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Against Corporate Activism: Examining the Use of Corporate Speech to Promote Corporate Social Responsibility

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AGAINST CORPORATE ACTIVISM: EXAMINING THE USE OF CORPORATE SPEECH TO PROMOTE CORPORATE SOCIAL RESPONSIBILITY

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Abstract

This Article offers a novel typography of expenditures on corporate social responsibility, highlighting that such spending often requires a public business corporation to engage in corporate speech. When this speech pertains to social or political issues unrelated to the company's business, this Article argues that such expenditures are generally not in the best interests of the firm's stockholders and terms this spending "corporate activism." Corporate activism is described as the product of agency costs and ideological conflict that derive from an expansion of corporate speech rights under the First Amendment. To protect shareholders from corporate activism, courts have relied upon various disciplining mechanisms that are often not up to the task. This Article offers a different solution, placing the responsibility squarely upon the board of directors of public corporations to limit "expressive" expenditures on corporate social responsibility that do not directly advance the best interests of a company's shareholders. As a tentative policy proposal, this Article suggests that the Securities and Exchange Commission encourage public companies that trade on U.S. stock exchanges to have a "Communications Committee" responsible for the oversight of all forms of corporate speech.

Keywords: Corporate Governance; Corporate Social Responsibility; Corporate Speech; Agency Costs; Corporate Activism; Ideological Conflict; Communications.

Table of Contents

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I. Introduction

In business ethics, a distinction is often drawn between corporate expenditures on corporate social responsibility that are in the best interests of a company's stakeholders and expenditures that are not. Indeed, a rich empirical literature investigates the causal relationship between corporate social responsibility and various measures of financial performance.[1] What has often been overlooked in this literature is a related distinction between expenditures on corporate social responsibility that require a company to engage in some form of protected speech and expenditures that do not. This Article observes that many forms of corporate social responsibility require a public business corporation to "speak," be it directly or indirectly. A public business corporation may speak directly through marketing activities, or the corporation may speak indirectly through corporate contributions to philanthropic organizations, including political action committees, in which

1. *See infra* notes 23–25 and accompanying text.

a firm promotes social or political issues often unrelated to the company's business. Corporate speech, however, raises several difficult conceptual problems, many of which are familiar in the context of corporate political speech, as famously discussed in the U.S. Supreme Court case *Citizens United v. FEC*.[2] Hence, while spending on corporate social responsibility can benefit a broad set of corporate stakeholders, when this spending takes the form of corporate speech on issues *unrelated* to the company's business (i.e., "corporate activism"), such expenditures are generally not in the best interests of a firm's stockholders.[3]

In the following discussion, it will be useful to have a hypothetical in mind. Consider a firm that manufactures toothpaste. Two production processes are available to the firm: (1) a low-cost technology and (2) a high-cost technology. The low-cost production technology is cheaper than the high-cost technology but results in significant pollution of a nearby river serving as the town's main water supply. By contrast, the high-cost technology, while more expensive, eliminates any pollution of the nearby river. No laws or regulations currently prevent the use of the low-cost technology. Suppose further that the social cost of pollution exceeds the cost differential between the two production technologies; therefore, it is socially optimal for the firm—albeit not in its financial best interest—to choose the high-cost production technology.

This Article proceeds as follows: Part II offers a novel typography of expenditures on corporate social responsibility. This typography highlights that corporate social responsibility often requires a public corporation to engage in corporate speech, drawing a distinction between expenditures on corporate social responsibility that are "expressive" and "inexpressive." Expressive expenditures are defined as corporate expenditures in which the company engages in some form of protected speech. In general, expressive expenditures on corporate social responsibility take two forms: (1) marketing activities or (2) corporate contributions. This spending on corporate speech is further categorized according to whether the expenditure maximizes corporate profits. As others have argued, this Article contends that expenditures on corporate social responsibility—made

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2. 558 U.S. 310 (2010).

3. Whether the cost to corporate stockholders exceeds the benefit to other corporate stakeholders, including a firm's customers or employees, is a larger empirical question outside the scope of this Article and left open for future research. For an argument that corporate law can serve as a force for positive social change, see generally Jennifer S. Fan, *Woke Capital: The Role of Corporations in Social Movements*, 9 HARV. BUS. L. REV. 441 (2019).

possible by the U.S. Supreme Court's gradual expansion of corporate speech rights—can lead to an important agency cost problem in which managers make expenditures on corporate social responsibility that do not maximize shareholder value, and which are motivated by interests other than the firm's shareholders.

Recognizing the agency costs implicated by expressive expenditures on corporate social responsibility, especially in the context of corporate political speech, the U.S. Supreme Court has relied upon specific disciplining mechanisms to curb managerial discretion in justifying its expansion of corporate speech rights over time. Part III examines three main categories of disciplining mechanisms: (1) free market forces, (2) mandated disclosures, and (3) corporate democracy. As others have similarly argued, these mechanisms are largely unsatisfactory in many cases.

Part IV provides an overview of the law of corporate advocacy, defined as a combination of marketing activities and corporate contributions to issue advocacy groups. Part IV also provides a brief survey of commercial speech and discusses the case *First National Bank of Boston v. Bellotti*,[4] in which the U.S. Supreme Court held that corporations have First Amendment speech protections that extend beyond commercial speech and are free to express opinions on social or political issues *unrelated* to the company's business.[5] This Article contends that the corporate advocacy made possible by *Bellotti* is often *not* in the best interests of the company's shareholders and refers to such expenditures on corporate social responsibility as "corporate activism." Two distinct theoretical justifications are provided for why spending on corporate advocacy is unlikely to maximize shareholder value: (1) agency costs and (2) free speech as pure conflict. This Article argues that public business corporations, and by default their shareholders, benefit from less corporate speech rights by avoiding a costly social conflict that does not advance the shareholders' economic interests. As a corollary, this Article further makes the point that an unfavorable view of the *Citizens United* decision—in which the Court held that corporate speech rights include (with certain limitations) communications that expressly advocate the election or defeat of a clearly identified candidate—is, in many ways, inconsistent with a favorable view

4. 435 U.S. 765 (1978).
5. *See id.* at 784.

of corporate advocacy (or "woke capitalism" as it is sometimes termed in this context).[6]

To reduce the frequency with which public business corporations engage in corporate activism, Part IV suggests, as a public policy proposal, that the Securities and Exchange Commission ("SEC") encourage public companies that trade on U.S. stock exchanges to have a "communications committee." The communications committee, chartered by the company's board of directors, would be responsible for the oversight of all forms of corporate speech. The primary responsibility of this proposed communications committee would be to ensure that spending on corporate speech promotes the best interests of the corporation's shareholders and not the interests of other corporate stakeholders, including management or certain special-interest groups with outsized influence.

Part V briefly concludes.

II. Typography of Corporate Social Responsibility

Part II presents a novel typography of expenditures on corporate social responsibility, as set forth in Table 1.[7]

Table 1. Typography of Corporate Social Responsibility

	Inexpressive Expenditures	**Expressive Expenditures**	
	Business Practices	*Marketing*	*Contributions*
Profit Sacrificing	Stakeholder Primacy	Advocacy Marketing	Philanthropic Contributions
Profit Maximizing	Environmental, Social, and Governance Criteria ("ESG Criteria")	Cause Marketing	Cause-Related Contributions

6. *See Citizens United*, 558 U.S. at 365–66 (overruling Austin v. Mich. Chamber of Com., 494 U.S. 652 (1990)).

7. Table 1 accommodates a well-known typography of corporate social responsibility that breaks down such activities into six distinct types of corporate social initiatives. *See generally* Philip Kotler & Nancy Lee, Corporate Social Responsibility: Doing the Most Good for Your Company and Your Cause (2005) (segmenting corporate social responsibility activities into six types of corporate social initiatives: (1) corporate giving, (2) community volunteering, (3) socially responsible business practices, (4) cause promotions, (5) cause-related marketing, and (6) corporate social marketing).

Note that Table 1 categorizes expenditures on corporate social responsibility along two distinct dimensions: (1) whether the expenditure maximizes shareholder profits and (2) whether the expenditure can be defined as inexpressive or expressive.

A. Profit Maximization

As an initial matter, Table 1 assumes shareholder primacy, defined as a normative model of corporate governance in which a manager has the singular goal of maximizing shareholder value.[8] Although this Article sometimes refers to the more general concept of shareholder value, the market price of shares can be presumed the only—or at least the principal—measure of the interests of a firm's shareholders.[9] Accordingly, the question of whether shareholders benefit from a given business decision can be equated with the expected impact of that decision on a firm's share price. In addition, the market price of shares can be set equal to the sum of all corporate profits discounted back to their present value.[10] Under this discounted profit model of a firm's stock price, the maximization of corporate profits, as a measure of shareholder value, can thus be posited as the only—or at least the primary—objective function of a corporate manager.[11]

8. *See generally* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 2–3 (1932) (stating that shareholders are a corporation's true owners); MILTON FRIEDMAN, CAPITALISM AND FREEDOM 112 (1982) ("[T]here 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 . . . engages in open and free competition, without deception or fraud."). *See also* Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970 (§ SM), at 17 (stating that a manager's primary responsibility is to shareholders).

9. *See* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 441 (2001).

10. *See generally* Stephen H. Penman & Theodore Sougiannis, *A Comparison of Dividend, Cash Flow, and Earnings Approaches to Equity Valuation*, 15 CONTEMP. ACCT. RSCH. 343 (1998) (assuming that the market price of shares is efficient, i.e., equal to intrinsic value).

11. Pure profit maximization may be too strong. As a more plausible alternative, scholars have described an "enlightened value maximization" in which managers "[s]pend an additional dollar on any constituency provided the long-term value added to the firm from such expenditure is a dollar or more." Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, J. APPLIED CORP. FIN., Oct. 29, 2001, at 14, 16.

1. Stakeholder Primacy

This shareholder primacy model of corporate governance is often contrasted with the stakeholder primacy model in which a manager is obligated to serve the interests of a broader set of corporate stakeholders.[12] In addition to the company's stockholders, other corporate stakeholders include employees, creditors, customers, and local communities.[13] Under the stakeholder primacy model, managers owe fiduciary duties to some subset of the company's primary stakeholders and must balance the legitimate interests of each when making business decisions.[14] Importantly, stakeholder primacy does not imply that managers do not take corporate profits into account when choosing to undertake a project. Even though managers seek to maximize the joint welfare of a larger set of corporate stakeholders—however defined—this maximization must be achieved by balancing the interests of all relevant stakeholders, including the firm's stockholders whose interests are assumed to align with the profitability of the firm.

12. *See, e.g.*, R. Edward Freeman & David L. Reed, *Stockholders and Stakeholders: A New Perspective on Corporate Governance*, 25 CAL. MGMT. REV. 88, 89 (1983); R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH (2010).

13. *See* Freeman & Reed, *supra* note 12, at 89; *see also* James E. Post et al., *Managing the Extended Enterprise: The New Stakeholder View*, 45 CAL. MGMT. REV. 6, 8 (2002) (defining corporate stakeholders as "individuals and constituencies that contribute, either voluntarily or involuntarily, to [a company's] wealth-creating capacity and activities, and who are therefore its potential beneficiaries and/or risk bearers"); *cf.* Samantha Miles, *Stakeholders: Essentially Contested or Just Confused?*, 108 J. BUS. ETHICS 285, 290 (2012) (noting that the nature of what constitutes a corporate stakeholder is highly contested, with numerous definitions existing in the existing academic literature).

14. *See, e.g.*, LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 95–102 (2012); Jill E. Fisch, *The "Bad Man" Goes to Washington: The Effect of Political Influence on Corporate Duty*, 75 FORDHAM L. REV. 1593, 1613 (2006). Many have questioned whether corporate managers can feasibly solve this type of joint welfare maximization program. *See, e.g.*, Jensen, *supra* note 11, at 14 (stating that stakeholder theory provides no guidance as to how corporate managers are to adjudicate among stakeholders' disparate interests); Elaine Sternberg, *The Defects of Stakeholder Theory*, 5 CORP. GOVERNANCE: AN INT'L REV. 3, 4 (1997) (noting that directors may not always be aware of what stakeholders consider a benefit); Kenneth E. Goodpaster, *Business Ethics and Stakeholder Analysis*, 1 BUS. ETHICS Q. 53, 66 (1991) (asserting that the stakeholder approach is likely to push "decision-making towards paralysis because of the dilemmas posed by divided loyalties and, in the final analysis, represents nothing less than the conversion of the modern private corporation into a public institution"); Andrew Keay, *Stakeholder Theory in Corporate Law: Has It Got What It Takes?*, 9 RICH. J. GLOB. L. & BUS. 249, 269–98 (2010).

As highlighted in Table 1, stakeholder primacy, as a form of corporate social responsibility, fundamentally differs from shareholder primacy in that a manager can take a corporate action that does *not* maximize corporate profits. For instance, in the case of our hypothetical toothpaste manufacturer, stakeholder primacy implies that the company can choose the high-cost technology even if this decision does not maximize shareholder value (e.g., the use of the high-cost technology leads to lower profits and, in turn, lower share prices). The firm can *voluntarily* choose to internalize the negative pollution externalities produced by its manufacturing process, foregoing private returns to its stockholders, to reduce broader social costs in the form of environmental harm (where these social costs are assumed to exceed the private benefits to shareholders). By adopting stakeholder primacy as its organizing model of corporate governance, the firm maximizes social welfare in prioritizing the local environment, qua stakeholder, over the firm's stockholders.[15] Such corporate action is not feasible under a shareholder primacy model of corporate governance in which a manager must maximize corporate profits (i.e., must choose the low-cost production technology).

2. ESG Criteria

Table 1 distinguishes between expenditures on corporate social responsibility that maximize corporate profits and those that do not. If the firm's business practices benefit other corporate stakeholders at the expense of the firm's shareholders, then the firm, having adopted stakeholder primacy as its operating model of corporate governance, is characterized as

15. Whether this form of profit-sacrificing is sustainable in the long run in the face of competitive pressures is an important empirical question. *See generally* Armen A. Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 J. POL. ECON. 211 (1950) (critiquing the use of profit maximization as a guide to action in economic analysis); Morris Altman, *The Methodology of Economics and the Survival Principle Revisited and Revised: Some Welfare and Public Policy Implications of Modeling the Economic Agent*, 57 REV. SOC. ECON. 427 (1999) (revisiting profit maximization using behavioral economics). In many cases, a firm that spends money on corporate social responsibility will have to raise prices, reduce wages or other costs of production, accept smaller profits, or pay smaller dividends. Forest L. Reinhardt et al., *Corporate Social Responsibility Through an Economic Lens*, 2 REV. ENV'T ECON. & POL'Y 219, 235 (2008) ("Other short-term economic consequences may include loss of market share, increased insurance costs, increased borrowing costs, and loss of reputation. In the long term, the firm may face shareholder litigation, corporate takeover, or closure.").

truly motivated by ethical or moral considerations.[16] If the firm's expenditures on corporate social responsibility, however, maximize corporate profits, then the firm is motivated not by ethical or moral considerations, but by corporate profits, and specifically, by reputation or brand management. Such expenditures on corporate social responsibility can be described as standard profit maximization where this optimization is performed subject to certain binding ESG constraints, defined as a set of standards related to a company's business operations that socially conscious stakeholders use to screen or evaluate firms.[17]

For many companies, especially large publicly traded corporations, the corporate brand is one of the company's most important corporate assets.[18] Because a firm's brand is a function of how the company is perceived by others, a firm must often focus on certain external corporate stakeholders if it wishes to strengthen its corporate brand, expending costly corporate resources to satisfy the needs or wants of those stakeholders whose perceptions determine the strength of its corporate brand or market reputation.[19] Under this category of corporate social responsibility, the firm's focus on corporate stakeholders other than the firm's stockholders is simply a rational investment in the company's brand, image, or reputation, no different than any other investment in a corporate asset. As in any financial investment, a firm is willing to forego private returns to shareholders in the short term because the company rationally expects these costs to generate a profit for its stockholders in the long term.[20]

Formally, a firm can be modeled as maximizing corporate profits subject to certain ESG constraints. Although the set of ethical constraints imposed upon a firm can relate to any aspect of its business, ESG constraints, as the name suggests, pertain to three basic factors used to measure a firm's social

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16. *See* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 744–45 (2005) (defining corporate social responsibility as sacrificing profits in the social interest).

17. *See* Witold Henisz et al., *Five Ways that ESG Creates Value*, MCKINSEY Q. (Nov. 14, 2019), https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/five-ways-that-esg-creates-value.

18. Blair Brady, *Your Brand Is Your Greatest Asset*, FORBES (Feb. 24, 2020, 6:15 AM EST), https://www.forbes.com/sites/forbesagencycouncil/2020/02/24/your-brand-is-your-greatest-asset/?sh=4a39a6a063b7.

