, 293 (2010) ("[T]he government's ownership of private businesses is not without precedent.").

¹³¹ See Nick Bunkley, *G.M. Repays U.S. Loan, While Chrysler Posts Improved Quarterly Results*, N.Y. TIMES, Apr. 22, 2010, at B3 (highlighting GM's repayment of government funds loaned during its bankruptcy in 2009); Jeff Zeleny & Eric Dash, *Citigroup Nears Deal to Return Billions in Bailout Funds*, N.Y. TIMES, Dec. 14, 2009, at A1 (detailing repayment of funds to government by large banking institutions after 2008 bailouts); *Bailout Recipients*, PRO PUBLICA, <http://projects.propublica.org/bailout/list> [<https://perma.cc/RX6T-LHBZ>] (last updated Oct. 17, 2018) (cataloguing significant bailout recipients).

¹³² Sheryl Gay Stolberg & Bill Vlasic, *President Gives a Short Lifeline to Carmakers*, N.Y. TIMES, Mar. 30, 2009, at A1 (describing changes President Obama demanded of General Motors and Chrysler in order to receive government bailout).

¹³³ Katie Thomas, *Mylan to Pay \$465 Million in EpiPen Overpricing Case*, N.Y. TIMES, Oct. 8, 2016, at B1 (reporting settlement reached between Mylan, maker of EpiPen, and Justice Department in overcharging scandal); Maya Rao, *Senators Including Amy Klobuchar, Al Franken Push United for Answers*, STAR TRIBUNE (Apr. 13, 2017, 5:35 AM), <http://www.startribune.com/senators-including-klobuchar-franken-push-united-for-answers/419331764/> [<https://perma.cc/87CY-G4W6>] (summarizing federal investigation into United Airlines's forced removal of passenger in 2017 overbooking incident).

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").

effective.¹³⁵ 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.¹³⁶ 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.¹³⁷ 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.¹³⁸ According to Dodd, an unreasonably narrow focus on shareholder interests would stifle corporate efforts to act for social welfare in addition to profit.¹³⁹ 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

¹³⁵ See DAVID CALLAHAN, *THE GIVERS: WEALTH POWER, AND PHILANTHROPY IN A NEW GILDED AGE* 28-29 (2017) (explaining how reductions in government spending in recent years enhanced role of philanthropies and nonprofits in society); THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM*, at x-xiv (2012) (discussing dysfunctional state of contemporary politics in Washington, D.C.).

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

¹⁴⁰ See Wells, *supra* note 3, at 96. In fact, when Berle published his landmark book, *The Modern Corporation and Private Property*, with Gardiner Means in 1932, it explicitly discussed the themes of Dodd's article about corporate responsibility and expert managerial independence. See ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 312-13 (1932) (discussing New York Stock Exchange policies aimed at maintaining transparency and managerial disinterest).

¹⁴¹ Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 *CORNELL L. REV.* 856, 902-03 (1997) (reviewing *PROGRESSIVE CORPORATE LAW* (Lawrence E. Mitchell ed., 1995)) (detailing evolution of corporate social responsibility conversation in decades following Berle and Dodd's debate).

¹⁴² Wells, *supra* note 3, at 99.

¹⁴³ See PETER F. DRUCKER, *THE NEW SOCIETY: THE ANATOMY OF THE INDUSTRIAL ORDER* 337-50 (1950) (discussing importance of corporate social responsibility in truly free society); Adolf A. Berle, Jr., *Historical Inheritance of American Corporations*, in *THE POWERS AND DUTIES OF CORPORATE MANAGEMENT* 189, 217 (Edmond N. Cahn ed., 1950) (asserting that corporation's "exercise of its power is increasingly conscripted to achieve certain defined public ends"); David L. Engel, *An Approach to Corporate Social Responsibility*, 32 *STAN. L. REV.* 1, 1-3 (1979) (discussing generally "whether corporate altruism is socially desirable"); David S. Ruder, *Public Obligations of Private Corporations*, 114 *U. PA. L. REV.* 209, 209 (1965) ("Although some businessmen still cling to the notion that the business of the corporation is solely to make profits, their position is not a popular one."); Wells, *supra* note 3, at 100-06 (tracing evolution of corporate contribution to public interest).

¹⁴⁴ HERMAN E. KROOSS, *EXECUTIVE OPINION: WHAT BUSINESS LEADERS SAID AND THOUGHT ON ECONOMIC ISSUES, 1920s-1960s*, at 52 (1970).

¹⁴⁵ ADOLF A. BERLE, JR., *THE 20TH CENTURY CAPITALIST REVOLUTION* 169 (1954) (indicating that argument over corporate responsibilities was settled in Dodd's favor).

¹⁴⁶ See Terry H. Anderson, *The New American Revolution: The Movement and Business, in THE SIXTIES: FROM MEMORY TO HISTORY* 135, 174 (David Farber ed., 1994) ("From 1960

the social cataclysms caused by the Vietnam War and Watergate, major corporations like General Motors and Eastman Kodak felt significant pressure to do more than benefit their shareholders and balance sheets; in response, they made significant contributions to social endeavors during this period.¹⁴⁷

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.¹⁴⁸ These dissenting views often highlighted the potentially profound adverse consequences of corporate social responsibility on democratic society and free markets.¹⁴⁹ 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.”¹⁵⁰ 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.¹⁵¹ Similarly, leading academics, like Henry Manne and Eugene Rostow, then Dean

to the early 1970s, the sixties era, activists attacked and in some respects changed America’s way of ‘doing business,’ a topic neglected by historians.”); Wells, *supra* note 3, at 111-16 (highlighting “debate over corporate responsibility” and detailing activism aimed at corporate giants such as AT&T, BankAmerica, GM, and Honeywell). See generally RALPH NADER, UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE (1965) (demanding that car manufacturers cease resistance to safety regulation).

¹⁴⁷ See RALPH NADER, MARK GREEN & JOEL SELIGMAN, TAMING THE GIANT CORPORATION 15-32 (1977) (detailing public pressure put on America’s largest corporate institutions by regulatory reforms beginning in early 1960s); LEONARD SILK & DAVID VOGEL, ETHICS AND PROFITS: THE CRISIS IN AMERICAN BUSINESS 17-23 (1976) (detailing rise of hostility toward American business by American public in early 1970s); Phillip I. Blumberg, *Corporate Responsibility and the Social Crisis*, 50 B.U. L. REV. 157, 158-60 (1970) (describing implementation of what amounted to “government-encouraged programs” by corporate giants, indicating public pressure on private enterprise); J.A.C. Hetherington, *Fact and Legal Theory: Shareholders, Managers, and Corporate Social Responsibility*, 21 STAN. L. REV. 248, 291 (1969) (identifying “rise of pressures external to business” as driving forces behind increased corporate social responsibility); Donald E. Schwartz, *The Public-Interest Proxy Contest: Reflections on Campaign GM*, 69 MICH. L. REV. 419, 421-23 (1971) (emphasizing role of dissident shareholders in promoting change in corporate policies affecting public good during 1960s and 1970s).

¹⁴⁸ 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”).

¹⁴⁹ 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”).

¹⁵⁰ Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32.

¹⁵¹ *Id.*

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.¹⁵²

The election of President Ronald Reagan in 1980 ushered in an era of smaller government and bigger business.¹⁵³ Meanwhile, the corporate social responsibility discussion continued to evolve.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.¹⁵⁵ Numerous states passed “corporate constituency statutes” to permit corporations to consider the impact of deals on non-shareholder constituents.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.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.¹⁵⁸ Leading contractarian scholars, like Frank Easterbrook and Daniel

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).

¹⁵³ See H.W. BRANDS, *REAGAN: THE LIFE 271-72* (2016) (discussing President Reagan’s preference for deregulation, businesses, and free markets); DOUGLAS M. EICHAR, *THE RISE AND FALL OF CORPORATE SOCIAL RESPONSIBILITY* 265-68 (2015) (describing impact of President Reagan’s election on business interests).

¹⁵⁴ See, e.g., Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 930-37 (1984) (highlighting competing conceptions of corporations and introducing new theory coined “corporatism”).

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).

¹⁵⁶ Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 16-28 (1992) (analyzing advent of corporate constituency statutes and their potential to challenge fundamental assumptions of corporate law).

¹⁵⁷ See generally EASTERBROOK & FISCHER, *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).

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).

¹⁶² See, e.g., Lyman P. Q. Johnson, *New Approaches to Corporate Law*, 50 WASH. & LEE L. REV. 1713, 1713-14 (1993) (highlighting importance of nonshareholder stakeholders); David Millon, *Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1377-90 (1993) (detailing debates between contractarians and communitarians and ultimately emphasizing diversity of individual shareholder interests).

¹⁶³ David Millon, *Communitarianism in Corporate Law: Foundations and Law Reform Strategies*, in *PROGRESSIVE CORPORATE LAW*, *supra* note 141, at 1, 9-11 (detailing communitarian approach to corporate social responsibility and its advocacy of expanding businesses’ views to advocate for nonshareholder issues).

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”)).

¹⁶⁵ See Archie B. Carroll & Kareem M. Shabana, *The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice*, 12 INT’L J. OF MGMT. REVS. 85, 92-98 (2010) (highlighting specific economic and financial benefits to businesses that flow from corporate social responsibility activities and initiatives); V. Kasturi Rangan, Lisa Chase & Sohail Karim, *The Truth About CSR*, HARV. BUS. REV., Jan.-Feb. 2015, at 41, 42

social activism and responsibility disclosures in its annual report on Form 10-K, which traditionally contains primarily business and financial information.¹⁶⁶ The Fortune Global 500 companies alone have spent billions of dollars annually in their social responsibility efforts in recent years.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 *Citizens United v. FEC*¹⁶⁸ and *Burwell v. Hobby*

(“[T]here is increasing pressure to dress up CSR as a business discipline and demand that every initiative deliver business results.”); *Environmental, Social and Governance*, GEN. ELECTRIC, <http://www.gesustainability.com/> [<https://perma.cc/5UZH-QJCM>] (last visited Nov. 18, 2018) (“GE brings to market innovative solutions that deliver essential energy, healthcare and transportation infrastructure. We work with the highest integrity, compliance culture and respect for human rights while also reducing the impact of our technology and environmental footprint.”); Knowledge@Wharton, *Why Companies Can No Longer Afford to Ignore Their Social Responsibilities*, TIME (May 28, 2012), <http://business.time.com/2012/05/28/why-companies-can-no-longer-afford-to-ignore-their-social-responsibilities/> [<https://perma.cc/X36T-3JQ6>] (“More than 8,000 businesses around the world have signed the UN Global Compact pledging to show good global citizenship in the areas of human rights, labor standards and environmental protection. The next generation of business leaders is even more likely to prioritize [corporate social responsibility].”); *Social Impact*, AIRBNBCITIZEN, <https://www.airbnbcitizen.com/social-impact> [<https://perma.cc/WC8S-73DJ>] (last visited Nov. 18, 2018) (“At Airbnb, we strive to leverage our company’s unique assets for social good.”).

¹⁶⁶ SALESFORCE.COM, INC., ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934, at 51 (2018), <https://www.sec.gov/Archives/edgar/data/1108524/000110852418000011/crmq4fy1810-k.htm> [<https://perma.cc/BES7-2RRG>] (highlighting Salesforce.com’s “environmental, social and governance efforts”).

¹⁶⁷ Alison Smith, *Fortune 500 Companies Spend More Than \$15bn on Corporate Responsibility*, FIN. TIMES (Oct. 12, 2014), <https://www.ft.com/content/95239a6e-4fe0-11e4-a0a4-00144feab7de> (reporting that U.S. and U.K. companies in Fortune Global 500 spent \$15.2 billion per year on CSR activities).

¹⁶⁸ 558 U.S. 310 (2010).

Lobby Stores, Inc.,¹⁶⁹ business interests are playing an ever-growing role in politics, policymaking, and social activism.¹⁷⁰ 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.¹⁷¹ Chief Justice Marshall famously characterized the corporation as “an artificial being, invisible, intangible, and existing only in contemplation of law.”¹⁷² Often dictated by facts and circumstances, rather than clear doctrine, the Supreme Court has constructed an expanding, if not always coherent, corporate-rights jurisprudence.¹⁷³ Since the 1880s, the Court has recognized corporations as distinct legal persons that possess contract and property rights.¹⁷⁴ Over time, the Court has also recognized that corporations possess certain Fourth Amendment

¹⁶⁹ 134 S. Ct. 2751 (2014).

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.”).

¹⁷² *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819).

¹⁷³ See, e.g., Blair & Pollman, *supra* note 5, at 1679 (“[T]he Court has not carefully analyzed its legal theory of corporate rights, nor has it expressly articulated a framework for thinking about corporations that could guide its decision making in a consistent way.”); William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1503 (1989) (describing Supreme Court’s corporate rights doctrine as “situational practice”); Vincent S.J. Buccola, *Corporate Rights and Organizational Neutrality*, 101 IOWA L. REV. 499, 501 (2016) (“Over the course of 200 years, the Court has articulated inconsistent theories of the corporation—theories which seem to yield predictably unpredictable judgments about the existence of a corporate right.”); Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 98 (2014) (“What theory explains why corporations have some constitutional rights and not others? The Supreme Court has not offered a general theory.”).

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.¹⁷⁵ More recently, in *Citizens United* and *Hobby Lobby*, the Court held that corporations possess free speech protections for political contributions and religious liberties.¹⁷⁶ 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.¹⁷⁷ 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.¹⁷⁸ 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.¹⁷⁹ The opinion declared: “The Court has thus rejected the argument that political speech of corporations or other associations should be

¹⁷⁵ See, e.g., *FCC v. AT&T Inc.*, 562 U.S. 397, 409 (2011) (holding that corporations do not have “personal privacy” protections akin to those of natural persons); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 775-76 (1978) (characterizing corporate political expenditures as speech protected under First Amendment); *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (extending First Amendment protections to commercial speech); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (affirming freedom of press to corporations); *NAACP v. Button*, 371 U.S. 415, 428 (1963) (recognizing free speech rights of nonprofit corporations); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-62 (1958) (holding same); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244 (1936) (recognizing applicability of First Amendment’s press protections to corporations); *Hale v. Henkel*, 201 U.S. 43, 71 (1906) (holding that corporations are protected by Fourth Amendment against unreasonable searches and seizures). *But see* *Braswell v. United States*, 487 U.S. 99, 108-09 (1988) (holding that corporations did not enjoy Fifth Amendment protections).