19. *See generally* Maria João Louro & Paulo Vieira Cunha, *Brand Management Paradigms*, 17 J. MKTG. MGMT. 849 (2010).

20. *See, e.g.*, Robert Eccles et al., *Is Sustainability Now the Key to Corporate Success?*, GUARDIAN (Jan. 6, 2012, 11:52 EST), https://www.theguardian.com/sustainable-business/sustainability-key-corporate-success.

impact: (1) environmental, (2) social, and (3) governance.[21] Importantly, the firm's stakeholders (e.g., consumers, investors) are concerned about these criteria not because these stakeholders believe that a firm that is similarly concerned about these criteria is, on average, more profitable or produces superior products compared to a firm that does not. Rather, the ESG criteria concern these stakeholders because of their individual preferences that are not simply a function of price or return on investment but include other variables related to social impact, such as sustainability or diversity of board composition.[22] Indeed, if a relationship exists between consideration of ESG criteria and financial performance, then, as was true of a public corporation, the consideration of ESG criteria would not implicate business ethics; instead, it would correspond to self-interested profit or utility maximization no different than the consideration of any other variable with the potential to improve an investment or consumption decision.

Specifically, ESG criteria can operate as a binding constraint on profit maximization through three main external channels. *First*, if a firm consistently flouts societal norms and imposes large social costs on local communities (e.g., in the form of pollution), then the government may respond by enacting laws or regulations proscribing such behavior. These laws and regulations can limit a firm's freedom to operate as it so chooses and can lead to lower corporate profits if the regulatory interventions are not optimally designed.[23] *Second*, for firms catering to a more socially conscious clientele, the failure to satisfy societal norms, even if the conduct is otherwise legal, can result in decreased sales and, in turn, lower corporate profits.[24] *Third*, investors may choose not to invest in firms viewed as socially irresponsible, raising the firm's effective cost of capital.[25] Applying pressure through these external channels, socially conscious ESG stakeholders can compel a firm to internalize the social costs generated by

21. *See generally* JOHN ELKINGTON, CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS (1998). Areas of environmental concern are broad and include greenhouse gas emissions, biodiversity, waste management, and depletion of scarce natural resources. Areas of social concern include diversity and inclusion, consumer protection, and animal rights. Areas of corporate governance concern include management structure (e.g., split roles of CEO and Chairperson) and executive or employee compensation.

22. *See id.*

23. *See* Henisz et al., *supra* note 17.

24. *See, e.g.*, Lois A. Mohr et al., *Do Consumers Expect Companies to Be Socially Responsible? The Impact of Corporate Social Responsibility on Buying Behavior*, 35 J. CONSUMER AFFS. 45, 67–68 (2001).

25. *See, e.g.*, Joshua Graff Zivin & Arthur Small, *A Modigliani–Miller Theory of Altruistic Corporate Social Responsibility*, 5 TOPICS IN ECON. ANALYSIS & POL'Y 1 (2005).

its business operations. Unlike in a stakeholder primacy model, where a firm voluntarily chooses the socially optimal outcome at the financial expense of its stockholders, a firm, in this case, chooses the socially optimal outcome as a rational, profit-maximizing response to external constraints imposed upon it by its socially conscious corporate stakeholders. The key driver of socially responsible corporate behavior is not the firm itself, but market forces external to the firm.[26] Accordingly, this specific category of corporate social responsibility is best described not as a fundamentally new model of corporate governance, but rather as an investor or consumer phenomenon that can potentially force companies to alter their existing business practices for the benefit of other corporate stakeholders, including the environment, and society more broadly.

B. Expressive Expenditures

As Table 1 highlights, corporate social responsibility often requires a public business corporation to engage in some type of corporate speech, be it directly through marketing activities, or indirectly through corporate contributions to philanthropic organizations (as defined here). Specifically, Table 1 distinguishes between expenditures on corporate social responsibility that are "expressive" and "inexpressive." Expressive expenditures are defined as expenditures on corporate social responsibility in which the company engages in some form of protected speech. Inexpressive expenditures are defined as corporate expenditures that are *not* expressive. In general, expressive expenditures on corporate social responsibility take two main forms: (1) marketing activities or (2) corporate contributions. Most straightforwardly, expressive expenditures encompass marketing activities in which the company makes some form of communication directly to the public, typically to its consumers or investors—for example, corporate spending on mass-market advertising. Marketing activities, however, are more broadly defined here, as discussed in greater detail in Section IV.A, to also include corporate spending on social or political issues unrelated to the company's business.

In addition to marketing activities, expressive expenditures also comprise contributions to charitable or political organizations that seek to promote or otherwise advance specific social or political issues. This can be seen in issue advocacy groups, like the ACLU, or certain types of political action committees, like Super PACs.[27] In *Buckley v. Valeo*,[28] the U.S. Supreme

26. *See id.* at 5.
27. *See infra* note 64 and accompanying text.
28. 424 U.S. 1 (1976).

Court rejected the idea that restrictions on contributions to such organizations merely limit conduct: "[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to . . . reduce the exacting scrutiny required by the First Amendment."[29] To support the connection between contributions and protected speech, the Court stated that organizations seeking to advance a social or political issue typically must possess sufficient financial resources to effectively promote or communicate that issue to the public: "[V]irtually every means of communicating ideas in today's mass society requires the expenditure of money."[30] Because money is often a precondition for speech, placing restrictions on contributions to organizations that engage in protected speech can be reasonably expected to result in less speech by these organizations, which in turn "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[31] Even though the relationship to speech is less direct because money is used for expressive purposes by the recipient of the money, and not the donor, contributions to organizations that seek to promote social or political issues nevertheless constitute—as an "indispensable" component of these organizations' communicative efforts—speech, and not conduct; therefore, these contributions are classified as expressive expenditures under the typography set forth in Table 1.[32]

1. Marketing Activities

Table 1 classifies marketing activities according to whether this spending on corporate social responsibility (1) maximizes corporate profits (i.e., cause marketing), or (2) does *not* maximize corporate profits (i.e., advocacy marketing).

29. *Id.* at 16–17 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964)) (noting that a citizen sending a telegram to a public official—a clearly protected activity—requires spending money).

30. *Id.* at 19.

31. *Id.*

32. *See id.* Expressive expenditures are defined to also include corporate contributions to charitable organizations that seek to redistribute scarce resources rather than promote specific social or political issues. The claim is that the expenditure communicates to those aware of the corporate contribution a broader corporate ideology that approves of specific redistributive public policies.

a) Cause Marketing

Cause marketing is defined as a type of expenditure on corporate social responsibility in which a firm seeks to maximize profits by highlighting specific social causes in the marketing of its products or services.[33] In general, cause marketing takes two forms: (1) cause promotion and (2) corporate social marketing.[34] Cause promotion is defined as a company-funded issue advocacy campaign in which a firm has a financial self-interest, targeting consumers of its products or services to increase sales and, in turn, corporate profits.[35] In some cases, this financial self-interest is direct and obvious—for example, when The Body Shop, a retailer of "cruelty-free" cosmetic products, promoted a ban to stop testing cosmetics on animals.[36] In other cases, cause promotions simply attempt to establish an affinity with a target market—for example, Pantene's "Strong is Beautiful" marketing campaign that encourages African American women to embrace their strong and unique hair as beautiful.[37]

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33. *See* Scott M. Smith & David S. Alcorn, *Cause Marketing: A New Direction in the Marketing of Corporate Responsibility*, J. CONSUMER MKTG., Mar. 1, 1991, at 19, 20–21.

34. *See* PHILIP KOTLER ET AL., GOOD WORKS! 49–81, 111–38 (2012). Lobbying can be considered a third type of cause marketing operating at the level of the individual, in which a corporation lawfully seeks to *influence* a government official, such as a legislator or member of a regulatory agency. Although lobbying activities may be motivated by interests other than the firm's shareholders, studies have shown that corporations tend to engage in lobbying activities to maximize shareholder value. *See, e.g.*, Raquel Alexander et al., *Measuring Rates of Return on Lobbying Expenditures: An Empirical Case Study of Tax Breaks for Multinational Corporations*, 25 J.L. & POL. 401, 404 (2009) (finding "an average return in excess of $220 for every $1 spent on lobbying, or 22,000 percent"); *Money and Politics: Ask What Your Country Can Do for You*, ECONOMIST (Oct. 1, 2011), https://www.economist.com/finance-and-economics/2011/10/01/money-and-politics (citing a study by an investment-research firm, Strategas, concluding that political lobbying is a "spectacular investment" yielding "blistering" returns); *see also* Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 132 (2010) ("[L]obbying is a more effective means of securing desired ends, and the amounts spent on lobbying rather than on campaign activities (even in states that permit contributions) reflect corporate understanding that the work of securing a compliant government is best carried out in the legislative rather than electoral arena."). *See generally* ROBERT G. KAISER, SO DAMN MUCH MONEY: THE TRIUMPH OF LOBBYING AND THE CORROSION OF AMERICAN GOVERNMENT (2010) (noting that lobbying appears to be a primary means of corporate political activity, with corporate contributions acting more as complementary activity).

35. *See* KOTLER ET AL., *supra* note 34, at 49–81.

36. *See Forever Against Animal Testing*, BODY SHOP, https://www.thebodyshop.com/en-au/about-us/activism/faat/a/a00018 (last visited Oct. 17, 2021).

37. *See* Barrett J. Brunsman, *P&G Launches Ad Campaign to Remedy Bias Against African-Americans*, CINCINNATI BUS. COURIER (Mar. 23, 2017, 1:33 PM EDT), https://www.

Corporate social marketing, by contrast, constitutes a behavior-change marketing campaign intended to improve public health, safety, or the environment.[38] In this case, a firm acts in a financially self-interested manner not to increase sales directly, but rather to reduce specific forms of product misuse that may result in laws or regulations that negatively impact the firm's profitability. The intended outcome of this marketing initiative is behavior change, not increased sales.[39] Beer companies, for example, engage in corporate social marketing in urging customers to "drink responsibly."[40] Likewise, mobile phone companies engage in corporate social marketing in urging customers not to text while driving.[41] These marketing campaigns are expressly intended to support or influence a specific public behavior related to consumer misuse of a product or service (e.g., drinking responsibly, not texting while driving) that, if adopted by a sufficient number of people, decreases the likelihood of unprofitable government intervention to reduce the social harm created by such misuse.

b) Advocacy Marketing

Unlike cause marketing, advocacy marketing is defined as a type of marketing strategy in which a firm no longer seeks to maximize corporate profits in highlighting specific social causes. A company engages in advocacy marketing without a profit-maximization motive; rather, the firm spends corporate funds on such marketing activities to promote the personal convictions of its corporate managers or other stakeholders of the firm at the expense of the firm's stockholders. In general, advocacy marketing takes two distinct forms: (1) express advocacy or (2) issue advocacy.[42]

Express advocacy is defined as a marketing campaign in which a company makes communications expressly advocating for the election or defeat of one or more clearly identified candidates (or ballot measures).[43]

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bizjournals.com/cincinnati/news/2017/03/23/p-g-launches-ad-campaign-to-remedy-bias-against.html.

38. *See* KOTLER ET AL., *supra* note 34, at 111.

39. *See id.* at 113.

40. *See, e.g.*, HEINEKEN, *Enjoy Heineken® Responsibly*, https://www.heineken.com/global/en/enjoy-responsibly (last visited Oct. 17, 2021).

41. *See, e.g.*, Magdalena Cismaru & Kate Nimegeers, *"Keep Your Eyes Up, Don't Text and Drive": A Review of Anti-Texting While Driving Campaigns' Recommendations*, 14 INT'L REV. ON PUB. & NONPROFIT MKTG. 113, 113–14 (2017).

42. *See* Citizens for Responsible Gov't State Pol. Action Comm. v. Davidson, 236 F.3d 1174, 1187 (10th Cir. 2000) (discussing the distinctions between permissible restrictions on express advocacy and issue advocacy).

43. *See* 11 C.F.R. § 100.22 (2021).

Under federal election law, corporations may support (or oppose) candidates by making independent expenditures, which are expenditures for a communication (1) that expressly advocates the election or defeat of a clearly identified candidate (or ballot measure) and (2) "that is not made in cooperation, consultation, or concert with, or at the request or suggestion of" any candidate, the candidate's authorized committees or agents, or a political party committee or its agents.[44] If the advocacy effort of a corporation is "coordinated" in this manner, then the expenditure is considered an in-kind contribution to the candidate, contravening the Federal Election Campaign Act, which expressly prohibits a corporation from making contributions to electoral candidates.[45]

Issue advocacy, by contrast, can be defined as a communication that does *not* contain express advocacy.[46] Because the U.S. Supreme Court in *Buckley v. Valeo*[47] limited the reach of campaign finance laws to express advocacy, the First Amendment shields issue advocacy from government regulation.[48] In footnote 52 of the *Buckley* opinion, the Supreme Court listed eight words or phrases as illustrative of speech that qualifies as express advocacy. Speakers who did not invoke any of the eight specific words or phrases of *Buckley*, or similar language expressly calling voters to vote for or against a candidate, were exempt from campaign finance laws.[49] Revisiting this difference, however, in *McConnell v. Federal Election Commission*,[50] the Supreme Court ruled that "magic words" are "functionally meaningless," because an advertiser can still communicate its intention to voters without them.[51] In lieu of a bright-line rule, the Court set forth the functional-equivalent test: if a communication has "no reasonable interpretation other than as an appeal to vote for or against a specific candidate," then the communication is "the functional equivalent of express advocacy."[52]

2. Corporate Contributions

Like marketing activities, Table 1 further classifies corporate contributions according to whether this spending on corporate social

44. *See* 11 C.F.R. § 100.16.
45. *See* 11 C.F.R. § 114.2(a).
46. *See Davidson*, 236 F.3d at 1187.
47. 424 U.S. 1 (1976).
48. *Id.* at 44–49.
49. *Id.* at 44 n.52 (listing "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject," or any variations thereof).
50. 540 U.S. 93 (2003).
51. *Id.* at 217.
52. FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 469–70 (2007).

responsibility (1) maximizes corporate profits (i.e., cause-related contributions) or (2) does *not* maximize corporate profits (i.e., philanthropic contributions).

a) Cause-Related Contributions

A cause-related contribution is defined as a type of expressive expenditure on corporate social responsibility in which a corporation contributes to a corporate partner, often a non-profit organization, with the intention of maximizing corporate profits.[53] Under this type of partnership, a company contributes to a partner charitable organization based upon sales of its product or service.[54] In addition to strengthening its corporate brand or reputation, a company can benefit from cause-related contributions in several ways. For example, corporate support of local causes can improve the quality of life in communities in which the company does business, helping the company build productive relationships with government officials and community leaders that reduce expected regulatory obstacles.[55] A firm can use cause-related contributions to improve economic conditions in developing or otherwise low-income regions, with the long-term business objective of increasing the size and quality of its customer base.[56] Further, a commitment to philanthropy can greatly facilitate efforts to recruit talented

53. *See* P. Rajan Varadarajan & Anil Menon, *Cause-Related Marketing: A Coalignment of Marketing Strategy and Corporate Philanthropy*, 52 J. MKTG. 58, 60 (1988) (defining cause-related contributions as "the process of formulating and implementing marketing activities that are characterized by an offer from the firm to contribute a specified amount to a designated cause when customers engage in revenue-providing exchanges that satisfy organizational and individual objectives").

54. Often credited as the first to use the phrase "cause-related" contributions, American Express, in 1983, pledged to donate to the Statue of Liberty Renovation Fund one cent for each use of its credit card and one dollar for each new card issued. Matthew Berglind & Cheryl Nakata, *Cause-Related Marketing: More Buck than Bang?*, 48 BUS. HORIZONS 443, 445 (2005). The campaign was a financial success: American Express raised over one million dollars for the cause and produced a 28% increase in American Express card usage and a 17% increase in card applications. *Id.*

55. *See* David P. Baron, *Private Politics, Corporate Social Responsibility, and Integrated Strategy*, 10 J. ECON. & MGMT. STRATEGY 7, 7–8 (2001); *see also* Witold J. Henisz et al., *Spinning Gold: The Financial Returns to Stakeholder Engagement*, 35 STRATEGIC MGMT. J. 1727, 1742–44 (2014) (finding that mining companies that gained the trust of regulatory authorities through social-engagement activities were able to extract gold with less regulatory costs or delays).

56. *See* Baruch Lev et al., *Is Doing Good Good for You? How Corporate Charitable Contributions Enhance Revenue Growth*, 31 STRATEGIC MGMT. J. 182, 185 (2010).

employees with socially conscious preferences or to bond such employees to the company.[57]

b) Philanthropic Contributions

Unlike cause-related contributions, a philanthropic contribution is defined as an expressive expenditure on corporate social responsibility that does not maximize corporate profits: like advocacy marketing, a philanthropic contribution is made without a profit-maximization motive. Instead, the company contributes to another organization for some other reason, such as to promote the personal ideological agenda of individual corporate managers (or other stakeholders of the firm).[58] Philanthropic contributions take one of two forms based upon the intended beneficiary: (1) charitable contributions or (2) political contributions.

Charitable contributions can be defined as philanthropic contributions to 501(c)(3)[59] charitable organizations, sometimes made through a distinct corporate foundation. These donations are tax-deductible and can be in the form of direct cash payments or non-cash contributions.[60] Political contributions, by contrast, are defined as philanthropic contributions to certain types of political action committees and are not tax-deductible (because the IRS does not consider political action committees to be qualifying organizations for the purposes of federal income taxes).[61] Under federal election law, corporations are generally prohibited from using general treasury funds to make contributions directly to candidates, accounts of political party committees, or standard political action committees ("PACs").[62] Corporations can, however, contribute to "special"

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57. *See id.* at 183–84; *see also* Alex Edmans, *The Link Between Job Satisfaction and Firm Value, with Implications for Corporate Social Responsibility*, ACAD. MGMT. PERSP., Nov. 2012, at 1, 1 (finding that companies that made Fortune's "100 Best Companies to Work For" list generated 2.3% to 3.8% higher stock returns per year compared to relevant peer group).

58. *See* KOTLER & LEE, *supra* note 7, at 23–24, 144–45.

59. *See* 26 U.S.C. § 501(c)(3).

60. *See* 26 U.S.C. § 170. Examples of non-cash contributions can include donation of new or used equipment or supplies, use of a company's administrative services or facilities, or receipt of pro bono work in the form of professional services or more general company-organized volunteer activities. KOTLER & LEE, *supra* note 7, at 146.

61. *See* 26 U.S.C. § 162(e)(1); *see also* I.R.S. Pub. 529 (Dec. 2020), http://www.irs.gov/pub/irs-pdf/p529.pdf (stating that corporations cannot "deduct contributions made to a political candidate [or] a campaign committee").

62. *See* 11 C.F.R. § 114.2(a) (2021). Races for non-federal offices are governed by state and local law. Over half the states allow some level of corporate contributions to non-federal offices. *See Campaign Contribution Limits: Overview*, NAT'L CONF. STATE LEGISLATURES

political action committees established solely to finance independent expenditures (i.e., Super PACs).[63] Super PACs, officially known as "independent expenditure-only political committee[s]," can raise and spend unlimited amounts of money to advocate for or against any candidate or political issue as long as there is *no* coordination, consultation, or request by any electoral campaign or candidate.[64]

III. Proposed Solutions to Agency Cost Problem

Over time, the U.S. Supreme Court has gradually expanded the speech rights of public business corporations under the First Amendment of the U.S. Constitution. These expanded speech rights have enabled public corporations to spend more on corporate social responsibility in the form of expressive expenditures.[65] As others have cautioned, this type of spending on corporate speech, especially with respect to social or political issues unrelated to the company's business, allows corporate managers to promote individual pet social or political causes at the expense of profit maximization.[66] In his dissent in *Citizens United*, Justice Stevens warned

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(Oct. 4, 2019), https://www.ncsl.org/research/elections-and-campaigns/campaign-contribution-limits-overview.aspx.

63. *See* Citizens United v. FEC, 558 U.S. 310, 365 (2010); SpeechNow.org v. FEC, 599 F.3d 686, 693 (D.C. Cir. 2010) (en banc); Carey v. FEC, 791 F. Supp. 2d 121, 135 (D.D.C. 2011).

64. *See* FEC Op. 2010-11 (July 22, 2010). Public corporations can also make contributions to 501(c) "dark money" groups that are distinct from Super PACs. These "dark money" groups refer to 501(c)(4) (social welfare), 501(c)(5) (unions), and 501(c)(6) (trade association) nonprofit organizations. *See* John Francis Reilly & Barbara A. Braig Allen, *Political Campaign and Lobbying Activities of IRC 501(c)(4), (c)(5), and (c)(6) Organizations*, I.R.S. (2003), at L-2 to L-3, https://www.irs.gov/pub/irs-tege/eotopicl03.pdf. Although both types of closely related entities can raise and spend unlimited sums of money if there is no coordination with political parties or candidates, a Super PAC must disclose its donors, while 501(c) groups, with a few limited exceptions, are not required to make such disclosures. *Compare* 52 U.S.C. § 30104(b), *with* 52 U.S.C. § 30104(c). Moreover, unlike Super PACs, 501(c) groups may engage in political activities only if these activities do not become the group's "primary" activity. *See* Treas. Reg. § 1.501(c)(4)-1(a)(2) (2021).

65. *See supra* Section II.B.

66. *See generally* CHARLES T. CLOTFELTER, FEDERAL TAX POLICY AND CHARITABLE GIVING (1985). Managers can reap personal benefits from expenditures on corporate social responsibility in several ways. Even if a gift is fully funded with company money, the corporate manager often receives some credit—these awards, honors, and accolades provide the manager with a psychic benefit and can elevate the manager's status in elite social circles. *See* James Andreoni, *Impure Altruism and Donations to Public Goods: A Theory of Warm-Glow Giving*, 100 ECON. J. 464, 464–65 (1990). In addition, a corporate manager can use corporate philanthropic donations to advance a personal ideological agenda or pet

that when managers use general treasury funds on corporate social responsibility to advance specific social or political issues, the company's shareholders, as residual claimants, are "effectively footing the bill" and may be forced to engage in "a kind of coerced speech" in which a corporation promotes social or political causes that do not represent the ideological viewpoints of the firm's shareholders.[67] This divergence between the ideological preferences of a public business corporation, as expressed or promoted through its spending on corporate speech, and those of its shareholders exemplifies the core agency cost problem at the heart of the modern corporation. The misalignment of incentives between managers and shareholders created by the separation of ownership and control[68] is unavoidably implicated when a public business corporation is granted expansive speech rights that enable corporations to spend shareholder money to promote social or political issues.[69]

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charity. *See* William O. Brown et al., *Corporate Philanthropic Practices*, 12 J. CORP. FIN. 855, 856 (2006). Also, corporate managers may use corporate philanthropy to divert public attention from reported negative financial results or to buy goodwill after the firm has been required to restate earnings. *See* Daryl Koehn & Joe Ueng, *Is Philanthropy Being Used by Corporate Wrongdoers to Buy Good Will?*, 14 J. MGMT. & GOVERNANCE 1, 14 (2009).

67. *See Citizens United*, 558 U.S. at 475 (Stevens, J., concurring in part and dissenting in part).

68. *See generally* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 309 (1976); Michael C. Jensen, *Agency Costs of Free Cash Flow, Corporate Finance, and Takeovers*, 76 AM. ECON. REV. 323, 323 (1986).

69. Although the existing empirical literature is by no means conclusive, several studies suggest that corporate contributions can be motivated by interests other than the firm's stockholders and do not maximize shareholder value. *See, e.g.*, Anthony Fowler et al., *Quid Pro Quo? Corporate Returns to Campaign Contributions*, 82 J. POL. 844, 854, 856 (2020) (finding no evidence that a corporate donation to a candidate produces monetary benefits if that candidate wins the election); Hao Liang & Luc Renneboog, *Corporate Donations and Shareholder Value*, 33 OXFORD REV. ECON. POL'Y 278, 307 (2017) (finding that political contributions do not appear to enhance shareholder value); CIARA TORRES-SPELLISCY, BRENNAN CTR. FOR JUST., CORPORATE CAMPAIGN SPENDING: GIVING SHAREHOLDERS A VOICE 9 (2010), https://www.brennancenter.org/sites/default/files/2019-08/Report_Corporate-Campaign-Spending-Giving-Shareholders-Voice.pdf ("[H]igh levels of political spending are a trademark of poor corporate management, and that 'managers willing to squander small sums on political giving are likely to squander larger sums elsewhere.'" (quoting Rajesh Aggarwal, Felix Meschke, & Tracy Wang, Corporate Political Contributions: Investment or Agency? 39 (June 25, 2009) (unpublished manuscript)); John C. Coates IV, *Corporate Politics, Governance, and Value Before and After* Citizens United, 9 J. EMPIRICAL LEGAL STUD. 657, 688 (2012) (finding corporate political contributions to be negatively correlated with measures of shareholder power, positively correlated with signs of agency costs, and negatively correlated with shareholder value).

To justify its gradual expansion of corporate speech protected by the First Amendment, the U.S. Supreme Court has identified as a check on managerial discretion—and agency costs more generally—three principal categories of disciplining mechanisms: (1) free market forces, (2) mandated disclosure, and (3) corporate democracy. As others have argued, this Article contends that, for the most part, these disciplining mechanisms are not up to the task.

A. Free Market Forces

Courts have argued that free market economic forces can act as a natural disciplining mechanism to prevent expenditures on corporate social responsibility that are motivated by interests other than corporate stockholders. In both *Bellotti* and *Citizens United*, for example, the U.S. Supreme Court noted that ownership of corporate stock is voluntary and that dissatisfied shareholders can freely choose to sell their shares in the company if displeased with its corporate speech.[70] Rather than engage in acts of corporate democracy, such as proxy fights or shareholder proposals—which, as discussed below, are costly, risky, and time-consuming—shareholders can express their dissatisfaction with spending on corporate speech by simply selling their shares (i.e., doing the "Wall Street Walk").[71] The claim is that the sale of shares, or the threat thereof, especially by large institutional investors, puts downward pressure on a firm's stock price that can materially impact the behavior of its corporate managers. In this way, free market exchange itself becomes a form of shareholder activism.[72]

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70. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 794 n.34 (stating that a corporate shareholder "invests in a company at his own volition and is free to withdraw his investment at any time and for any reason" (internal brackets omitted)); *Citizens United*, 558 U.S. at 370–71.

71. *See, e.g.*, Carl T. Bogus, *Excessive Executive Compensation and the Failure of Corporate Democracy*, 41 BUFF. L. REV. 1, 41 (1993) (describing the "Wall Street Rule") ("[I]t is more efficient to sell a particular stock than it is to try to reform the company."); Michael S. Kang, *Shareholder Voting as Veto*, 88 IND. L.J. 1299, 1308 (2013). *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 4 (1970). Hirschman argues that a member of an organization has two possible responses when confronted with decreasing benefits of membership: (1) *exit* (withdraw from the relationship) or (2) *voice* (attempt to repair or improve the relationship through communication of the complaint, grievance, or proposal for change). *Id.*

72. *See, e.g.*, Anat R. Admati & Paul Pfleiderer, *The "Wall Street Walk" and Shareholder Activism: Exit as a Form of Voice*, 22 REV. FIN. STUD. 2645, 2646 (2009).

Such free market forces, however, are unlikely to act as a meaningful check on management for several reasons. As an initial matter, limitations on required corporate disclosures substantially impair a shareholder's ability to obtain the information necessary to make an informed decision to sell.[73] Moreover, even if a shareholder learns of objectionable spending on corporate social responsibility, the "Wall Street Walk" permits a shareholder "only to escape continued unauthorized use of corporate resources" through the sale of his securities.[74] This sale does not necessarily curtail the activity or provide a remedy for prior unauthorized use.[75] In addition, selling shares in response to objectionable corporate speech is unlikely to have a significant disciplining effect on management unless a large number of shareholders all sell at roughly the same point in time. For this to occur, a large group of stockholders must be willing to forego the future economic benefits of stock ownership—in the form of dividend payments and stock price appreciation—in exchange for the more ephemeral psychic benefits of having sold the company's stock in a principled act of quiet protest.[76] Finally, even if a coordinated sell-off causes the company's stock price to drop, management may not know the reason.[77] This disconnect can occur if shareholders have no means of communicating to management that the sell-off was prompted by certain expenditures on corporate social responsibility.[78] Indeed, orchestrating such a concerted shareholder sell-off in the first instance is extremely unlikely given the regulatory obstacles shareholders of public business corporations confront in seeking to communicate (and coordinate) with each other.[79]

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73. *See* discussion *infra* Section III.B.

74. *See* Thomas W. Joo, *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence*, 79 WASH. U. L.Q. 1, 58 (2001).

75. *Id.* at 58–59. In addition, selling shares does not serve to punish the corporation by depleting its capital: "An exiting shareholder does not 'reclaim' his capital investment from the corporation but merely sells his investment to a new shareholder." *Id.* at 59.

76. *See id.* at 58–59. Shareholders may also incur a tax penalty if shares are sold from within a pension plan. *See, e.g.*, I.R.C. § 72(t)(1), (2)(A)(i) (noting that a 10% additional tax will be imposed on distributions from 401(k) plans that are made before the employee attains the age of fifty-nine-and-one-half).

77. Joo, *supra* note 74, at 58.

78. *Id.*

79. *Id.* at 58–59.

B. Mandated Disclosure

In addition to free market forces, courts have offered disclosure as another possible disciplining mechanism. In *Citizens United*, for example, Justice Kennedy described the free flow of information as empowering shareholders to protect their financial self-interests, optimistically explaining the potential of modern campaign finance systems as follows:

> With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "'in the pocket' of so-called moneyed interests." The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.[80]

Unfortunately, Justice Kennedy's sanguine view of the future of corporate disclosure does not match present reality. Under existing federal securities law, a manager of a public company is not required to disclose to the stockholders of the corporation information materially related to its corporate contributions.[81] Likewise, state corporate laws, which tend to encourage corporate philanthropy, also generally do not require management to disclose corporate contributions to the company's shareholders.[82] Even if philanthropic spending must be reported to a government agency, such as corporate contributions to a Super PAC, a public corporation generally has no legal duty to share this information with its shareholders in a readily accessible manner, such as in a Form 10-K annual report.[83] Accordingly, given this lack of public access to information,[84] shareholders of a public corporation, as a group, are

80. Citizens United v. FEC, 558 U.S. 310, 370–71 (2010) (citation omitted) (quoting McConnell v. FEC, 540 U.S. 93, 259 (Scalia, J., concurring in part and dissenting in part)).

81. *See, e.g.*, Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923, 930–37 (2013).

82. *See* John A. Pearce II, *The Rights of Shareholders in Authorizing Corporate Philanthropy*, 60 VILL. L. REV. 251, 253–54 (2015).

83. TORRES-SPELLISCY, *supra* note 69, at 12; *see also* Bebchuk & Jackson, *supra* note 81, at 935–36.

84. *See* Bebchuk & Jackson, *supra* note 81, at 935. Further contributing to the lack of transparency regarding campaign finance, a Super PAC must report its donors to the Federal

generally uninformed as to the extent to which their capital investments are used to promote specific social or political issues, and they do not have the information necessary to act as an effective check on managerial discretion by punishing managers in some manner when objectionable spending on corporate speech is identified or discovered.[85]

C. Corporate Democracy

Finally, courts have relied upon "corporate democracy" as a potential disciplining mechanism on managerial discretion. In *Citizens United*, Justice Kennedy dismissed the concern that greater corporate speech rights may harm the shareholders of public companies, stating that there was "little evidence of abuse that cannot be corrected by shareholders 'through the procedures of *corporate democracy*.'"[86] Here, corporate democracy refers to two distinct corporate governance mechanisms: (1) derivative suits for breach of corporate fiduciary duties and (2) shareholder voting.[87]

Election Commission, but the original source of contributed funds is not necessarily disclosed. *See* R. SAM GARRETT, CONG. RSCH. SERV., R42042, SUPER PACS IN FEDERAL ELECTIONS: OVERVIEW AND ISSUES FOR CONGRESS 15 (2016), https://fas.org/sgp/crs/misc/R42042.pdf. Thus, a corporation can make unlimited donations to a 501(c) "dark money" group that is not required to publicly disclose funders, which can, in turn, make unlimited donations to a Super PAC that reports the nonprofit's donation but not the original contribution of the donor corporation. *See* Kim Barker & Marian Wang, *Super-PACs and Dark Money: ProPublica's Guide to the New World of Campaign Finance*, PROPUBLICA (July 11, 2011, 12:38 PM EDT), https://www.propublica.org/article/super-pacs-propublicas-guide-to-the-new-world-of-campaign-finance.