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 . . .”).

¹⁷⁸ *Citizens United*, 558 U.S. at 319, 327-29 (describing efforts of Citizens United to fund and broadcast film entitled *Hillary: The Movie*).

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.’”¹⁸⁰

The *Citizens United* decision has had profound consequences for the political process, many of which are still unfolding and being studied.¹⁸¹ The Court effectively lifted any limitations on American corporations to make political expenditures.¹⁸² Following the decision, super PACs emerged as key players in elections.¹⁸³ 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.¹⁸⁴ In

¹⁸⁰ *Id.* at 342-43.

¹⁸¹ See generally JEFFREY D. CLEMENTS, CORPORATIONS ARE NOT PEOPLE: WHY THEY HAVE MORE RIGHTS THAN YOU DO AND WHAT YOU CAN DO ABOUT IT (2012) (discussing how identity of corporations and their place in our government is not obvious following *Citizens United*); Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011) (suggesting that *Citizens United* has both practical and theoretical consequences that will require addressing by courts or politicians); Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118 (2010) (highlighting constitutional and practical issues that have arisen in response to *Citizens United*); Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1 (2012) (discussing how *Citizens United's* impact on campaign finance law goes beyond narrow concept of corporate electioneering); Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L. & POL'Y REV. 217 (2010) (discussing impact that advocates' rhetoric on either side of *Citizens United* has on obscuring tangible issues); David Min, *Corporate Political Activity and Non-Shareholder Agency Costs*, 33 YALE J. REG. 423 (2016) (asserting that Supreme Court's decisions expanding corporate political speech will have unpredictable consequences, with potential for deleterious impact); Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143 (2010) (arguing that clashing views of *Citizens United* may lead to four possible reform efforts).

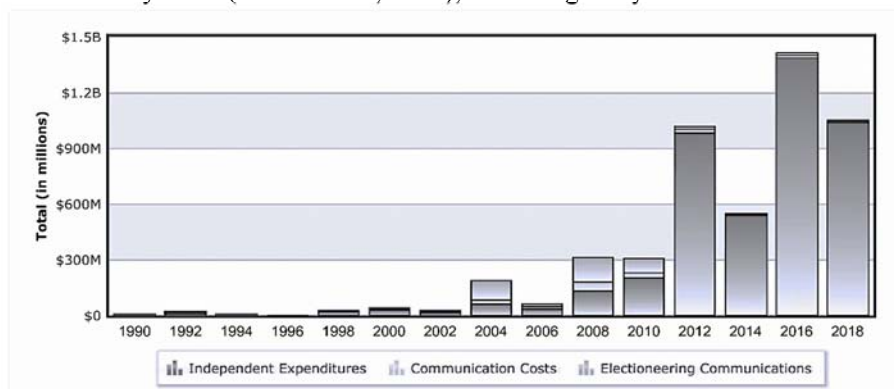
¹⁸² Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923, 930-37 (2013) (“Public companies can, and do, engage in political spending that is never disclosed . . .”).

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

¹⁸⁴ See LEE DRUTMAN, THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE 3-4 (2015) (describing expansion of corporate lobbying efforts in “almost every process of American democratic policymaking”); LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT 183-84 (2011) (discussing pervasive and corrosive influence of corporate interests in American politics); Bebchuk & Jackson, *supra* note 182, at 930-37 (summarizing direct and indirect corporate political spending in recent years); Briffault, *supra* note 183, at 1656-66 (chronicling growing influence of Super PACs on political campaigns); Dan Eggen, *Super PACs Dominate Republican Primary Spending*, WASH. POST, Jan. 16, 2012, at A6 (highlighting large campaign donations made by specific PACs in 2012 presidential primaries and congressional races); Steven Greenhouse, *Here's a Memo from the Boss: Vote This Way*, N.Y. TIMES, Oct. 27, 2012, at A1 (discussing how corporations may influence elections through their employees); Mike McIntire & Nicholas Confessore, *Groups Shield Political Gifts of Businesses*, N.Y. TIMES, July 8, 2012, at A1 (describing how corporations are “trying to influence campaigns by donating money to tax-exempt

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



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

¹⁸⁵ Center for Responsive Politics, *Total Outside Spending by Election Cycle, All Groups*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/cycle_tots.php?cycle=2016&view=A&chart=A#viewpt [https://perma.cc/M3TY-X3KD] (last visited Nov. 18, 2018) (reporting total spending on campaigns by non-candidates in various election cycles).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Center for Responsive Politics, *2016 Outside Spending, by Super PAC*, OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2016&hrt=V&disp=O&type=S> [https://perma.cc/A34Y-Z3PK] (last visited Nov. 18, 2018).

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*.¹⁹¹ 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.¹⁹² Shareholders of the three businesses claimed that compliance with the provisions would force them to violate their deeply-held Christian beliefs.¹⁹³ 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.¹⁹⁴ 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.”¹⁹⁵ 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.¹⁹⁶

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

the 2018 election cycle as many disclosures are made in the weeks and months following election day.

¹⁹¹ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014) (extending Religious Freedom Reformation Act (“RFRA”) to corporations in part due to Dictionary Act including corporations under definition of person).

¹⁹² *See* 42 U.S.C. § 300gg-13(a)(4) (2012) (requiring coverage of “preventative care and screenings” including contraception); *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2762 (noting FDA standards require coverage of contraceptive methods under 42 U.S.C. § 300gg-13(a)(4)).

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).

¹⁹⁵ 42 U.S.C. § 2000bb-1(a)-(b) (2012) (“Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability . . .”).

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.

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.²⁰⁰ 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.²⁰¹ Activists can broaden the reach and impact of their efforts by leveraging the communication resources, political influence, and operational expertise of businesses.²⁰²

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.²⁰³ 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.²⁰⁴ 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.”).

²⁰³ KORNGOLD, *supra* note 5, at 21-24 (discussing how non-profits can benefit by partnering with corporations).

²⁰⁴ See, e.g., HULA, *supra* note 200, at 74-75 (discussing lobbying power of corporate trade associations); MACKAY & SISODIA, *supra* note 5, at 81 (“Businesses have a lot of power to shape the popular culture and to influence the tastes and preferences of customers, primarily through their marketing efforts.”); *For Nonprofits*, GOOGLE, <https://www.google.com/nonprofits/> [https://perma.cc/T3QP-BXKN] (last visited Nov. 18, 2018) (showcasing Google’s efforts to aid nonprofits).

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.

²⁰⁶ Cook, *supra* note 41 (describing dangers of religious freedom laws); *see also* Aaron K. Chatterji & Michael W. Toffel, *Assessing the Impact of CEO Activism* 3-4 (Harvard Bus. Sch. Tech. & Operations Mgmt. Unit, Working Paper No. 16-100, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2742209 [<https://perma.cc/NTE6-CJF5>] (noting Tim Cook among CEOs who spoke out for LGBT rights).

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

²¹¹ April Jordin, *Project Last Mile Initiative Continues to Expand in Africa*, COCA-COLA JOURNEY (Jan. 19, 2016), <http://www.coca-colacompany.com/stories/projectlastmile> [https://perma.cc/QPM9-83AL] (describing collaboration between Coca-Cola and nonprofit partners, including Gates Foundation).

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).

²¹³ See MATTHEW BISHOP & MICHAEL GREEN, PHILANTHROCAPITALISM: HOW THE RICH CAN SAVE THE WORLD 2-3 (2008) (labelling new era of philanthropists "philanthrocapitalists"); MINOW, *supra* note 116, at 11-12 ("Social entrepreneurship is a new buzzword to characterize efforts by philanthropists to bring market-style ideas or business accountability methods to philanthropic investment."); Bill Gates, Co-Chair and Tr., Gates Found., Prepared Remarks by Bill Gates at 2008 World Economic Forum – Creative Capitalism (Jan. 24, 2008), <http://www.gatesfoundation.org/media-center/speeches/2008/01/bill-gates-2008-world-economic-forum> [https://perma.cc/DQ4J-9F35] (defining creative capitalism as "system [that] would have a twin mission: making profits and also improving lives for those who don't fully benefit from market forces").

accountability and data-driven processes in their operations.²¹⁴ Nonprofits and social advocates (like many businesses) can benefit by reducing their administrative costs so that more resources go directly to their causes.²¹⁵ Because good businesses efficiently maximize shareholder returns, they are likely to take that same data-driven, market-oriented mindset to their social activism efforts.²¹⁶ 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.²¹⁷

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.²¹⁸ Social activism thus becomes less akin to charity or volunteerism, and more akin to social entrepreneurship or venture philanthropy.²¹⁹ With more emphasis on thoughtful capital management, social

²¹⁴ See Robin Rogers, *Why Philanthro-Policymaking Matters*, 48 SOCIETY 376, 378 (2011) (discussing how capitalists bring market- and metric-oriented decision-making to philanthropic efforts); Laura Arrillaga-Andreessen & Sarah Murray, *Palantir Philanthropy Engineering: Software to Improve Lives*, STAN. GRAD. SCH. BUS.: CASE STUDIES 4 (Oct. 2, 2015), <http://static1.squarespace.com/static/57a0dd1dbebabfbfe80f9a7/t/57be108c893fc0b6f357c984/1472073870486/SI-125+Palantir+Philanthropy+Engineering+Case.pdf> [<https://perma.cc/G6TK-D2JZ>] (describing how nonprofit organizations used Palantir's donated data management software "to make better decisions on where and when to direct their limited resources").

²¹⁵ Bill Bradley, Paul Jansen & Les Silverman, *The Nonprofit Sector's \$100 Billion Opportunity*, HARV. BUS. REV., May 2003, at 94, 97 (noting nonprofits could add additional \$15 to \$26 billion each year by developing practices to lower administrative costs).

²¹⁶ See ABHIJIT BANERJEE & ESTHER DUFLO, POOR ECONOMICS: A RADICAL RETHINKING OF THE WAY TO FIGHT GLOBAL POVERTY 267-73 (2011) (advocating, in part, for market-based experimentation and solutions to help poor); BISHOP & GREEN, *supra* note 213, at 2-3 ("The past couple of decades have been a golden age for capitalism, and today's new philanthropists are trying to apply the secrets behind that money-making success to their giving."); JOHN DOERR, MEASURE WHAT MATTERS: HOW GOOGLE, BONO, AND THE GATES FOUNDATION ROCK THE WORLD WITH OKRS 120-25 (2018) (describing metric-driven process for goal-setting and execution at Intel and Google); Dana Brakman Reiser, *For-Profit Philanthropy*, 77 FORDHAM L. REV. 2437, 2468 (2009) (discussing Google's for-profit philanthropy approach, which combines philanthropy with innovation).

²¹⁷ BISHOP & GREEN, *supra* note 213, at 155 (noting Rockefeller Foundation "partnered with the charitable arms of Salesforce.com and Google, among others, to develop ways of tracking and publishing online data").

²¹⁸ See *id.* at 78 (describing how capitalist mindset can help social organizations to "leverage their resources by concentrating them where they can generate maximum bang for the buck").

²¹⁹ See LAURA ARRILLAGA-ANDREESSEN, GIVING 2.0: TRANSFORM YOUR GIVING AND OUR WORLD 154-56 (2011) (chronicling venture investing approach to philanthropy); BISHOP & GREEN, *supra* note 213, at 88 (explaining venture philanthropy); DAVID BORNSTEIN & SUSAN DAVIS, SOCIAL ENTREPRENEURSHIP: WHAT EVERYONE NEEDS TO KNOW 1-20 (2010) (explaining social entrepreneurship); CALLAHAN, *supra* note 135, at 57-59 (discussing how

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.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.²²¹ They consider their contributions and efforts less as gifts and more as investments and social risk capital.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.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.”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.²²⁵ Successful businesses grow and last over time because they are able to raise more capital, increase their market share, and attract talented individuals.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).

²²⁰ See BISHOP & GREEN, *supra* note 213, at 91 (describing how venture philanthropists monitor and nurture their investments for social change).

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.”).

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 shyed away from.”).

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.”).

²²⁴ *Ford Foundation Commits \$1 Billion from Endowment to Mission-Related Investments*, FORD FOUND.: NEWS (Apr. 5, 2017), <https://www.fordfoundation.org/the-latest/news/ford-foundation-commits-1-billion-from-endowment-to-mission-related-investments/> [<https://perma.cc/3K63-VDKS>] (noting one billion dollars of its twelve billion dollar endowment will go to “mission-related investing”).

²²⁵ KORNGOLD, *supra* note 5, at 4-5 (noting economic issues that tend to plague nonprofits).

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.²²⁷ 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.²²⁸ 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.²²⁹ 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.²³⁰

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.²³¹ 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.²³² Being socially

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.”).

²³⁰ Mark Zuckerberg, *A Letter to Our Daughter*, FACEBOOK (Dec. 1, 2015), <https://www.facebook.com/notes/mark-zuckerberg/a-letter-to-ourdaughter/10153375081581634/> [<https://perma.cc/8KUE-ECHN>] (discussing commitment to solving challenging issues by establishing Chan Zuckerberg Initiative); see also Natasha Singer & Mike Isaac, *Zuckerberg’s Philanthropy Uses L.L.C. for More Control*, N.Y. TIMES, Dec. 3, 2015, at B1 (noting Chan Zuckerberg initiative was set up as LLC, and intends to “tackle some of the biggest problems their daughter’s generation might face, including heart disease and cancer”).

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.²³³ 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.²³⁴ 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.²³⁵

Recent research suggests that socially responsible businesses generate stronger returns for their shareholders and have greater brand value in the marketplace.²³⁶ 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).