85. To provide shareholders with greater information related to corporate contributions, several commentators have argued that federal securities law should mandate public companies disclose such spending directly to shareholders. *See, e.g.*, Bebchuk & Jackson, *supra* note 81, at 950–53. In addition, members of Congress have introduced legislation seeking to mandate disclosure of corporate contributions. *See, e.g.*, Corporate Charitable Disclosure Act of 2002, H.R. 3745, 107th Cong. § 2 (requiring disclosure of both amount and beneficiary of charitable donations by companies required to report under the Securities and Exchange Act of 1934 or the Investment Company Act of 1940); Corporate Political Disclosure Act of 2019, H.R. 1053, 116th Cong. § 2 (seeking to amend the Securities and Exchange Act of 1934 to direct the SEC to issue regulations to require public corporations to disclose political expenditures).

86. Citizens United v. FEC, 558 U.S. 310, 361–62 (2010) (Stevens, J., concurring in part and dissenting in part) (emphasis added) (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 794 (1978)).

87. *See id.* at 477 (Stevens, J., concurring in part and dissenting in part) ("By 'corporate democracy,' presumably the Court means the rights of shareholders to vote and to bring derivative suits for breach of fiduciary duty.").

1. Breach of Corporate Fiduciary Duties

In terms of corporate law remedies, corporate contributions are subject to attack under two separate legal doctrines: (1) ultra vires and (2) breach of fiduciary duty. Ultra vires is largely irrelevant, however, because almost all states, including Delaware, have enacted statutes expressly granting corporations the power to make corporate contributions.[88] These state statutes typically contain no express limit on the size of permissible gifts, do not demand director accountability to shareholders, and do not require board oversight; "managers may approve contributions as they choose, for any purpose they choose, to whatever qualifying charity they decide, and without regard to shareholder interests."[89] Moreover, in *Burwell v. Hobby Lobby Stores, Inc.*,[90] the U.S. Supreme Court held that a business does not need to *solely* pursue a profit as a matter of corporate law.[91] The only real limitation that courts have placed upon expressive expenditures on corporate social responsibility is that such spending be reasonable both as to the amount and the purpose for which such expenditures are made.[92]

Thus, to challenge the validity of a business decision related to spending on corporate social responsibility, the best argument available to a shareholder-plaintiff, absent unusual facts, is that management was motivated by interests other than the company's stockholders. Given the

88. *See generally* Pearce, *supra* note 82, at 268. Specifically, many states, including Delaware, provide corporations with power "to make donations for the public welfare or for charitable, scientific or educational purposes" or some similar variation, with no explicit requirement that the donation benefit the corporation. *Id.* at 253 n.15.

89. R. Franklin Balotti & James J. Hanks, Jr., *Giving at the Office: A Reappraisal of Charitable Contributions by Corporations*, 54 BUS. LAW. 965, 982 (1999).

90. 573 U.S. 682 (2014).

91. *Id.* at 711–12. Writing for the Court, Justice Alito stated:

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

Id.

92. *See, e.g.*, Theodora Holding Corp. v. Henderson, 257 A.2d 398, 405 (Del. Ch. 1969) (considering factors such as whether the contribution fell within a tax deduction in assessing the reasonableness of a corporate contribution); Kahn v. Sullivan, 594 A.2d 48, 61 (Del. 1991) (holding that a defendant-corporation acted within the bounds of the law and was expressly authorized to make charitable contributions which, in this case, were reasonable and not excessive given the corporation's net worth and tax benefits received because of donation).

strong judicial protection afforded corporate managers under the business judgment rule, however, a shareholder-plaintiff cannot simply allege that management acted with improper motivation.[93] Instead, a plaintiff must adduce specific evidence in support of this claim—a task made particularly difficult by how easily management can offer a plausible, yet entirely pretextual, justification for almost any expenditure on corporate social responsibility.[94] Absent "smoking gun" evidence of improper self-interest (e.g., a board that clearly lacks independence), a shareholder-plaintiff will generally not be able to establish that management intended for the expressive expenditure at issue to exclusively promote interests other than the company's stockholders.[95] Justice Stevens echoed this sentiment in his dissent in *Citizens United*:

> [M]any corporate lawyers will tell you that these rights [i.e., the rights of shareholders to vote and to bring derivative suits for breach of fiduciary duty] are so limited as to be almost nonexistent, given the internal authority wielded by boards and managers and the expansive protections afforded by the business judgment rule.[96]

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93. A court will assess a business decision under management-friendly business judgment review, unless the plaintiff can rebut the business judgment rule presumption that, in making the business decision, management "acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interest[]" of the corporation. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984). If plaintiff can rebut this presumption, then a court will assess the business decision at issue under plaintiff-friendly entire fairness review. *See* Krasner v. Moffett, 826 A.2d 277, 287 (Del. 2003).

94. *See generally* Joseph K. Leahy, *Intermediate Scrutiny for Corporate Political Contributions*, 44 FLA. ST. U. L. REV. 1119, 1155–56 (2017) (noting attempts by courts to "smoke out mere pretextual justifications for improperly motivated decisions").

95. *See* Stephen M. Bainbridge, *Citizens United, Corporate Political Expenditures, and the Business Judgment Rule*, PROFESSORBAINBRIDGE.COM (May 24, 2012), http://www.professorbainbridge.com/professorbainbridgecom/2012/05/citizens-united-corporate-political-expenditures-and-the-business-judgment-rule.html (stating that it will be "damned difficult" for a plaintiff challenging such a charitable donation—or an analogous political contribution—to survive a motion to dismiss because "courts will require considerable evidence of self-dealing before the business judgment rule will be rebutted").

96. Citizens United v. FEC, 558 U.S. 310, 477 (2010) (Stevens, J., concurring in part and dissenting in part) (internal quotation marks omitted).

2. Shareholder Voting

In addition to derivative suits for breach of fiduciary duty, courts have identified shareholder voting as a second principal component of corporate democracy.[97]

a) Limited Access to Proxy Machinery

To exercise control over corporate expressive expenditures, a shareholder can, in theory, include in the company's proxy statement, under Rule 14a-8, proposals requiring a company to disclose its corporate contributions, as well as its standards for choosing recipients of such contributions, and requesting that contributions not be made to specific organizations or specific types of organizations.[98] In practice, however, most proposals of this kind are excluded under Rule 14a-8(i)(7), which states that a shareholder proposal may be excluded from a company's proxy materials if the proposal "deals with matters relating to the [c]ompany's ordinary business operations."[99] Under this exclusion, the SEC considers "the degree to which the proposal seeks to 'micro-manage' the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment."[100] The SEC staff has consistently granted no-action relief in cases where a shareholder proposal requests that corporate contributions be made, or not made, to specific organizations or specific types of organizations as impermissibly prescriptive under this micromanagement

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97. *See, e.g.*, MM Companies, Inc. v. Liquid Audio, Inc., 813 A.2d 1118, 1127 (Del. 2003) ("This Court has repeatedly stated that, if the stockholders are not satisfied with the management or actions of their elected representatives on the board of directors, the power of corporate democracy is available to the stockholders to replace the incumbent directors when they stand for re-election.").

98. Under Rule 14a-8, a company must include a shareholder proposal in its proxy statements unless the proponent fails to comply with the rule's eligibility and procedural requirements, or the proposal falls within one of thirteen substantive bases for exclusion. *See* 17 C.F.R. § 240.14a-8 (2021). Companies seeking to omit a proposal under Rule 14a-8 generally request a "no-action letter" from the Staff of the SEC's Division of Corporation Finance seeking the Staff's concurrence with the company's conclusion that the SEC may exclude the shareholder proposal under Rule 14a-8. *See, e.g.*, Thomas P. Lemke, *The SEC No-Action Letter Process*, 42 BUS. LAW. 1019, 1024 (1987).

99. Notice of Intent Letter from Am. Express Co. to the Office of Chief Counsel, U.S. Sec. & Exch. Comm'n 2 (Dec. 22, 2020), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2021/ncppramerican022621-14a8.pdf.

100. Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018, S7-25-97 (May 21, 1998), https://www.sec.gov/rules/final/34-40018.htm.

prong of Rule 14a-8(i)(7).[101] An individual shareholder can use the procedures under Rule 14a-8 to include a shareholder proposal in the company's proxy materials only if the proposal relates to the company's corporate contributions *generally*, and not to some segment of its corporate contributions.[102] Accordingly, given the SEC's current strict interpretation of Rule 14a-8(i)(7) that significantly limits the capacity of shareholders to access the company's proxy machinery to correct perceived managerial abuses, business decisions related to expressive expenditures on corporate social responsibility remain largely within the discretion of corporate management.[103]

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101. *See, e.g.*, No-Action Letter from Matt S. McNair, Office of Chief Counsel, U.S. Sec. & Exch. Comm'n, to PepsiCo, Inc. (Feb. 24, 2010), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2010/johnlthoma022410-14a8.pdf (concurring in the exclusion of a proposal requesting that PepsiCo specifically prohibit financial or other support of "any organization or philosophy which either rejects or supports homosexuality") ("Proposals that concern charitable contributions directed to specific types of organizations are generally excludable under rule 14a-8(i)(7).").

102. *See, e.g.*, Shareholder Proposal Letter from Scott Shepard to Rachel A. Gonzalez, Corp. Sec'y, Starbucks Corp. (Sept. 17, 2020), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2020/ncpprstarbucks110320-14a8-incoming.pdf (stating that a shareholder proposal will not be excluded "so long as the proposal relates . . . to the corporation's charitable contributions *generally*, rather than merely to some segment of the corporation's charitable contributions" (emphasis added) (internal quotation marks omitted)).

103. To provide shareholders with greater control over corporate contributions, some commentators have argued that corporate law should be modified to require managers to obtain some form of prior authorization from shareholders before making corporate contributions over certain amounts, citing British law as a legislative model that U.S. corporate law should emulate, especially in light of the *Citizens United* decision. *See, e.g.*, TORRES-SPELLISCY, *supra* note 69, at 16–21. In 2000, the United Kingdom adopted an amendment to its Companies Act requiring British companies to seek consent from shareholders before any political donations are made. *See* Political Parties, Elections and Referendums Act 2000, c. 41, § 139, sched. 19, § 140, sched. 7 (Eng.), https://www.legislation.gov.uk/ukpga/2000/41/pdfs/ukpga_20000041_en.pdf (requiring that shareholders expressly confer authority on the company to spend over £5,000 on political expenditures). This type of mandated shareholder approval is not new, however. Several members of Congress have introduced legislation requiring shareholder approval for corporate contributions. *See, e.g.*, Shareholder Protection Act of 2021, S. 530, 117th Cong. § 3(b) (seeking to amend the Exchange Act to add requirement that proxy statements contain a description of any expenditure for political activities proposed for the coming fiscal year that has not been authorized by shareholder vote, including proposed total amount, and provide for a separate vote of shareholders to authorize these expenditures); *see also* H.R. 945, 105th Cong. (1997) (seeking to amend the Securities and Exchange Act of 1934 to allow shareholders the opportunity, based upon their proportional number of shares, to participate in deciding the recipients of charitable donations).

b) Myth of Shareholder Democracy

Finally, this subpart explores a broader, more fundamental critique that can be made of shareholder voting as a disciplining mechanism: the notion of shareholder democracy ignores the important reality that most investors in public business corporations cannot plausibly be thought to have joined together for shared associational reasons unrelated to profit.[104] To start, the vast majority of shares in U.S. public corporations—approximately 80%—are owned by large financial institutions, such as pension funds or mutual funds.[105] With the decline of defined-benefit pension plans, most Americans no longer invest in individual companies but, instead, relinquish some portion of employment earnings to investment funds in the menu selected for them by their employer.[106] None of these funds, however, suggest that investments in the fund were made by worker-investors to empower the fund to actively promote specific social or political issues; none of these funds advertise themselves as vehicles for political or ideological expression, and many have their own significant agency problems.[107] In fact, major institutional investors generally recognize that the only shared

104. *See generally* Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950–2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1521–22 (2007) (stating that concentration of equity ownership in the hands of a few large institutional investors has "created a class of shareholders singularly focused on shareholder value").

105. *See* Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493, 498–99 (2018) ("From 1980 to 1996, large institutional investors nearly doubled their share of ownership of U.S. corporations from under 30% to over 50%. By 2010, institutional investors held approximately 80% of the U.S. stock market. Mutual funds have been the largest drivers of this growth: in 1980, they owned $70 billion in assets, and in 2009, that number was up to $7.2 trillion."); *cf.* Alicia Davis Evans, *A Requiem for the Retail Investor?*, 95 VA. L. REV. 1105, 1105 (2009) ("There is no question that U.S. securities markets are now dominated by institutional investors.").

106. *See* Ian Ayres & Quinn Curtis, *Beyond Diversification: The Pervasive Problem of Excessive Fees and "Dominated Funds" in 401(k) Plans*, 124 YALE L.J. 1476, 1485 (2015) ("The menu of mutual funds from which employees choose is ultimately constructed by the employer.").

107. *See* Leo E. Strine, Jr., *Making It Easier for Directors to "Do the Right Thing"?*, 4 HARV. BUS. L. REV. 235, 250 (2014) ("[T]here are socially responsible investment funds that appear to vote their shares in line with all the other funds of their mutual fund family, and to take no special efforts to vote in a way that is consistent with the fund's supposed commitment to social responsibility."); *see also* Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 COLUM. L. REV. 795, 796 (1993) ("[P]ublic pension funds face distinctive investment conflicts that limit the benefits of [institutional] activism.").

interest among investors is in a positive return on the investment in the fund and rightly assume that investors possess widely disparate political or social views that, much like a public corporation itself, cannot be reconciled in a logically coherent way other than by focusing solely on maximizing investment returns.[108]

Further, just like investors in pension funds or mutual funds, shareholders of public business corporations are not monolithic in their views on social or political issues and do not invest in the stock of public business corporations for expressive purposes—any public business corporation that purports to speak on behalf of its shareholders is almost always speaking on behalf of only a small subset of its shareholders.[109] Indeed, if a large number of individuals hold dissimilar preferences, then the aggregation of these individual preferences into a coherent system of collective choice is often logically impossible.[110] Profit maximization is the only objective for which shareholder unanimity can be posited, at least theoretically.[111] Moreover, to the extent that the shareholders of a public corporation do hold a consensus view on a specific social or political issue, shareholders do not "send out a human corporate spokesperson" to promote this issue on their associated behalf.[112] With a few limited exceptions, shareholders only vote for the directors of the company.[113] Even in states like Delaware, with a strong focus on shareholder protection, the directors, not stockholders, determine corporate policy and do not have a fiduciary

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108. *See* Jonathan Macey & Leo E. Strine, Jr., Citizens United *as Bad Corporate Law*, 2019 WIS. L. REV. 451, 502.

109. *See generally* Erin Miller, *What Should Congress Do About* Citizens United*?*, SCOTUSBLOG.COM (Jan. 24, 2010, 10:30 PM), https://www.scotusblog.com/2010/01/what-should-congress-do-about-citizens-united/ ("Talking about a business corporation as merely another way that individuals might choose to organize their association with one another to pursue their common expressive aims is worse than unrealistic; it obscures the very real injustice and distortion entailed in the phenomenon of some people using other people's money to support candidates they have made no decision to support, or to oppose candidates they have made no decision to oppose.").

110. *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 70 (1991).

111. *See* Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 961 (1984) (arguing that the pursuit of ends other than profit maximization is "especially disturbing because profit maximization is the only goal for which we can at least theoretically posit shareholder unanimity").

112. *See* Macey & Strine, *supra* note 108, at 476.

113. *See id. See generally* 5 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2097 (rev. vol. 2019) ("[T]he powers of management vesting in the shareholders as a body are very few.").

duty to satisfy momentary stockholder demands.[114] In general, stockholders have only limited influence and must engage in a costly, risky, and time-consuming process to remove directors as part of a concerted effort to implement a change in corporate policy.[115]

For the most part, stockholders of public business corporations are generally weak compared to corporate managers and are poorly positioned to constrain management even with respect to key issues, such as executive compensation.[116] And it is this relative weakness, this inability of shareholders to act as an effective check on corporate managers, that many have relied upon to justify shareholder primacy and its exclusive focus on shareholder value.[117] Specifically, the claim is that managers must focus exclusively on maximizing corporate profits subject to external legal and ethical constraints, because holding managers accountable to shareholders along this one dimension alone is sufficiently difficult.[118] If managers can instead act for diffuse interests, prioritizing other stakeholders over the firm's stockholders, then managerial accountability to the owners of the company is severely weakened, if not non-existent, insofar as a corporate manager can now justify any business decision on many different bases:[119] "A manager responsible to two conflicting interests is in fact answerable to

114. *See* 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).

115. *See generally* Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 688–94 (2007) (documenting the challenges in running a proxy contest); Melvin Aron Eisenberg, *Access to the Corporate Proxy Machinery*, 83 HARV. L. REV. 1489 (1970).

116. *See* MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE (1994); *cf.* Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 865–69 (2005) (proposing increased shareholder power based on an efficiency rationale).

117. *See* Macey & Strine, *supra* note 108, at 495–96.

118. *See* EASTERBROOK & FISCHEL, *supra* note 110, at 70; *see also* Henry N. Butler & Fred S. McChesney, *Why They Give at the Office: Shareholder Welfare and Corporate Philanthropy in the Contractual Theory of the Corporation*, 84 CORNELL L. REV. 1195, 1225 (1999) ("Corporate managers have enough trouble meeting the challenges of maximizing shareholder value without diverting their attention to saving the world.").

119. *See* Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 32 (1991) ("[T]he primary beneficiaries of nonshareholder constituency statutes are incumbent managers, who can justify virtually any decision they make on the grounds that it benefits some constituency of the firm." (emphasis omitted)).

neither."[120] The difficulty shareholders face in monitoring or otherwise constraining corporate management demands that managerial decision-making be confined to the narrow task of profit maximization and that managers not be allowed to use corporate funds to promote social or political issues that do not maximize firm profits.[121] Profit maximization, and not issue advocacy, must be the sole purpose of the public business corporation.[122] As Justice Scalia succinctly stated, "The Campbell Soup Company does not exist to promote a message."[123]

IV. Corporate Activism

Part IV provides an overview of the law of corporate advocacy, including a brief survey of commercial speech, and examines the case *First National Bank of Boston v. Bellotti*,[124] in which the U.S. Supreme Court held for the first time that corporations have First Amendment speech protections extending beyond commercial speech and are free to express opinions on social or political issues *unrelated* to the company's business practices.[125] Part IV contends that the corporate advocacy made possible by *Bellotti* is often not in the best interests of the company's shareholders and refers to such expressive expenditures on corporate social responsibility as "corporate activism." Two theoretical justifications are provided for why this spending on corporate speech is unlikely to maximize shareholder value: (1) agency costs and (2) free speech as pure conflict. Finally, to reduce the frequency with which public business corporations engage in corporate activism, Part IV suggests, as a public policy proposal, that the SEC encourage public companies that trade on U.S. stock exchanges to have a "communications committee," chartered by the board of directors, responsible for the oversight of all forms of corporate speech.

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120. Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1192 (1981).

121. *See generally id.* at 1191–92.

122. *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 [stockholder-owners] . . . , and the function of directors, as agents of the owners, is faithfully to advance the financial interests of the owners."); eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010) ("The 'Inc.' after the company name has to mean at least that" corporate managers are bound to "promote the value of the corporation for the benefit of its stockholders.").

123. Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 467 (2008) (Scalia, J., dissenting).

124. 435 U.S. 765 (1978).

125. *Id.* at 784.

A. Overview of Law

This subpart provides an overview of the law of issue advocacy, providing a brief survey of commercial speech, and examines the *Bellotti* case, which expanded corporate speech rights to include speech pertaining to social or political issues *unrelated* to the company's business practices.[126]

1. Commercial Speech

Prior to 1975, most corporate advertising was not protected under the First Amendment. The commonly accepted legal principle was that commercial speech, which the Supreme Court has defined as speech that "propos[es] a commercial transaction," was inferior to political speech and received little, if any, protection under the First Amendment.[127] As the Court explained in *Valentine v. Chrestensen*,[128] "the Constitution imposes no such restraint on government as respects purely commercial advertising."[129] In 1975, the Supreme Court in *Bigelow v. Virginia*[130] significantly modified this judicial standard in holding that a Virginia statute restricting the circulation of an abortion advertisement was unconstitutional.[131] In the Court's view, the newspaper advertisement contained information of clear public interest and value to individuals and was therefore entitled to First Amendment protection.[132] The next year, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[133] the Supreme Court expressly overturned *Valentine*, holding that commercial speech does *not* fall outside the protection of the U.S. Constitution and must be afforded First Amendment protection commensurate with its position in relation to other constitutionally guaranteed forms of expression.[134]

Although the Court has agreed that commercial speech is entitled to First Amendment protection, the Court has also held that commercial speech is less protected by the First Amendment than other forms of "constitutionally

126. *See generally id.*

127. Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 562–63 (1980).

128. 316 U.S. 52 (1942).

129. *Id.* at 54.

130. 421 U.S. 809 (1975).

131. *Id.* at 829.

132. *See id.* at 825–26 (stating that the First Amendment should prevent states from prohibiting advertisements of products or conduct that is clearly legal at the place advertised).

133. 425 U.S. 748 (1976).

134. *Id.* at 765.

guaranteed expression," such as political, ideological, or artistic speech, and that the government may regulate any type of commercial speech that is "more likely to deceive . . . than to inform."[135] With this grant of regulatory power, state and federal governments have enacted laws to protect consumers from false or misleading advertising, including section 43(a) of the Lanham Act, which prohibits commercial advertising containing false or misleading descriptions or representations of fact that misrepresent the nature, qualities, or characteristics of goods, services, or commercial activities.[136] To state a cause of action under the Lanham Act, a plaintiff must do more than merely demonstrate that a statement of fact used in advertising is false or misleading—a plaintiff must demonstrate that the alleged misrepresentation deceived a substantial portion of the consuming public and that these misrepresentations were "likely to influence the purchasing decisions" of consumers.[137] This type of general consumer deception is often demonstrated through surveys establishing that consumers were misled by the alleged misrepresentations.[138]

Establishing false or misleading advertising is further complicated by the fact that a business, in its marketing campaigns, is allowed to engage in "puffery," which has been described as "a 'vague statement' boosting the appeal of a service or product that, because of its vagueness and

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135. *See* Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n, 447 U.S. 557, 563 (1980).

136. 15 U.S.C. § 1125(a). Securities law implements a broadly similar framework. The SEC, for example, recently alleged that Praxsyn's press releases, which made claims about the company's ability to acquire and supply large quantities of N95 or similar masks, were *false* and *misleading*, and violated section 10(b) of the Securities and Exchange Act and Rule 10b-5, which essentially prohibits, in connection with the purchase or sale of securities, both fraud and any untrue statements of material fact (or a failure to disclose material facts). *See* SEC Charges Company and CEO for Covid-19 Scam, Litigation Release No. 24807 (Apr. 28, 2020), https://www.sec.gov/litigation/litreleases/2020/lr24807.htm.

137. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 32 cmt. b (AM. LAW INST. 1995). A plaintiff whose claim alleges that a statement is literally false does not need to prove consumer deception; literally false advertisements are presumptively deceptive. *See, e.g.*, B. Sanfield, Inc. v. Finlay Fine Jewelry Corp., 168 F.3d 967, 971 (7th Cir. 1999) ("Where the statement in question is actually false, then the plaintiff need not show that the statement either actually deceived consumers or was likely to do so."); Balance Dynamics Corp. v. Schmitt Indus., Inc., 204 F.3d 683, 693 (6th Cir. 2000) ("Because proof of 'actual confusion' can be difficult to obtain, most of the circuits have ruled that when a statement is literally false, a plaintiff need not demonstrate actual customer deception in order to obtain relief under the Lanham Act." (citation omitted)).

138. *See, e.g.*, Johnson & Johnson v. Carter-Wallace, Inc., 631 F.2d 186, 191 (2d Cir. 1980) (using surveys to establish the consumer deception element of a false advertising claim).

unreliability, is immunized from regulation."[139] The puffery defense in false-advertising cases protects accused defendant-speakers whose commercial speech is not factual, meaning that the speech is not capable of being falsified.[140] In this context, falsifiability is not a question of fact decided by a jury, but rather a question of law decided by courts and regulators who have defined the puffery defense categorically as claims that are "not capable of measurement" and that "consumers would not take seriously."[141] In support of this approach, these authorities assume that factual speech can be distinguished from nonfactual speech through an examination of the speech itself, and that "'consumers acting reasonably' are unlikely to be deceived by speech-assertions that are not 'capable of measurement.'"[142] These assumptions have led courts and regulators to focus on the specificity of the advertisement itself as the key feature of a business's puffery defense under the assumption that "consumer reliance will be induced by specific rather than general assertions."[143] Hence, general marketing claims about how the company operates in ways that make the world a better place that do not reference specific business practices are unlikely to be found false or misleading and would, therefore, not be actionable under state or federal law (e.g., under existing law, a company can engage in potential greenwashing by making the *general* claim that its products are "sustainable," "organic," or "natural").[144]

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139. *See* David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395, 1397 (2006). In security law, puffery is similarly defined as a "vague statement of corporate optimism." *See, e.g.*, Jennifer O'Hare, *The Resurrection of the Dodo: The Unfortunate Re-emergence of the Puffery Defense in Private Securities Fraud Actions*, 59 OHIO ST. L.J. 1697, 1698–99 (1998).

140. *See* Ivan L. Preston, *The Definition of Deceptiveness in Advertising and Other Commercial Speech*, 39 CATH. U. L. REV. 1035, 1046–47 (1990).

141. *See In re* Bristol-Myers Co., 102 F.T.C. 21, 321 (1983); *see also* FTC Policy Statement on Deception, Letter from James C. Miller, FTC Chairman, to John D. Dingell, Chairman, Comm. on Energy & Com., U.S. House of Representatives (Oct. 14, 1983) [hereinafter Statement on Deception], https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf (defining puffery as those claims "that the ordinary consumers do not take seriously").

142. *See* Statement on Deception, *supra* note 141; Hoffman, *supra* note 139, at 1402–03 (quoting *In re* Bristol-Myers Co., 102 F.T.C. at 321).

143. *See, e.g.*, Tylka v. Gerber Prods. Co., No. 96 C 1647, 1999 WL 495126, at *6–7 (N.D. Ill. July 1, 1999) (summarizing courts' applications of the puffery defense in false-advertising cases).

144. "Greenwashing" can be defined as a form of mass-market advertising in which marketing techniques are used to persuade the public that a company's business products or services are more environmentally friendly than is, in fact, the case. *See, e.g.*, William S.

2. Beyond Commercial Speech

In some ways its act of original sin with respect to corporate speech rights, the U.S. Supreme Court in *Bellotti* held for the first time that corporations have First Amendment speech protections that extend beyond commercial speech, and that a public business corporation, like a person, is free to express or otherwise promote opinions on social or political issues *unrelated* to the company's business.[145] Procedurally, Massachusetts enacted a criminal statute disallowing the use of corporate funds to purchase advertising to influence the outcome of referendum elections, unless the corporation's business interests were directly involved.[146] That same year, Massachusetts proposed an amendment to the state constitution—to be voted upon in a referendum election—modifying the state personal income tax laws.[147] Several Massachusetts companies, including the First National Bank of Boston, sued the State, alleging that the new criminal statute violated their constitutional right to free speech in disallowing the expenditure of corporate funds on advertising in opposition to the proposed modification of state income tax laws.[148] The Massachusetts Supreme Court ruled in favor of the State, concluding that the statute was constitutionally applied; the corporate plaintiffs appealed this decision to the Supreme Court of the United States.[149]

The U.S. Supreme Court reversed the Massachusetts Supreme Court in a 5-to-4 majority opinion delivered by Justice Powell.[150] The Court held that Massachusetts' criminal statute violated corporate speech rights protected by the First Amendment, stating that "[a] commercial advertisement is

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Laufer, *Social Accountability and Corporate Greenwashing,* 43 J. BUS. ETHICS 253, 255–57 (2003). Although the Federal Trade Commission ("FTC") has taken steps to help marketers avoid making deceptive advertising claims related to the environmental benefits of a product or service by providing several useful resources—including its "Guides for the Use of Environmental Marketing Claims," known as the "Revised Green Guides," which is not binding law—the FTC has declined to interpret several commonly used terms such as "sustainable" or "natural." *See generally* 16 C.F.R. § 260 (2020).

145. Referred to as "the most important Supreme Court case no one's ever heard of," this Supreme Court case, unlike *Citizens United*, did not elicit a very strong reaction from the media or the public. *See What's the Most Important Supreme Court Case No One's Ever Heard Of?*, ATLANTIC, May 2013, https://www.theatlantic.com/magazine/archive/2013/05/the-big-question/309290/.

146. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 767–68 (1978).

147. *See id.* at 769.

148. *See id.* at 771.

149. *See id.* at 773–74.

150. *See id.* at 767.

constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the 'free flow of commercial information.'"[151] The Court stated that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source"[152] and further asserted that the government may not "dictat[e] the subjects about which persons may speak and the speakers who may address a public issue,"[153] citing the *Buckley* principle that the government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others."[154] Importantly, the Court rejected the argument that the First Amendment rights of a corporation derive purely from its ongoing business or property interests.[155] The Court asserted that its "decisions involving corporations in the business of communication or entertainment are based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas."[156] It also cited *Virginia State Board of Pharmacy* in which the Supreme Court held that whether "the advertiser's interest [in a commercial advertisement] is a purely economic one" does not "disqualif[y] him from protection under the First Amendment."[157] Importantly, stating that both individual consumers and society as a whole may have strong interests in "the free flow of commercial information," the Court in that case concluded that a corporation does not lose its free speech protections if the speech in question is *unrelated* to the business of the corporation.[158]

The *Bellotti* Court also rejected the claim that the Massachusetts criminal statute was necessary to protect the shareholders of a public corporation, "preventing the use of corporate resources in furtherance of views with which some shareholders may disagree."[159] Relying on the same rationale later set forth in *Citizens United*, the Court held that corporate election-related spending was unlikely to result in corporate expenditures motivated

151. *See id.* at 783 (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 764 (1976)).

152. *Id.* at 777.

153. *Id.* at 784–85.

154. *Id.* at 790–91 (citing Buckley v. Valeo, 424 U.S. 1, 48–49 (1976)).

155. *See id.* at 784.

156. *Id.* at 783.

157. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council Inc., 425 U.S. 748, 762 (1976).

158. *Id.* at 761–62, 763–64.

159. *Bellotti*, 435 U.S. at 792–95.

by interests other than the company's shareholders, because shareholders themselves control corporate spending "through the procedures of *corporate democracy*."[160] Hence, as in *Citizens United*, the Court offered up the myth of corporate democracy as a remedy for the agency cost problems unavoidably created when corporate speech rights under the First Amendment are expanded to include communications unrelated to a company's business practices. And like Justice Stevens in *Citizens United*, Justice White in *Bellotti*, joined in dissent by Justices Brennan and Marshall, similarly acknowledged the ineffectiveness of corporate democracy as a disciplining mechanism on managerial discretion, writing that the government has an equally compelling First Amendment interest in "assuring that shareholders are not compelled to support and financially further beliefs with which they disagree."[161] The sole purpose uniting all shareholders of a public business corporation is to make a profit, Justice White asserted, noting, as discussed above, that allowing a public corporation to pursue other issues unrelated to its business interests can too easily allow corporate managers to promote their own interests and not the best interests of the company's stockholders.[162]

B. Defining Corporate Activism

This Article defines corporate advocacy as a combination of (1) marketing activities and (2) corporate contributions to issue advocacy groups, in which a public business corporation exercises its corporate speech rights to promote social or political issues *unrelated* to the company's business. As the central thesis of this Article, this subpart advances the claim that corporate advocacy is generally *not* in the best interests of a firm's shareholders and provides two distinct theoretical justifications in support of this claim.[163]

1. Types of Corporate Advocacy

In general, corporate advocacy assumes one of three forms: (1) mass-market advertising, (2) stand-alone public statements by corporate officers or directors, and (3) corporate contributions to issue advocacy groups.

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160. *See id.* at 794 (emphasis added).

161. *Id.* at 812 (White, J., dissenting).

162. *See id.* at 805–06 (White, J., dissenting).

163. Note that this claim applies only to corporate advocacy and not stakeholder primacy, which, as defined here, means inexpressive expenditures related to the company's actual business practices (e.g., choice of production technology).

a) Mass-Market Advertising

Companies that employ mass-market advertising to engage in corporate advocacy often promote topical, sometimes controversial social or political issues unrelated to the company's business. These advertisements are not designed simply to evoke a visceral response from the viewer, but also to inform the viewer exactly where the corporate brand "stands" on a particular social or political issue.[164] Consider, for example, Nike's 2018 "Dream Crazy" campaign that launched with the release of a video highlighting narratives of diverse athletes overcoming adversity to succeed in their respective sports.[165] The video was narrated by American footballer, Colin Kaepernick, who had gained notoriety in 2016 by refusing to stand during the U.S. national anthem as a protest against racial injustice and police brutality.[166] Kaepernick announced his partnership with Nike on Twitter, sharing a black-and-white photo of himself with "Believe in something. Even if it means sacrificing everything." centered across his face.[167] Although the commercial itself was not overtly political, making no mention of "taking a knee," the mass-marketing advertising campaign was a clear attempt by Nike to align its corporate brand with a particular social movement.