²³³ 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).

²³⁴ Fred Krupp, *Walmart: The Awakening of an Environmental Giant*, HUFFINGTON POST (Feb. 17, 2016, 2:49 PM), http://www.huffingtonpost.com/fred-krupp/walmart-the-awakening-of_b_9253920.html [<https://perma.cc/93GU-NGWT>] (examining partnership between Walmart and Environmental Defense Fund and its benefits to both and environment); *Sustainability*, WALMART, <http://corporate.walmart.com/global-responsibility/sustainability/> [<https://perma.cc/L7GZ-QW7V>] (last visited Nov. 18, 2018) (discussing Walmart's goals to "create zero waste, operate with 100% renewable energy and sell products that sustain our resources and the environment").

²³⁵ See *Corporate Responsibility: Invested in Detroit*, JPMORGAN CHASE, <https://www.jpmorganchase.com/corporate/Corporate-Responsibility/detroit.htm> [<https://perma.cc/GR8J-3VP7>] (last visited Nov. 18, 2018) ("We view our work in Detroit as proof of concept of the model we've developed to help more people move up the economic ladder and share in the rewards of a growing economy."); Matthew Heimer, *J.P. Morgan's Big Bet on Detroit Is Paying Off*, FORTUNE (May 10, 2017), <http://fortune.com/2017/05/10/jp-morgan-chase-detroit-investment/> [<https://perma.cc/JZN8-FKBZ>] (highlighting success of JPMorgan Chase's Detroit investment project for both company and city).

²³⁶ See MACKAY & SISODIA, *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.²³⁷ 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.²³⁸ 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.²³⁹ 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.²⁴⁰

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.²⁴¹

at maximizing shareholder value over time are those that aim toward goals other than maximizing shareholder value.”).

²³⁷ See J. Haskell Murray, *Social Enterprise and Investment Professionals: Sacrificing Financial Interests?*, 40 SEATTLE U. L. REV. 765, 774–77 (2017) (highlighting growth of social investing).

²³⁸ See ANTONY BUGG-LEVINE & JED EMERSON, *IMPACT INVESTING: TRANSFORMING HOW WE MAKE MONEY WHILE MAKING A DIFFERENCE* 5 (2011) (“Impact investing recognizes that investments can pursue financial returns while also intentionally addressing social and environmental challenges.”).

²³⁹ See Deborah Burand, *Resolving Impact Investment Disputes: When Doing Good Goes Bad*, 48 WASH. U. J.L. & POL’Y 55, 60 (2015) (discussing pool of investors active in impact investment market); *Investing Based on Your Principles*, FIDELITY (June 27, 2018), <https://www.fidelity.com/viewpoints/active-investor/strategies-for-sustainable-investing> [<https://perma.cc/33U7-C4PR>] (defining sustainable investing and advertising opportunities to sustainably invest with Fidelity); *Sustainable Investing Is Simply Smart Investing*, BLACKROCK, <https://www.blackrock.com/investing/investment-ideas/sustainable-investing> [<https://perma.cc/6ZQ6-LMXC>] (last visited Nov. 18, 2018) (“Blackrock’s sustainable funds are designed to meet the performance characteristics of traditional investments while targeting specific social impact objectives, such as reducing the carbon footprint of an investment portfolio.”); *Vanguard FTSE Social Index Fund Investor Shares*, VANGUARD, <https://investor.vanguard.com/mutual-funds/profile/VFTSX> [<https://perma.cc/8KXL-44TA>] (last visited Nov. 18, 2018) (providing information on Vanguard social investment fund).

²⁴⁰ See Tom C.W. Lin, *Reasonable Investor(s)*, 95 B.U. L. REV. 461, 466-74 (2015) (cataloging diverse typology of contemporary investors); Matthew J. Mallow & Jasmin Sethi, *Engagement: The Missing Middle Approach in the Bebchuk-Strine Debate*, 12 N.Y.U. J.L. & BUS. 385, 399-400 (2016) (describing trend of companies who are “recognizing the need for engagement and are voluntarily choosing to commit to it as an approach”).

²⁴¹ See MACKAY & SISODIA, *supra* note 5, at 125 (“Smart corporate philanthropy can be beneficial to the corporation, its stakeholders, and society.”); Kent Greenfield, *Corporate Citizenship: Goal or Fear?*, 10 U. ST. THOMAS L.J. 960, 970 (2013) (advocating for “more democracy within businesses—more participation in corporate governance by workers, communities, shareholders, and consumers”).

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.²⁴² 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.²⁴³ 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.²⁴⁴ Following *Citizens United*, some leading legal scholars and

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.”).

²⁴³ See LUIGI ZINGALES, A CAPITALISM FOR THE PEOPLE: RECAPTURING THE LOST GENIUS OF AMERICAN PROSPERITY 115-20 (2012) (explaining how populist social movements impact business policy); Greenfield, *supra* note 171, at 309-10 (discussing unprecedented corporate involvement in political process); Kate Taylor, *Trump Spurred a ‘Consumer Awakening’ That Is Pushing Businesses into Uncharted Territory*, BUS. INSIDER (Feb. 26, 2017, 11:39 AM), <http://www.businessinsider.com/trump-forces-companies-to-get-political-2017-2> [<https://perma.cc/K2E8-4LY8>] (examining how different companies react to political flashpoints).

²⁴⁴ See Haan, *supra* note 2, at 277; Brayden G. King & Mary-Hunter McDonnell, *Good Firms, Good Targets: The Relationship Between Corporate Social Responsibility, Reputation, and Activist Targeting*, in CORPORATE SOCIAL RESPONSIBILITY IN A GLOBALIZING WORLD 430, 430-32 (Kiyoteru Tsutsui & Alwyn Lim eds., 2015); Ben White & Tony Romm, *Corporate America Tackles Trump*, POLITICO (Feb. 6, 2017, 5:02 PM), <http://www.politico.com/story/2017/02/corporate-america-challenges-trump-234704> [<https://perma.cc/6QB9-FLEU>]

shareholder advocates have suggested that corporate political expenditures should be subject to stringent disclosures and scrutiny.²⁴⁵ 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.²⁴⁶ President Donald Trump, for instance, has directly criticized and praised individual companies and executives on Twitter.²⁴⁷

Additionally, businesses wading into contentious social issues could lead to further consumer scrutiny and social fragmentation in the marketplace.²⁴⁸ As businesses position themselves as good social citizens, any failing—real or

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

²⁴⁵ See, e.g., Bebchuk & Jackson, *supra* note 182, at 949-53 (describing how SEC should design regulations requiring disclosure of corporate political expenditures); Mary-Hunter McDonnell & Timothy Werner, *Blacklisted Businesses: Social Activists’ Challenges and the Disruption of Corporate Political Activity*, 61 ADMIN. SCI. Q. 584, 611-14 (2016) (highlighting political impact on corporations arising from social activism against firms); James R. Copeland, *Shareholder Activism Focused on Political Spending and Lobbying*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (June 10, 2012), <https://corpgov.law.harvard.edu/2012/06/10/shareholder-activism-focused-on-political-spending-and-lobbying/> [<https://perma.cc/CYM8-SM28>] (“The prevalence of shareholder proposals related to political spending continues a recent upward trend.”).