Along similar lines, in 2019, Gillette introduced a mass-market advertising campaign designed to increase consumer awareness of the

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164. *See, e.g.*, Robert E. McDonald et al., *The Interplay Between Advertising and Society: An Historical Analysis*, J. MACROMARKETING 1, 20 (2020); RACHEL BARTON ET AL., ACCENTURE STRATEGY, TO AFFINITY AND BEYOND: FROM ME TO WE, THE RISE OF THE PURPOSE-LED BRAND 1, 6 (2018), https://www.accenture.com/_acnmedia/Thought-Leadership-Assets/PDF/Accenture-CompetitiveAgility-GCPR-POV.pdf; *see also* Justin Racine, *Using Human Emotion as a Conduit for Connection in Branding and Advertising*, 9 J. BRAND STRATEGY 423, 423 (2021) (stating that "woke advertising" attempts to create an emotional connection with a target audience that allows the brand to take on "human-like" qualities in the eyes of the consumer).

165. *See* Simon Chadwick & Sarah Zipp, *Nike, Colin Kaepernick and the Pitfalls of 'Woke' Corporate Branding*, CONVERSATION (Sept. 14, 2018, 8:53 AM EDT), https://theconversation.com/nike-colin-kaepernick-and-the-pitfalls-of-woke-corporate-branding-102922.

166. *See* Vann R. Newkirk II, *No Country for Colin Kaepernick*, ATLANTIC (Aug. 11, 2017), https://www.theatlantic.com/entertainment/archive/2017/08/no-country-for-colin-kaepernick/536340/.

167. *See* Kevin Draper et al., *Nike Returns to Familiar Strategy with Kaepernick Ad Campaign*, N.Y. TIMES (Sept. 4, 2018), https://www.nytimes.com/2018/09/04/sports/nike-colin-kaepernick.html.

#MeToo movement.[168] The campaign launched with the digital release of a short film that began by asking, "[I]s this the best a man can get?" followed by scenes highlighting negative social male behavior including bullying, sexism, sexual misconduct, and toxic masculinity.[169] An accompanying voiceover encouraged men to intervene to prevent this type of behavior and to provide a positive example for young boys, explaining, "We believe in the best in men: To say the right thing, to act the right way," because "the boys watching today will be the men of tomorrow."[170] The commercial concluded with the brand's slogan since 1989, "The Best a Man Can Get," reworked to reinforce this message in becoming "The Best Men Can Be."[171]

Representing a significant shift in how many companies have chosen to market their goods or services to consumers, companies engaged in this type of corporate advocacy focus less on the functional benefits of the advertised good or service and more on communicating, through mass-market advertising campaigns, a specific statement of corporate values to the firm's stakeholders that is unrelated—or only tangentially so—to specific aspects of the company's business practices.

b) Stand-Alone Public Statements by Corporate Officers or Directors

While public business corporations have generally, in the past, chosen to stay silent on social or political issues unrelated to the company's business,[172] public corporations understand that, today, choosing to remain

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168. *See* Alexandra Topping et al., *Gillette #MeToo Razors Ad on 'Toxic Masculinity' Gets Praise—And Abuse*, GUARDIAN (Jan. 15, 2019, 4:15 PM EST), https://www.theguardian.com/world/2019/jan/15/gillette-metoo-ad-on-toxic-masculinity-cuts-deep-with-mens-rights-activists.

169. *See id.*

170. *See id.*

171. *See id.*; *see also The Best Men Can Be*, GILLETTE, https://gillette.com/en-us/our-committment (last visited Jan. 5, 2022) ("It's time we acknowledge that brands, like ours, play a role in influencing culture. And as a company that encourages men to be their best, we have a responsibility to make sure we are promoting positive, attainable, inclusive, and healthy versions of what it means to be a man.").

172.

> In the past, wading into activism was a surefire way to risk damaging your business. Now, between the endless, real-time conversation taking place on social media, and the rising tide of advocacy bubbling up from their own employees, customers and investors, saying nothing may be just as dangerous—if not more so.

Sam Walker, *You're a CEO—Stop Talking Like a Political Activist*, WALL ST. J. (July 27, 2018, 5:30 AM ET), https://www.wsj.com/articles/youre-a-ceostop-talking-like-a-political-activist-1532683844.

silent on such issues can have significant negative financial repercussions for the company.[173] To prevent this negative outcome, public corporations, as well as corporate managers personally, have increasingly issued public statements on a wide range of social or political issues. In 2019, for example, more than 180 CEOs signed a letter opposing regulations designed to restrict women's access to reproductive healthcare, including abortion.[174] Using the headline "Don't Ban Equality," this letter appeared as a full-page advertisement in *The New York Times* less than a month after the signing of Alabama legislation that banned doctors from performing abortion procedures at any stage of pregnancy.[175] Similarly, the CEOs of fourteen major food companies cosigned an open letter calling on government leaders to create a strong accord that would "meaningfully address the reality of climate change."[176] Also, in February 2021, approximately three hundred companies signed a letter that appeared as a full-page advertisement in *The New York Times* and other publications.[177] Headlined "We Stand for Democracy," the signers committed "to defend the right to vote and to oppose any discriminatory legislation or measures that restrict or prevent any eligible voter from having an equal and fair opportunity to cast a ballot."[178] Although the letter did not reference new voting legislation—either in Georgia or in any other state—or mention any

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173. A 2016 study by the Public Affairs Council, for example, reported that "[m]ore than three-quarters of [the companies studied] said they experienced increased pressure to weigh in on social issues." Doug Pinkham, *Why Companies Are Getting More Engaged on Social Issues*, PUB. AFFS. COUNCIL (Aug. 30, 2016), https://pac.org/blog/why-companies-are-getting-more-engaged-on-social-issues; *see also* Jessica Vredenburg et al., *Brands Taking a Stand: Authentic Brand Activism or Woke Washing*, 39 J. PUB. POL'Y & MKTG. 444, 450 (2020) (suggesting that brand activism is becoming increasingly demanded).

174. *See* Courtney Connley, *Jack Dorsey, Emily Weiss and 185 Other CEOs Sign Letter Calling Abortion Bans 'Bad for Business*,' CNBC (June 10, 2019, 1:27 PM EDT), https://www.cnbc.com/2019/06/09/nearly-200-ceos-sign-letter-calling-abortion-bans-bad-for-business.html.

175. *See id.* "The letter that appears today in The Times was spearheaded by the American Civil Liberties Union (ACLU), Planned Parenthood Federation of America, NARAL Pro-Choice America and the Center for Reproductive Rights." *Id.*

176. Aaron K. Chatterji & Michael W. Toffel, *The New CEO Activists*, HARV. BUS. REV., Jan.–Feb. 2018, at 78, 82. "Similarly, nearly 100 CEOs cosigned an amicus brief to encourage federal judges to overturn Trump's executive order banning citizens from seven Muslim-majority countries from entering the United States." *Id.*

177. *See* Ian Carlos Campbell, *Amazon, Apple, Google, and Facebook Sign Public Letter Supporting Voting Rights*, VERGE (Apr. 14, 2021, 5:11 PM EDT), https://www.theverge.com/2021/4/14/22384060/amazon-apple-google-facebook-public-letter-voting-rights.

178. *Id.*

other action under consideration, *The New York Times* still chose to explicitly identify certain CEOs "who didn't sign a big defense of voting rights."[179]

With the rise of social media, public companies can now more easily disseminate these types of public statements on social or political issues.[180] Following the horrific killing of George Floyd, for example, Netflix tweeted: "To be silent is to be complicit. Black lives matter."[181] Six hours later, Hulu, a subsidiary of Disney, tweeted: "We support Black lives. Today, and every day."[182] Reebok posted a similar statement: "Without the black community, Reebok would not exist. America would not exist."[183] Even PAW Patrol, an animated television show for children, posted a solidarity message, choosing to mute its content so that other voices may be heard.[184] Although not overtly political, the language in these social media communications is designed to indicate solidarity towards the Black Lives Matter social movement.[185] Other public corporations, however, have used social media to engage in much more explicitly political corporate speech. Expressing its support for the "Defund the Police" movement, for example, ice-cream maker Ben & Jerry's, a subsidiary of parent company Unilever, posted on Twitter: "The murder of #DaunteWright is rooted in white supremacy and results from the intentional criminalization of Black and Brown communities. This system can't be reformed. It must be *dismantled*, and a real system of public safety rebuilt from the ground up."[186] Similarly,

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179. *See* Andrew Ross Sorkin et al., *The C.E.O.s Who Didn't Sign a Big Defense of Voting Rights*, N.Y. TIMES (Apr. 14, 2021), https://www.nytimes.com/2021/04/14/business/dealbook/ceos-voting-rights.html.

180. *See generally* Don E. Schultz & James W. Peltier, *Social Media's Slippery Slope: Challenges, Opportunities and Future Research Directions*, 7 J. RSCH. INTERACTIVE MKTG. 86 (2013).

181. Netflix (@netflix), TWITTER (May 30, 2020, 3:30 PM), https://twitter.com/netflix/status/1266829242353893376.

182. Hulu (@hulu), TWITTER (May 30, 2020, 9:05 PM), https://twitter.com/hulu/status/1266913549512658946.

183. Reebok (@Reebok), TWITTER (May 30, 2020, 1:04 PM), https://twitter.com/Reebok/status/1266792697941164032.

184. PAW Patrol (@pawpatrol), TWITTER (Jun. 2, 2020, 8:21 AM), https://twitter.com/pawpatrol/status/1267808607694917633.

185. *See* Nick Martin, *The Brands Don't Care About George Floyd's Death*, NEW REPUBLIC (Jun. 3, 2020), https://newrepublic.com/article/157977/corporate-brands-dont-care-george-floyds-death.

186. Ben & Jerry's (@benandjerrys), TWITTER (April 12, 2021, 6:00 PM) (emphasis added), https://twitter.com/benandjerrys/status/1381743962558504969?lang=en. Some have argued that "these brave, ice-cream-slinging warriors for racial justice seem to be putting

Seventh Generation, an American company that sells natural household cleaning products, posted this message on Twitter: "We support *defunding* the police like we support keeping fossil fuels in the ground. It's imperative we divest from systems of harm and invest in regenerative systems for all."[187]

In addition, like the corporate entity itself, CEOs and other corporate managers have also used social media platforms, such as Twitter or Instagram, to publicly communicate a personal stance on social or political issues unrelated to the company's business.[188] Evan Greenberg, the CEO of Chubb, a Zurich-based insurance company, publicly stated in connection with the 2017 travel ban from certain countries: "We are a country of immigrants. Our country's openness to immigration is fundamental to our identity and history as a nation, and vital to our future prosperity. I am 100 percent for the security of our citizens."[189] Greenberg added, "But at the same time, America is the land of the free, and we are a beacon and place of refuge that those seeking a better and safer life to themselves and their families. Shutting our doors to immigration is a mistake."[190] Likewise, Joe Kiani, the CEO of Masimo, a global publicly traded medical technology company, tweeted in response to a national student-led demonstration in support of gun control legislation: "I stand with @AMarch4OurLives & the students leading the way to gun reform! Join the march! Our schools and our children must be safe!"[191]

c) Contributions to Issue Advocacy Groups

Finally, a public business corporation, as part of its corporate advocacy, can make contributions to specific issue advocacy groups. Again, following the death of George Floyd, many companies announced contributions to

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themselves at odds with much of the black community." Tom Slater, *Why Do Ben & Jerry's Want to Defund the Police?*, SPECTATOR (Apr. 15, 2021, 9:27 AM), https://www.spectator.co.uk/article/why-does-ben-jerry-s-want-to-defund-the-police- ("According to Gallup, while black Americans of course want better policing, 81 per cent still want police to spend the same amount of time or more time in their area.").

187. Seventh Generation (@SeventhGen), TWITTER (April 19, 2021, 8:42 AM) (emphasis added), https://twitter.com/seventhgen/status/1384140247345205253?lang=en.

188. *See generally* David F. Larcker et al., *The Double-Edged Sword of CEO Activism*, STAN. UNIV. CLOSER LOOK SERIES (Nov. 8, 2018), https://www.gsb.stanford.edu/sites/default/files/publication-pdf/cgri-closer-look-74-double-edged-sword-ceo-activism.pdf.

189. *Id.* at 3.

190. *Id.*

191. *See id.* at 4; *see also* Joe Kiani (@JoeKiani), TWITTER (Mar. 24, 2018, 12:09 PM), https://twitter.com/JoeKiani/status/977593163224440832.

charitable organizations that advocate in support of greater racial justice and equality. Verizon, for example, "committed $10 million to be shared equally between The National Urban League, NAACP, National Action Network, Leadership Conference for Civil and Human Rights, Rainbow Push Coalition, National Coalition on Black Civic Participation, and NAACP Legal Defense and Educational Fund."[192] With recipients selected from Amazon's Black Employee Network, Amazon committed to donate a total of $10 million to recipients including "the ACLU Foundation, Brennan Center for Justice, Equal Justice Initiative, Lawyers' Committee for Civil Rights Under Law, NAACP, National Bar Association, National Museum of African American History and Culture, National Urban League, Thurgood Marshall College Fund, UNCF (United Negro College Fund), and Year Up."[193] The Coca-Cola Foundation committed $2.5 million in grants to The Equal Justice Initiative, NAACP Legal Defense and Educational Fund, and National Center for Civil and Human Rights.[194] Likewise, Zynga announced $1 million in donations to the ACLU Foundation, NAACP, Thurgood Marshall College Fund, Northside Achievement Zone, and Race Forward.[195]

2. Maximizing Corporate Profits

This Article has defined corporate advocacy as a combination of marketing activities and corporate contributions to issue advocacy groups. To place these expressive expenditures on corporate social responsibility within the typography set forth in Table 1, this spending on corporate speech must be categorized according to whether this spending on corporate speech maximizes corporate profits. This Article advances the claim that corporate advocacy is generally not in the best interests of the company's stockholders and refers to such spending on corporate social responsibility as "corporate activism."

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192. *See* David Hessekiel, *Companies Taking a Public Stand in the Wake of George Floyd's Death*, FORBES (Jun. 4, 2020, 11:24 AM EDT), https://www.forbes.com/sites/davidhessekiel/2020/06/04/companies-taking-a-public-stand-in-the-wake-of-george-floyds-death/?sh=90539d172148.

193. *Id.*

194. *Id.*

195. Frank Gibeau, *My Thoughts; Zynga's Call to Action*, ZYNGA (June 5, 2020), https://www.zynga.com/corporate/my-thoughts-zyngas-call-to-action/. On a smaller scale, Biossance, a skincare company, has pledged $100,000 in donations to the ACLU Foundation, Minnesota Freedom Fund, Color of Change, and Black Lives Matter. *See* Hessekiel, *supra* note 192.

a) Profit Maximizing

The impact of corporate advocacy on corporate profits is, of course, ultimately an empirical question, and certainly some corporate advocacy may not constitute corporate activism insofar as these expressive expenditures on corporate social responsibility maximize shareholder value. In this case, corporate advocacy can be classified, according to the typography in Table 1, as a mix of cause promotion and cause-related contributions.[196] This Article contends that most corporate advocacy is better classified as corporate activism. The argument to the contrary, however, contends that management engages in corporate advocacy to align the corporate brand with particular social or political issues unrelated to the company's business that management believes will, nevertheless, resonate with specific corporate stakeholders, such as customers or investors, to the financial benefit of the firm's shareholders.[197] Under this view, corporate advocacy is merely another form of corporate brand management: a profit maximization business strategy, like cause-promotion marketing or cause-related contributions, in which a company spends money on corporate social responsibility to advance the best interests of its existing stockholders.

Proponents of corporate advocacy cite to survey results indicating that corporate stakeholders increasingly expect companies to take a public stance on social or political issues unrelated to the company's business and are willing to forego financial benefits (e.g., higher wage, lower prices, higher return on investment) to transact with firms that "hold" values or beliefs in close lockstep to their own.[198] The demographic group most likely to exhibit such socially conscious preferences are Millennials, who have overtaken Baby Boomers to become the United States' largest living adult generation.[199] A 2017 survey, for example, found that 47% of Millennials

196. *See supra* Table 1.

197. *See, e.g.*, Michelle Andrews et al., *Cause Marketing Effectiveness and the Moderating Role of Price Discounts*, 78 J. MARKETING 120, 121 (2014) (reporting study results suggesting that cause marketing "can significantly increase consumer purchases").

198. *See generally* EDELMAN, 2019 EDELMAN TRUST BAROMETER SPECIAL REPORT: IN BRANDS WE TRUST? 2 (2020), https://www.edelman.com/sites/g/files/aatuss191/files/2019-06/2019_edelman_trust_barometer_special_report_in_brands_we_trust.pdf (finding that 64% of consumers were "belief-driven buyers," meaning such consumers may choose to purchase, switch from or to, or boycott, a brand based upon its public stance on social or political issues).

199. *See* Richard Fry, *Millennials Overtake Baby Boomers as America's Largest Generation*, PEW RSCH. CTR. (Apr. 28, 2020), https://www.pewresearch.org/fact-tank/2020/04/28/millennials-overtake-baby-boomers-as-americas-largest-generation/.

"believe CEOs have a responsibility to speak up about issues that are important to society."[200] In this same survey, 56% of Millennials agreed that "CEOs and other business leaders have greater responsibility today for speaking out on hotly debated current issues than they used to."[201] In view of these stated preferences, proponents of corporate advocacy thus rationalize a public corporation's decision to engage in corporate advocacy as a customer-retention or employee-bonding strategy designed to harness and amplify, and ultimately monetize, the changing preferences of those stakeholders who matter most in terms of corporate profits—and who increasingly disproportionately fall on one side of the culture war.[202]

b) Profit Sacrificing

Although a positive view of corporate advocacy may have merit in certain limited cases, this Article argues that corporate advocacy is generally *not* in the best interests of a firm's shareholders. This subpart provides two distinct theoretical justifications for why spending on corporate advocacy is unlikely to maximize corporate profits: (1) agency costs and (2) free speech as pure conflict.

(1) Agency Costs

To start, corporate advocacy suffers from the same fundamental agency costs that afflict all expenditures on corporate social responsibility. This Article contends that these agency costs are particularly acute in the case of expressive expenditures on corporate social responsibility, as compared to inexpressive expenditures, for two reasons. *First*, the cost to a corporate manager of engaging in corporate speech is significantly lower than the cost incurred by a manager in implementing a firm-wide change to a firm's existing business practices. For example, a manager can much more easily make a public announcement or direct a contribution to a specific charitable organization than compel the company to adopt a new production technology or change its corporate culture. To this point, an important critique of corporate advocacy argues that companies prefer to communicate token responses to systemic problems rather than do the hard

200. WEBER SHANDWICK & KRC RESEARCH, CEO ACTIVISM IN 2017: HIGH NOON IN THE C-SUITE 5 (2017), https://www.webershandwick.com/wp-content/uploads/2018/04/ceo-activism-in-2017-high-noon-in-the-c-suite.pdf .

201. *Id.*

202. *See* Josh Barro, *There's a Simple Reason Companies Are Becoming More Publicly Left-Wing on Social Issues*, BUS. INSIDER (Mar. 1, 2018, 7:53 AM), https://www.businessinsider.com/why-companies-ditching-nra-delta-selling-guns-2018-2.

work of implementing a material change to the company's existing business practices.[203]

Second, the benefit to a corporate manager of engaging in corporate speech is likely to be higher than the benefit enjoyed in implementing a firm-wide change to the company's existing business practices. While a manager may certainly enjoy the private satisfaction of knowing that the company's business practices satisfy or fulfill some personal ideological agenda, this benefit is likely to be an increasing function of public knowledge or awareness; the manager receives a greater benefit the more people know or are aware of her support for a given social or political issue.[204] Almost by definition, corporate speech reaches a larger audience than do changes to a company's business practices, which are often highly technical and have social impact implications that can be fully understood by only a small number of experts. Motivated by reputational concerns, a corporate manager may prefer to communicate to a large audience of like-minded individuals, without any additional action by the company, a personal commitment to, say, environmental sustainability or racial justice, rather than to silently run the company in a more environmentally sustainable or racially equitable manner. The latter option would reap only the quiet satisfaction of knowing that the company has sacrificed profits to make other corporate stakeholders better off.

More specifically, in the standard critique of corporate advocacy, management is described as progressive, highly educated, urban, coastal, wealthy elites who engage in "faculty lounge" politics in publicly communicating support for social or political issues that do not represent the views of a vast majority of their shareholders.[205] As Professor Bainbridge argues, corporate advocacy often reflects the more inherently liberal values of corporate officers whose "values, beliefs, and tastes . . . have radically diverged from those of red state populists. In many cases, it simply would not occur to SJWs [social justice warriors] like [former Nike CEO Phil] Knight that there are folks who would take offense from the

203. *See generally infra* notes 217–218 and accompanying text.

204. *See generally* Andreoni, *supra* note 66, at 464–65.

205. *See generally* Sean Illing, *"Wokeness Is a Problem and We All Know It": James Carville on the State of Democratic Politics*, VOX (Apr. 27, 2021, 8:30 AM EDT), https://www.vox.com/22338417/james-carville-democratic-party-biden-100-days (quoting Carville's description of "faculty lounge" politics as a form of signaling based on the use of elevated language).

Kaepernick ad."[206] Of course, this agency cost problem is not confined to corporate managers whose ideological views lie to the left of the median voter. David Green, for example, the founder and CEO of Hobby Lobby—a closely held corporation—publicly cited his religious beliefs in justifying his opposition to the Obamacare requirement that health insurance for employees include coverage for the morning-after pill,[207] a personal belief that lies to the right of the median voter.[208]

This agency cost argument against corporate advocacy assumes, of course, that management and the stockholders of a corporation have differing personal beliefs or convictions. Such an ideological disconnect may have been unlikely a generation ago when "the class of Americans who were invested in the stock market was likely to be far more affluent than the average person," and "ordinary American workers were typically not considered part of the investing class" because they were not likely to be invested in the stock market.[209] Today, however, most workers save for retirement in a defined-contribution 401(k) plan, meaning that the beneficial owners of publicly traded companies are much more likely to comprise a representative cross-section of America, holding widely divergent views across a range of social and political issues.[210] With approximately 80% of the shares of public corporations in the hands of

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206. Stephen M. Bainbridge, *Woke Business: Putting the Nike-Kaepernick Ad Controversy into Context: The Problem of Social Justice Warrior CEOs*, PROFESSORBAINBRIDGE.COM (Sept. 5, 2018), https://www.professorbainbridge.com/professorbainbridgecom/2018/09/woke-business-putting-the-nike-kaepernick-ad-controversy-into-context-the-problemof-social-justice-.html; *cf.* Ann Lipton, *The Revolution Will Be Marketed*, BUS. L. PROF. BLOG (Sept. 8, 2018), https://lawprofessors.typepad.com/business_1aw/2018/09/the-revolution-will-be-marketed.html (finding it "difficult to believe that Knight was unaware this is a controversial move; it seems designed to be controversial" (emphases omitted)).

207. *See* Chatterji & Toffel, *supra* note 176, at 81. *See generally* Ryan M. Hrobak & Robin Fretwell Wilson, *Emergency Contraceptives or "Abortion-Inducing" Drugs? Empowering Women to Make Informed Decisions*, 71 WASH. & LEE L. REV. 1385 (2014).

208. *See* Scott Hensley, *Poll: Americans Favor Age Restrictions on Morning-After Pill*, NPR (Dec. 19, 2013, 5:07 PM ET), https://www.npr.org/sections/health-shots/2013/10/16/235384057/americans-favor-age-restrictions-on-morning-after-pill ("[M]ost Americans believe insurers should pay for the morning-after pill.").

209. Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and* Citizens United, 100 CORNELL L. REV. 335, 368 (2015).

210. *See* Robert M. Ackerman & Lance Cole, *Making Corporate Law More Communitarian: A Proposed Response to the Roberts Court's Personification of Corporations*, 81 BROOK. L. REV. 895, 945 (2016).

large institutional investors,[211] such as pension funds or mutual funds, the typical owner of a public company today is less likely to be progressive in the manner of a Phil Knight or Marc Benioff or conservative in the manner of a David Green. Instead, the typical owner is more likely to be moderate in the manner of an ordinary American who has invested in the stock market to save for retirement or for her child's education and is not particularly interested in having her capital investment fund be aligned with specific corporate advocacy efforts that she would not otherwise individually support if asked to do so directly.

Arguably, the existence of an agency cost problem is evidenced by the lack of empirical evidence showing that corporate advocacy is profitable in the long run; the impact of such expenditures on corporate social responsibility on shareholder value remains essentially unknown.[212] Researchers have found, for example, that CEO advocacy "can shape public opinion and purchasing intent," but only if some alignment exists between the CEO's message and individuals' policy preferences.[213] A study in 2016 similarly found that consumers positively viewed corporate advocacy in companies that were considered "values-oriented" but negatively viewed companies that failed to align with particular values; the study posited that the impact of corporate advocacy on consumers' purchasing behavior is largely driven "by the degree of 'perceived corporate hypocrisy.'"[214] These empirical findings suggest that even if corporate advocacy is profitable in the short run, such expressive expenditures on corporate social responsibility are unlikely to be profitable in the long run, unless the company invests costly corporate resources in building up its perceived

211. *See* Lund, *supra* note 105, at 498–99.

212. It is unclear whether corporate social responsibility causes better financial performance or vice versa, or even whether causation simultaneously runs in both directions. *See, e.g.*, Marc Orlitzky et al., *Corporate Social and Financial Performance: A Meta-analysis*, 24 ORG. STUD. 403, 406 (2003) ("There is bidirectional causality between corporate social performance and financial performance."); Jordi Surroca et al., *Corporate Responsibility and Financial Performance: The Role of Intangible Resources*, 31 STRATEGIC MGMT. J. 463, 465–66 (2010) (discussing research that suggests corporate social responsibility "is both a predictor and a consequence of" financial performance).

213. Aaron K. Chatterji & Michael W. Toffel, *Assessing the Impact of CEO Activism*, 32 ORG. & ENV'T 159, 160, 178 (2019) ("CEO activism risks alienating consumers who disagree with the CEO's public stance.").

214. *See* Larcker et al., *supra* note 188, at 1 (quoting Daniel Korschun et al., Taking a Stand: Consumer Responses When Companies Get (Or Don't Get) Political 18–19 (July 3, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2806476).

authenticity with key corporate stakeholders. This means closely aligning its existing business practices with the messaging of its corporate advocacy. Communications that do not accurately depict the company's actual business practices expose the company to credible accusations that the company is "all talk" and run the risk of antagonizing various corporate stakeholders, including customers or investors, who may come to perceive the company's cause-marketing campaign as a deliberate misdirection intended to convey a false or misleading impression of the firm's actual business practices.[215] As Robert F. Smith recently noted regarding corporate America's response to the death of George Floyd, "Corporate America can no longer get away with token responses to systemic problems."[216]

Pepsi's famously calamitous 2017 "Live for Now" commercial serves as a powerful cautionary tale in this regard. The commercial featured an angry, diverse crowd of mostly Millennials at what appears to be a Black Lives Matter protest marching to a standoff with the police, until reality-television star Kendall Jenner singlehandedly defuses the tension by offering a police officer a single can of Pepsi.[217] Many considered this commercial to be disingenuous and insensitive, a transparent attempt by a corporate brand to capitalize on, or monetize in some way, racial injustice and police brutality. In response to a barrage of negative responses, PepsiCo pulled the commercial from circulation.[218] The immediately

215. *See, e.g.*, Jessica Vredenburg et al., *Woke Washing: What Happens When Marketing Communications Don't Match Corporate Practice*, CONVERSATION (Dec. 5, 2018, 8:14 PM AEDT), https://openrepository.aut.ac.nz/bitstream/handle/10292/12164/Woke%20washing_%20what%20happens%20when%20marketing%20communications%20don't%20match%20corporate%20practice.pdf?sequence=2; *see also* Mark R. Forehand & Sonya Grier, *When Is Honesty the Best Policy? The Effect of Stated Company Intent on Consumer Skepticism*, 13 J. CONSUMER PSYCHOL. 349, 354–55 (2003) (confirming that consumers' attribution of a firm's business practices to firm-serving motivations lowered the consumers' evaluation of the firm only when those firm-serving attributions were inconsistent with the motive expressed by the firm).

216. *See, e.g.*, David Gelles, '*Corporate America Has Failed Black America*,' N.Y. TIMES (June 6, 2020), https://www.nytimes.com/2020/06/06/business/corporate-america-has-failed-black-america.html.

217. *See, e.g.*, Daniel Victor, *Pepsi Pulls Ad Accused of Trivializing Black Lives Matter*, N.Y. TIMES (Apr. 5, 2017), https://www.nytimes.com/2017/04/05/business/kendall-jenner-pepsi-ad.html.

218. *See id.*; Sandra Gonzalez, *Kendall Jenner's Pepsi Ad Sparks Backlash*, CNN BUS. (Apr. 5, 2017, 6:27 AM ET), https://money.cnn.com/2017/04/04/media/kendall-jenner-pepsi-ad/index.html. The Gillette advertisement discussed in Section IV.B.1.a provoked a similarly negative response. *See* Josh Barro, *Why Nike's Woke Ad Campaign Works and Gillette's Doesn't*, INTELLIGENCER (Jan. 15, 2019), https://nymag.com/intelligencer/2019/01/

unfavorable reaction to this commercial strongly suggests that the success of corporate advocacy critically depends upon how consumers perceive the authenticity of the corporation's positioning on a given social or political issue. Further, the overwhelmingly negative reaction also dramatically demonstrates the extent to which management and other corporate stakeholders, including the firm's stockholders, can have widely divergent views on how a company can best exercise its corporate speech rights to promote social or political issues unrelated to the company's business.

(2) Speech as Pure Conflict

In addition to agency costs, this Article contends that corporate activism is also the product of socially suboptimal conflict created when public business corporations are granted greater speech rights. With an increased capacity to speak, a public business corporation is compelled to engage in a costly ideological conflict at the expense of its shareholders. To make this more concrete, corporate speech is modeled below, in a simplification of reality, as a static game in which two players contest an indivisible resource.[219] Each player chooses one of two actions: (1) speak or (2) stay silent. If both players choose to speak, then they engage in a costly ideological conflict that neither wins. If only one player chooses to speak, however, with the other choosing to stay silent, then the player who has chosen to speak wins, defeating the other player who has chosen not to participate in the ideological conflict. If both players choose to stay silent, then neither player engages in costly conflict and the issue remains equally likely to be true.

Formally, the payoff matrix for this simple static two-player game of speech as pure conflict is represented in Figure 1.

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why-nikes-woke-ad-campaign-works-and-gillettes-doesnt.html (arguing that stakeholders were bound to ask why a public company such as Gillette should have any authority to lecture them on masculinity and what Gillette actually contributed to the #MeToo movement or what efforts Gillette had undertaken to empower women other than changing its corporate slogan).

219. *See* W.C. Bunting, *Resolving Conflicts Over Scarce Resources: Private Versus Shared Ownership*, 99 MARQ. L. REV. 893, 904–05 (2016) (applying a similar model of conflict—the "Hawk-Dove game"—to shared ownership).

Figure 1. Speech as Pure Conflict

	Speak	Stay Silent
Speak	$\frac{v-c}{2}, \frac{v-c}{2}$	v, 0
Stay Silent	0, v	$\frac{v}{2}, \frac{v}{2}$

Let $v > 0$ denote the value of the contested scarce resource, and $c > 0$ denote the cost of conflict.[220]

Specifically, v represents acceptance of a social or political viewpoint, where acceptance means that the ideological position (e.g., the right to an attorney in a criminal trial) has binding impact in society through a judicial opinion or a legislative statute, or more abstractly perhaps, as the result of a prevailing social norm. Likewise, c represents the cost of ideological conflict: it is the cost of engaging in a war of ideas through the exercise of corporate speech rights. A key feature of this conflict game is that the socially optimal outcome in which both players choose to stay silent does not obtain as a pure strategy Nash equilibrium of the game.[221] In this representation of speech as pure conflict, the right to speak leaves both parties worse-off compared to the state of the world in which neither has such speech rights.[222] That is, both parties would prefer to stay silent, but

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220. If $0 < c \leq v$, then Figure 1 represents the traditional matrix for the Prisoner's Dilemma game. If $c > v > 0$, then Figure 1 represents the traditional payoff matrix for the Hawk-Dove game. *See generally* J. Maynard Smith & G. R. Price, *The Logic of Animal Conflict*, 246 NATURE 15, 15–16 (1973).

221. *See* David Sally, *Game Theory: Game Theory Behaves*, 87 MARQ. L. REV. 783, 783 (2004) ("The Nash equilibrium is a pair of strategies in a two-player game that are the best possible responses to each other."); *see generally* JOHN MAYNARD SMITH, EVOLUTION AND THE THEORY OF GAMES (1982).