²⁴⁶ 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).

²⁴⁷ 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).

²⁴⁸ 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.²⁴⁹ 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.²⁵⁰ This politicization of commerce could harm businesses because they will likely alienate many customers and investors, and energize activists with opposing views.²⁵¹ 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.²⁵² More recently, in 2018, businesses received unwanted attention for simply serving or refusing to serve officials of the Trump Administration.²⁵³ This political balkanization of the

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).

²⁵⁰ See, e.g., Harrison Hong & Leonard Kostovetsky, *Red and Blue Investing: Values and Finance*, 103 J. FIN. ECON. 1, 2 (2012) (finding “strong evidence that political values influence the investment decisions of mutual fund managers”); Carolina Wilson, *ETFs Now with Political Opinions*, BLOOMBERG BUSINESSWEEK, Dec. 25, 2017, at 29, 29-30 (examining success of politically oriented exchange-traded funds).

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).

²⁵² Kim Severson, *Chick-fil-A Thrust Back into Spotlight on Gay Rights*, N.Y. TIMES, July 26, 2012, at A13 (examining reactions by politicians and activists to Chick-fil-A president Dan Cathy’s stance against gay marriage).

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

of the president's policies."); Antonia Noori Farzan, *A Mexican Restaurant Is Facing Backlash After Saying It Was an 'Honor' to Serve Jeff Sessions*, WASH. POST: MORNING MIX (Aug. 13, 2018, 10:13 AM), https://www.washingtonpost.com/news/morning-mix/wp/2018/08/13/a-mexican-restaurant-is-facing-backlash-after-saying-it-was-an-honor-to-serve-jeff-sessions/?utm_term=.28e5722c8a50 (describing social media tempest provoked by restaurant posting on Facebook after serving Attorney General Sessions).

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.”).

²⁵⁵ See, e.g., Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 693 (2014) (“Extreme concentrations of economic and political power undermine equal citizenship and equal opportunity.”); Chrystia Freeland, *The Rise of the New Global Elite*, ATLANTIC, Jan.-Feb. 2011, at 46 (describing rise of plutocracy “in which the rich display outsize political influence, narrowly self-interested motives, and a casual indifference to anyone outside their own rarefied economic bubble”).

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).

²⁵⁷ See KORNGOLD, *supra* note 201, at ix (“[C]ompanies are not acting selflessly. Companies are in the business of maximizing profits.”); Ross Douthat, Opinion, *The Rise of Woke Capital*, N.Y. TIMES (Feb. 28, 2018), <https://www.nytimes.com/2018/02/28/opinion/corporate-america-activism.html> (examining relationship between corporate decision-making and public image).

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.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.²⁵⁹

In *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.²⁶⁰ Going beyond prior legal principles that conferred deference to corporations for business decisions,²⁶¹ *Citizens United* conferred deference to corporations for political

²⁵⁸ See, e.g., 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.”).

²⁵⁹ See Chatterji & Richman, *supra* note 5, at 38 (highlighting progressive nature of many corporate social initiatives); Daniel Gross, *Jamie Dimon Steps in It*, SLATE (May 17, 2017), http://www.slate.com/articles/business/moneybox/2017/05/jamie_dimon_steps_in_it.html [<https://perma.cc/UV9F-7KPS>] (“As a group, Fortune 500 companies today are socially liberal, especially on areas surrounding diversity, gay rights, and immigration; they are unabashedly in favor of free trade and globalization, express concern about climate change, and embrace renewable energy.”); Nico Lang, *The Hidden Downside to Corporate America’s Fight for LGBT Equality*, QUARTZ (May 31, 2016), <https://qz.com/694617/the-hidden-downside-to-corporate-americas-fight-for-lgbt-equality/> [<https://perma.cc/3V5T-YM27>] (discussing corporate backing for LGBT causes).

²⁶⁰ *Citizens United v. FEC*, 558 U.S. 310, 361-62 (2010) (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 (1978)).

²⁶¹ One of the key principles of corporate law is known as the business judgment rule doctrine, a principle of judicial deference to corporate executives for business decisions. See *Shlensky v. Wrigley*, 237 N.E.2d 776, 779 (Ill. App. Ct. 1968) (“In a purely business corporation . . . the authority of the directors in the conduct of the business of the corporation must be regarded as absolute when they act within the law, and the court is without authority to substitute its judgment for that of the directors.” (quoting *Toebelman v. Missouri-Kansas Pipe Line Co.*, 41 F. Supp. 334, 339 (D. Del. 1941))); *Kamin v. Am. Express Co.*, 383 N.Y.S.2d 807, 810-11 (Sup. Ct. 1976) (“The directors’ room rather than the courtroom is the appropriate forum for thrashing out purely business questions”); Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 90 (2004) (explaining business judgment rule as principle that “establishes a presumption against judicial review of [substantive business decisions]”).

decisions that may be unrelated to the core purposes of the business.²⁶² In the seminal corporate political expenditures case, *First National Bank of Boston v. Bellotti*,²⁶³ the Court reasoned, “Ultimately shareholders may decide . . . whether their corporation should engage in debate on public issues.”²⁶⁴ 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.²⁶⁵ Additionally, increasing numbers of Americans are invested in the stock market indirectly through mutual funds offered by their employer-sponsored 401(k) plans.²⁶⁶ 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.²⁶⁷

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.²⁶⁸ It may be difficult for the millionaire or billionaire corporate

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.”).

²⁶³ 435 U.S. 765 (1978).

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).

²⁶⁸ DELOITTE, MISSING PIECES REPORT: THE 2016 BOARD DIVERSITY CENSUS OF WOMEN AND MINORITIES ON FORTUNE 500 BOARDS 3, 7 (2017), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/center-for-corporate-governance/us-board-diversity-census-missing-pieces.pdf> [<https://perma.cc/5PZB-T7ML>] (reporting homogenous boardroom in

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,” as suggested by the Supreme Court in *Citizens United* and *Hobby Lobby*.²⁷⁰ 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).

²⁷⁰ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014); *Citizens United*, 558 U.S. at 361-62 (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 (1978)).

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.”).

²⁷³ See Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 304-05 (1999) (describing potential social harms of stubborn, singular focus on profit maximization); Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 CASE W. RES. L. REV. 495, 537 (2010) (“[W]hen corporations speak, it is speech of an economic—not a political—nature, due to corporations’ singular fidelity to profit maximization.”).

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, *Misalignment: 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.”).

²⁷⁵ See JOEL BAKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* 88 (2005) (“Corporations have no capacity to value political systems, fascist or democratic, for reasons of principle or ideology.”); EDWIN BLACK, *IBM AND THE HOLOCAUST: THE STRATEGIC ALLIANCE BETWEEN NAZI GERMANY AND AMERICA’S MOST POWERFUL CORPORATION* 7-16 (2002) (investigating close alliance between IBM and Nazi Germany).

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 “[b]usinesses . . . 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-NLBQ>] (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,²⁸¹ that faith may have been misplaced because corporate democracy does not operate like political democracy, and can in fact be undemocratic.²⁸² Political democracy, in the American legal context, adheres to a “one person, one vote” principle.²⁸³ In contrast, corporate democracies adhere to a “one share, one vote” principle.²⁸⁴ 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.²⁸⁵ 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.²⁸⁶

²⁸¹ See *Citizens United v. FEC*, 558 U.S. 310, 361-62 (2010) (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 (1978)) (“There is, furthermore, little evidence of abuse that cannot be corrected by shareholders ‘through the procedures of 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).

²⁸⁴ See Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811, 822 (1992) (“A shareholder who owns 1,000 shares is 1,000 times more likely to cast a decisive vote than a shareholder who owns a single share”); Usha Rodrigues, *The Seductive Comparison of Shareholder and Civic Democracy*, 63 WASH. & LEE L. REV. 1389, 1391 (2006) (comparing shareholder and civic democracy).

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.²⁸⁷ 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.²⁸⁸ Given the differences between political democracies and corporate democracies, democratic moral values should not be supplanted by corporate market values.²⁸⁹

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.²⁹⁰

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 desirable, 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 ascendancy 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

²⁹¹ See, e.g., KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* 107-08 (2006) (advocating for corporate law reforms that better account for corporate social impact); NIKOS MOURKOIANNIS, *PURPOSE: THE STARTING POINT OF GREAT COMPANIES* 5-7 (2008) (arguing for importance of clear purpose-driven narratives for business success).

²⁹² See, e.g., *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 35 (Del. 2010) (stating that directors of for-profit Delaware corporation cannot "defend a business strategy that openly eschews stockholder wealth maximization"); Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1423 (1993) ("Shareholder wealth maximization long has been the fundamental norm which guides U.S. corporate decisionmakers."); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001) (noting recent dominance of shareholder-centered ideology of corporate law); Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2065 (2001) ("Shareholder wealth maximization is usually accepted as the appropriate goal in American business circles."); cf. PETER DRUCKER, *THE PRACTICE OF MANAGEMENT* 31 (2012) ("There is only one valid definition of business purpose: *to create a customer.*").

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); Strine, *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.³⁰¹ 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.³⁰² 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."³⁰³ Similarly, Facebook's stated purpose is "to make the world more open and transparent, which we believe will create greater understanding and connection."³⁰⁴

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.³⁰⁵ Many entrepreneurs of startup businesses have legally positioned themselves as social enterprises, seeking both private profit and

of Corporate Law and Social Welfare, 50 WASH. & LEE L. REV. 767, 788-89 (2017) (discussing longstanding focus of contemporary corporations on productivity and efficiency to exclusion of other social costs); Millon, *supra* note 162, at 1374 (describing shareholder primacy with emphasis on profit maximization as leading governance principle in American corporate law in 20th century).

³⁰¹ See, e.g., Greenfield, *supra* note 171, at 312 ("Requiring corporations to attend to a broader range of stakeholders would make corporations more like people, [and] would make them better citizens . . ."); Stout, *supra* note 246, at 1190-93 (challenging assumption that shareholders own or are residual claimants of corporation); Strine & Walter, *supra* note 5, at 348 (highlighting arguments suggesting that "singular focus on profits will be likely to induce them [corporations] to take shortcuts that could result in harm to others through product defects, environmental spoilage, and firm failures, which hurt not only stockholders, but employees, creditors, and all who breathe the air and pay taxes").

³⁰² See, e.g., Claudine Gartenberg, Andrea Prat & George Serafeim, *Corporate Purpose and Financial Performance*, ORG. SCI. (forthcoming), <https://ssrn.com/abstract=2840005> [<https://perma.cc/AWP2-UEC7>] (finding that firms with high purpose and clarity in management have higher future accounting and stock market performance).

³⁰³ *From Garage to the Googleplex*, GOOGLE, <https://www.google.com/intl/en/about/our-story/> [<https://perma.cc/6B22-2AM7>] (last visited Nov. 18, 2018) (describing Google's mission statement in context of its success story).

³⁰⁴ *Facebook Principles*, FACEBOOK, <https://www.facebook.com/principles.php> [<https://perma.cc/2GET-VUQE>] (last visited Nov. 18, 2018) (enumerating list of operating principles, focusing on connections, transparency, and information access and control).

³⁰⁵ See Andrew Ross Sorkin, *No Politician, Apple Chief Says Step Up*, N.Y. TIMES, Aug. 29, 2017, at B1 (noting Apple's investment in renewable energy and education initiatives).

public gain.³⁰⁶ In fact, some startups have even organized their businesses as benefit corporations, legal entities designed to generate profits as well as social good.³⁰⁷ Benefit corporations, according to the Model Benefit Corporation Legislation, are required to have a stated “public benefit” and enhanced transparency, among other features.³⁰⁸ As of 2017, thirty-three states recognized benefit corporations.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.³¹⁰ Such interests could include the interests of employees, local communities, and the environment.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.³¹² They should do this not as a matter of superficial

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”).

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.’”).

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”).

³⁰⁹ *State by State Status of Legislation*, BENEFIT CORP., <http://benefitcorp.net/policymakers/state-by-state-status> [<https://perma.cc/WH33-97YF>] (last visited Nov. 18, 2018) (showing which states have adopted benefit corporation legislation).

³¹⁰ Ning Chiu, *Senator Warren’s Accountable Capitalism Act Modeled on the Public Benefit Corporation*, DAVISPOLK: BRIEFING: GOVERNANCE (Aug. 20, 2018), <https://www.briefinggovernance.com/2018/08/senator-warrens-accountable-capitalism-act-modeled-on-the-public-benefit-corporation> [<https://perma.cc/QAS6-R9K2>] (describing provisions and potential effect of Accountable Capitalism Act).

³¹¹ *Id.*

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.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.³¹⁴ Individuals, in their professional and personal capacities, frequently seek to contribute to a greater purpose beyond mere profit or financial gain alone.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.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

CORPORATE PURPOSE? 3 (2015) (discussing importance of communicating authentic corporate purpose); RAJENDRA S. SISODIA, DAVID B. WOLFE & JAGDISH N. SHETH, FIRMS OF ENDEARMENT: HOW WORLD-CLASS COMPANIES PROFIT FROM PASSION AND PURPOSE 1-14 (2014) (discussing importance of business purpose that connects with key corporate stakeholders); Du, Bhattacharya & Sen, *supra* note 236, at 9 (critiquing corporations' communications efforts in relation to their social responsibility activities).

³¹³ See 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); DONALD HISLOP, KNOWLEDGE MANAGEMENT IN ORGANIZATIONS 230 (2013) (explaining how strong firm identities can lead to greater employee loyalty); MACKEY & SISODIA, *supra* note 5, at 42-44 (highlighting importance of well-defined purposes for businesses); 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, *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).

³¹⁴ *Larry Fink's Annual Letter to CEOs: A Sense of Purpose*, BLACKROCK, <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter> [<https://perma.cc/Q5XQ-ZQLR>] (last visited Nov. 18, 2018) (encouraging companies to ask themselves, "What role do we play in the community?" among other questions).

³¹⁵ See 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.").

³¹⁶ JP Mangalindan, *Jeff Bezos's Mission: Compelling Small Publishers to Think Big*, FORTUNE (June 29, 2010), <http://fortune.com/2010/06/29/jeff-bezoss-mission-compelling-small-publishers-to-think-big/> [<https://perma.cc/3DP4-YC6Y>].

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

³¹⁷ See MACKAY & SISODIA, *supra* note 5, at 276-83 (explaining why and how socially conscious companies have superior financial performance); JIM STENGEL, GROW: HOW IDEALS POWER GROWTH AND PROFIT AT THE WORLD'S GREATEST COMPANIES 1-2, 22-33 (2011) (noting increased financial success of companies that have articulated social interest goals); George Serafeim & Claudine Gartenberg, *The Type of Purpose That Makes Companies More Profitable*, HARV. BUS. REV. (Oct. 21, 2016), <https://hbr.org/2016/10/the-type-of-purpose-that-makes-companies-more-profitable> [<https://perma.cc/88R8-7BL3>] (finding companies that clearly articulate their organization's purpose "exhibit superior accounting and stock market performance").

³¹⁸ Given the variety of corporations and corporate situations, there are, not surprisingly, other credible theories of corporate governance beyond the four theories expounded in this section. See, e.g., Eric C. Chaffee, *Collaboration Theory: A Theory of the Charitable Tax Exempt Nonprofit Corporation*, 49 U.C. DAVIS L. REV. 1719, 1719 (2016) (articulating "collaboration theory" of corporations, which "suggests that charitable tax-exempt nonprofit corporations are collaborations among the state governments, federal government, and individuals to promote the public good"); Henry Hansmann, *Worker Participation and Corporate Governance*, 43 U. TORONTO L.J. 589, 589 (1993) (discussing role of "collective choice mechanisms" in corporate governance); Jonathan C. Lipson, *Directors' Duties to Creditors: Power Imbalance and the Financially Distressed Corporation*, 50 UCLA L. REV. 1189, 1245-51 (2003) (arguing that four groups of claimants with low levels of volition, cognition, and exit should benefit from some sort of fiduciary duty from directors of distressed corporations); Brett H. McDonnell, *Employee Primacy, or Economics Meets Civic Republicanism at Work*, 13 STAN. J.L. BUS. & FIN. 334, 334 (2008) (arguing for employee primacy in which there is "ultimate employee control over the corporation, and an objective of maximizing employee welfare"); Robert B. Thompson, *Anti-Primacy: Sharing Power in American Corporations*, 71 BUS. LAW. 381, 384-85 (2016) (suggesting corporate governance power is best understood as shared between multiple actors); Frederick Tung, *The New Death of Contract: Creeping Corporate Fiduciary Duties for Creditors*, 57 EMORY L.J. 809, 809-10 (2008) (arguing for primacy of contract in guiding understanding of corporate governance).

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.³¹⁹ As such, corporate law should empower shareholders with more tools to govern the corporation for their own benefit.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.³²¹ As such, corporate law should empower directors with more freedom and protection to exercise their duties for shareholder wealth maximization.³²² Third, managerialism maintains that senior managers are the key functionaries of a corporation.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.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.³²⁵ As such, corporate law should help mediate and coordinate the

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.”).

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.”).

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

³²² *Id.* at 551 (noting importance of board’s “considerable discretionary powers” as means to provide more efficient decision-making).

³²³ See, e.g., William W. Bratton, *Hedge Funds and Governance Targets*, 95 GEO. L.J. 1375, 1378-79 (2007) (explaining managerialism in corporate governance); George W. Dent, Jr., *Academics in Wonderland: The Team Production and Director Primacy Models of Corporate Governance*, 44 HOUS. L. REV. 1213, 1215 (2008) (“[T]he status quo is not director primacy, shareholder primacy or team production, but CEO primacy—governance by managers largely for their own benefit.”); Martin Lipton & William Savitt, *The Many Myths of Lucian Bebchuk*, 93 VA. L. REV. 733, 736-38 (2007) (critiquing shareholder primacy and advocating for managerialism).

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.”).

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.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.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.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.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.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.³³¹

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.”).

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

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).

³²⁹ See Mary-Hunter McDonnell, Brayden G King & Sarah A. Soule, *A Dynamic Process Model of Private Politics: Activist Targeting and Corporate Receptivity to Social Challenges*, 80 AM. SOC. REV. 654, 674 (2015) (“[S]ustained activist challenges may actually begin to change the strategic mindset of executives, leading them to become increasingly sensitive to stakeholder and social issues.”); Tiffany Hsu, *Larry Fink: Social Responsibility Push Is Not a Fad*, N.Y. TIMES: DEALBOOK (Nov. 1, 2018), <https://www.nytimes.com/2018/11/01/business/dealbook/larry-fink-social-responsibility-dealbook.html> (reporting on belief of lasting corporate social responsibility efforts among leading business executives).

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.”).

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.³³² 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.³³³ 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.³³⁴ 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.³³⁵ 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).

³³⁵ See WEBER SHANDWICK, *THE DAWN OF CEO ACTIVISM* 12 (2016), <http://www.weber-shandwick.com/uploads/news/files/the-dawn-of-ceo-activism.pdf> [https://perma.cc/DV22-QNK9] (espousing importance of “establish[ing] a link between the issue and the company’s values and business”); McDonnell, *supra* note 5, at 55 (“[A]ny time firms take a public stance on a contentious issue, they risk alienating—and even mobilizing—stakeholders who disagree. Accordingly, firms must be selective about the types of initiatives that they support,

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 . . .").

³³⁶ See ALAN K. CHEN & SCOTT L. CUMMINGS, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE 32-33 (2013).

³³⁷ See Stephen M. Bainbridge, *Reflections on Twenty Years of Law Teaching*, 56 UCLA L. REV. DISCOURSE 13, 21 (2008) ("Legal education pervasively sends law students the message that corporate lawyering is a less moral and a less socially desirable career path than so-called 'public interest' lawyering."); John Bliss, *From Idealists to Hired Guns? An Empirical Analysis of "Public Interest Drift" in Law School*, 51 U.C. DAVIS L. REV. 1973, 2030 (2018) (discussing the "corporate/public-interest student divide").

³³⁸ See Bainbridge, *supra* note 337, at 21.

³³⁹ See MACKAY & 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.³⁴⁰ Not without their many and serious flaws,³⁴¹ 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.³⁴² Through jobs, goods, and services, corporations have directly created many economic benefits for society.³⁴³ 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 CYCLOPEDIA 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 (“[Corporations] 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.³⁴⁴ 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.³⁴⁵

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.³⁴⁶ 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.³⁴⁷ 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.³⁴⁸ 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

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).

³⁴⁶ See, e.g., LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (2017), <http://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<https://perma.cc/H23Q-LEPW>] (noting large difference between “civil legal needs of low-income Americans and the resources available to meet those needs”).

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.³⁴⁹ 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.

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).