222. *See generally* Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1654–55 (2000). For the Hawk-Dove game, assume that the mixed strategy equilibrium is more plausible and ignore the two pure strategy equilibria in which one player chooses to speak and the other player chooses to stay silent. Let p denote the probability that a player chooses to speak. It is relatively straightforward to show that $p = v/c$ in the mixed strategy Nash equilibrium (i.e., this equation is derived by equating the expected payoff of choosing to speak and the expected payoff of choosing to remain silent). Notice that as the value of winning the ideological conflict, v, increases relative to the cost of

the strategic incentives of the game preclude each from taking this socially optimal action; instead, both players speak, engaging in a mutually disadvantageous ideological conflict.[223]

In the case of a public business corporation, granting this business organization speech rights that protect communications beyond commercial speech—treating it as a person who can express opinions or beliefs with respect to complex social or political issues *unrelated* to its actual business practices—in effect transforms the public business corporation into a player in this mutually disadvantageous speech game. Once the public corporation possesses the legal capacity to speak on issues unrelated to the manufacture of toothpaste, for instance, the corporation is now compelled to weigh in on social or political issues and will have no reasonable basis for refusing to respond.[224] As Professor Lin states, "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."[225] Just as Super PACs are a foreseeable result of the holding in *Citizens United*, corporate activism, in many ways, is the entirely predictable result of *Bellotti*; with speech rights comes not only the ability to speak, but the public expectation to speak as well.

Why do public business corporations not heed the "so-called Michael Jordan dictum that Republicans buy sneakers too" and choose to stay silent on divisive social or political issues that can hurt sales?[226] Why not speak only on what traditionally has been perceived as core business issues, such as taxes or trade? Why weigh in on social or political issues that are likely to antagonize certain stakeholders of the firm? Assuming the company

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conflict, c, the probability that a player chooses to speak, p, approaches one. If $v = c$, then the Hawk-Dove game transforms into the standard Prisoner's Dilemma game in which both parties choose to speak, and suboptimal conflict obtains with probability one.

223. *See id.* If one player chooses to stay silent, then she concedes the outcome of the fight to the other player; thus, the other player can convince others in society, without any resistance or pushback, to accept her opposing ideological viewpoint.

224. *See* Harvey Golub, *Politics Is Risky Business for CEOs*, WALL ST. J. (Apr. 12, 2021 6:19 PM ET), https://www.wsj.com/articles/politics-is-risky-business-for-ceos-11618265960 ("There is no limiting principle to this problem. If business heads can be pressured to comment on issues unrelated to their businesses, they will be compelled to weigh in on more current events and issues and will have no basis for refusing to respond. What do you think of catch and release at the border, what do you think of no-bail laws in New York? It will go on and on.").

225. Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1573 (2018).

226. *See* Chatterji & Toffel, *supra* note 176, at 81.

chooses to stay silent, refusing to take a public stance on a social or political issue, the claim is that the company concedes the fight to other corporate stakeholders—for example, a small group of vocal employees or a handful of investors with outsized influence. These corporate stakeholders can reshape the corporate silence into an implicit affirmation of an opposing ideological viewpoint. To prevent harmful mischaracterizations of its ideological viewpoint, the corporation speaks out—but it does not accomplish much else in choosing to engage in this costly war of ideas. The shareholders of the company would prefer not to engage in ideological conflict in which costly corporate resources are expended on speech that achieves very little, if anything at all.[227] But shareholders also understand that this ideological conflict is unavoidable if a public business corporation is to be legally conceived of as a person who can, like all individuals, be asked to take a public position on a broad set of social or political issues.[228]

Under this view, corporate managers, as players in this free speech game, expend costly resources on otherwise unprofitable corporate activism, not to promote some private ideological agenda, but to avert harm to the corporation inflicted by external actors.[229] Compared to the agency cost model discussed throughout, these expenditures on corporate social responsibility are much more defensive in nature. The company chooses to speak not because the company believes that these expressive expenditures will, in fact, make a difference in society, but because the company understands that if it chooses to remain silent, the company will suffer financial losses in allowing others to distort or otherwise misrepresent its "corporate ideology." The objective is not to maximize gains, but rather to minimize losses, with the company exercising its corporate speech rights more to appease certain special interest groups with outsized influence than to push forward a specific ideological agenda to the betterment of

227. *See, e.g.*, Issacharoff, *supra* note 34, at 131 ("Most publicly traded corporations do not want to be associated with controversial positions on hot-button social issues that dominate elections, notably abortion, capital punishment, foreign military engagements, and school prayer.").

228. *See* Michael Neureiter & C.B. Bhattacharya, *Why Do Boycotts Sometimes Increase Sales? Consumer Activism in the Age of Political Polarization*, 64 BUS. HORIZONS 611, 619 (2021).

229. *See, e.g.*, Ross Douthat, Opinion, *The Rise of Woke Capital*, N.Y. TIMES (Feb. 28, 2018), https://www.nytimes.com/2018/02/28/opinion/corporate-america-activism.html (defining "woke capital" as "a certain kind of virtue-signaling on progressive social causes, a certain degree of performative wokeness . . . offered to liberalism and the activist left pre-emptively, in the hopes that having corporate America take their side in the culture wars will blunt efforts to tax or regulate our new monopolies too heavily") .

society.[230] In this way—and this is the key point—a public business corporation is made better off when the possibility of corporate advocacy is removed: less corporate speech rights benefits a public business corporation in precluding a costly ideological conflict that does not advance the best interests of the firm's stockholders.

C. Public Policy Proposal

To reduce the frequency with which public business corporations engage in unprofitable corporate activism, this Article suggests, as a tentative public policy proposal, that the SEC should encourage public companies that trade on stock exchanges in the United States to establish a "communications committee," chartered by the company's board of directors, responsible for the oversight of all forms of corporate speech by the corporation. The primary responsibility of this proposed committee is to ensure that the company's spending on corporate speech promotes the best interests of its shareholders, and not the interests of other corporate stakeholders, including management or certain special interest groups with outsized influence.

1. Unified Treatment of Corporate Speech

In most public business corporations, the oversight of expressive expenditures on corporate social responsibility tends to be dispersed among several distinct corporate divisions or departments. A government affairs division, for example, may oversee expenditures on express advocacy and political contributions. A dedicated community relations department may supervise and manage all charitable contributions; in some cases, the company may have set up a separately administered private non-profit foundation to manage charitable contributions. Several different departments may oversee issue advocacy, with the marketing department, for instance, responsible for brand management and the communications department in charge of vetting all public statements by the company or members of its management team. This Article argues for a more unified treatment of *all* corporate speech, meaning specifically that a single committee comprised of a subset of a firm's board of directors carefully assess all expressive expenditures on corporate social responsibility to determine whether this spending on corporate speech is consistent with the company's current business practices and, more importantly, whether this

230. *See generally* STEPHEN R. SOUKUP, THE DICTATORSHIP OF WOKE CAPITAL: HOW POLITICAL CORRECTNESS CAPTURED BIG BUSINESS (2021).

spending on corporate speech promotes the best interests of the firm's shareholders in a particularized and relatively verifiable manner.

As Table 1 highlights, corporate social responsibility often requires a public business corporation to engage in some form of corporate speech, be it directly, through marketing activities, or indirectly, through corporate contributions to philanthropic organizations, in which the corporation spends money to promote specific social or political issues. No matter the form, these expressive expenditures on corporate social responsibility all implicate the same basic agency cost problem: spending on corporate speech is motivated by interests other than the company's shareholders.

This similarity across the different types of expressive expenditures on corporate social responsibility is often lost, however, in the current social and political discourse. Consider issue advocacy and political contributions, for example. As discussed, corporate managers can use both forms of corporate speech to promote social or political issues unrelated to the company's business at the expense of corporate profits.[231] Yet despite this same fundamental shortcoming, these two types of expressive expenditures tend to be viewed entirely differently. In the case of political contributions, the political left, for instance, views *Citizens United*—which expanded corporate speech rights to include "independent expenditures"—in a markedly negative light, with Democratic politicians describing the decision as "devastating to the public interest,"[232] a "terrible decision [that] deserves as robust a response as soon as possible,"[233] "a stunning act of judicial activism—the kind of reaching-beyond-the-law action political conservatives have been complaining about,"[234] and "the worst Supreme Court decision since the Dred Scott case."[235] In the case of issue advocacy, on the other hand, the political left criticizes public corporations for not taking a more active public stance on specific social or political issues

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231. *See supra* Sections II.B.1, II.B.2.

232. *See* Darlene Superville, *Obama Weekly Address Video: President Blasts Supreme Court over Citizens United Decision*, HUFFPOST (Dec. 6, 2017), https://www.huffpost.com/entry/obama-weekly-address-vide_n_434082.

233. *See* Susan Crabtree, *Sen. Kerry Backs Changing Constitution to Deal with Supreme Court Decision*, THE HILL (Feb. 2, 2010, 8:00 PM EST), https://thehill.com/homenews/senate/79289-kerry-backs-changing-constitution-to-deal-with-scotus-decision.

234. *See* John F. Kerry, *Undoing SCOTUS-Decision Damage*, POLITICO (Feb. 16, 2010, 5:16 AM EST), https://www.politico.com/story/2010/02/undoing-scotus-decision-damage-032988.

235. Nick Baumann, *Grayson: Court's Campaign Finance Decision "Worst Since Dred Scott*," MOTHER JONES (Jan. 22, 2010), https://www.motherjones.com/politics/2010/01/grayson-courts-campaign-finance-decision-worst-dredd-scott/.

unrelated to the company's business and for not exercising its corporate speech rights under *Bellotti* to advocate in support of specific ideological issues, such as police brutality, abortion, or voting rights, in precisely the same way that a public business corporation is empowered under *Citizens United* to exercise its corporate speech rights to advocate in support of clearly identified electoral candidates.[236]

Table 1 underscores this inherent inconsistency. As discussed, an important objection to the decision in *Citizens United* is that the disciplining mechanisms upon which the Court relies to protect the stockholders of a public business corporation (e.g., free market forces, mandated disclosure, corporate democracy) are, in large part, insufficient as a check upon managerial discretion.[237] As Justice Stevens rightly notes in his dissent, management can too easily use corporate resources to advance political issues with which the firm's shareholders may disagree.[238] But the same objection is made by critics of corporate advocacy who argue, for example, that "woke" corporations communicate support for progressive causes, often through mass-market advertising campaigns, that reflect the liberal ideology of their corporate managers, and not the more varied ideological views of their corporate stockholders. Both types of expressive expenditures can result in a "kind of coerced speech."[239] In this way, the argument for not allowing managers to use corporate funds to engage in political activity (i.e., against *Citizens United*) is the same argument for not allowing managers to use corporate funds to promote social or political issues unrelated to the company's business (i.e., against corporate advocacy). In other words, an unfavorable view of *Citizens United* is inconsistent with a favorable view of corporate advocacy, or "woke capitalism" as it is sometimes termed in this context.[240] And, likewise, a favorable view of *Citizens United* is inconsistent with an unfavorable view

236. *See* Sorkin et al., *supra* note 179. *See generally* Bill Bostock, *Obama Laid into Young People Being 'Politically Woke' and 'as Judgmental as Possible' in a Speech About Call-Out Culture*, INSIDER (Oct. 30, 2019, 7:09 AM), https://www.businessinsider.com/barack-obama-slams-call-out-culture-young-not-activism-2019-10 ("I do get a sense sometimes now among certain young people, and this is accelerated by social media, that the way of me making change is to be as judgmental as possible about other people and that's enough.").

237. *See supra* notes 95–96 and accompanying text.

238. *See* Citizens United v. FEC, 558 U.S. 310, 475 (2010) (Stevens, J., concurring) ("Those shareholders who disagree with the corporation's electoral message may find their financial investments being used to undermine their political convictions.").

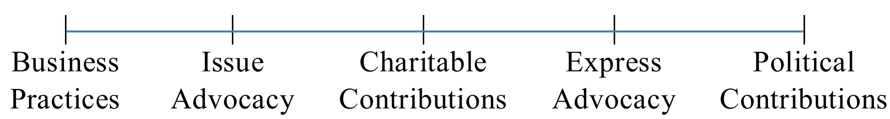
239. *See id.* at 476.

240. *See* Douthat, *supra* note 229.

of corporate advocacy. Yet, arguably, the two major political parties in the United States, Democrats and Republicans, each hold one of these two incoherent positions, respectively.

Recognizing that all expressive expenditures on corporate social responsibility implicate the same basic agency cost problem, one might nonetheless argue that a meaningful distinction can still be drawn based upon the magnitude of that problem, with spending on corporate speech categorized according to the expected harm to corporate shareholders.[241] Figure 2 suggests a possible graphical representation of a posited categorical relationship between corporate speech and the expected harm to shareholders.

Figure 2. Continuum of Expected Harm to Shareholders



Although this continuum of expected shareholder harm may be correct in a general sense, this Article contends that sufficient gray exists between these posited categories of corporate speech to render this continuum ultimately unhelpful as a justification for assessing the expected harm to shareholders *separately*, depending upon the type of expressive expenditure on corporate social responsibility.

Consider, for example, the distinction between charitable contributions and political contributions.[242] According to a recent empirical study, "6.3 percent of corporate charitable giving may be politically motivated, an amount 2.5 times larger than annual PAC contributions and 35 percent of

241. *See, e.g.*, *Citizens United*, 558 U.S. at 478 (suggesting that expressive expenditures "on lobbying and charitable contributions" can be treated differently than express advocacy or political contributions, because these "expenditures do not implicate the selection of public officials, an area in which the interests of unwilling . . . corporate shareholders [in not being] forced to subsidize that speech are at their zenith") (alteration in original) (internal quotation marks omitted).

242. Many have made a similar argument with respect to the distinction between issue advocacy and express advocacy. *See, e.g.*, Kathleen Hall Jamison, *Introduction* to ANNENBERG PUB. POL'Y CTR., UNIV. OF PA., ISSUE ADVERTISING IN THE 1999-2000 ELECTION CYCLE 2 (2001) (concluding "[a]fter analyzing hundreds of ads over a seven year period" that the "distinction between issue advocacy and express advocacy is a fiction"); *see also* Eliza Newlin Carney, *Air Strikes*, NAT'L J., June 15, 1996, at 1313, 1315 ("It is very easy to write these ads and do these commercials without using those magic words [e.g., "vote for," "vote against," "elect," "defeat" and "reject"], but they are very clearly campaign ads.").

federal lobbying."[243] The study's authors argue that charitable giving may be a form of corporate political influence undetected by voters and subsidized by taxpayers, involving monetary sums that are economically significant when compared to other channels of political influence-seeking.[244] Specifically, the authors find evidence consistent with the proposition that companies use charitable contributions to influence those legislators in a position to impact the firm's profitability.[245] Companies are statistically significantly more likely to make corporate contributions to charitable organizations of *personal* interest to such legislators (defined in this study as charities in the legislator's own congressional district or charities for which the legislator sits on the board).[246]

Additionally, the list of charitable contributions in Section IV.B.1 suggests the degree to which a charitable donation can itself be political in nature even if the contribution cannot be directly linked to an individual legislator or member of a regulatory agency. Note, for instance, the ACLU Foundation to which several companies on the list have made charitable contributions.[247] The ACLU Foundation is a 501(c)(3) organization that engages principally in litigation and communication efforts.[248] Apart from its Innocence Project, the principal objective of these efforts is not to advance the specific interests of individual clients, but rather to bring about broad changes to existing law.[249] Through a strategic combination of impact litigation, policy reports, and public education, the ACLU Foundation uses tax-deductible charitable donations to pay its employees to change the law, often pushing the law in a decidedly left-leaning direction.[250] Although these efforts certainly help those in need, the organization does not provide direct assistance; instead, it seeks to help those in need indirectly through legal change.[251] Arguably, this singular focus on legal or regulatory change suggests that issue advocacy groups, like the ACLU Foundation, more closely resemble political action committees that are similarly focused on

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243. *See* Marianne Bertrand et al., *Tax-Exempt Lobbying: Corporate Philanthropy as a Tool for Political Influence*, 110 AM. ECON. REV. 2065, 2065 (2020).

244. *Id.* at 2100.

245. *See id.* at 2068.

246. *Id.*

247. *See supra* Section IV.B.1.c.

248. *ACLU vs. ACLU Foundation*, ACLU PA., https://www.aclupa.org/en/about/aclu-vs-aclu-foundation (last visited Sept. 29, 2021).

249. *See Guardians of Freedom*, ACLU, https://www.aclu.org/guardians-freedom (last visited Oct. 2, 2021).

250. *See ACLU vs. ACLU Foundation*, *supra* note 248.

251. *See Guardians of Freedom*, *supra* note 249.

legal or regulatory change than standard charitable organizations that are primarily focused on the equitable redistribution of scarce resources. Indeed, in many cases, contributions to issue advocacy groups, like the ACLU Foundation, may have a greater impact on a specific social or political issue than more overtly political forms of issue advocacy, such as political contributions or lobbying efforts.[252]

2. Proposed Communications Committee

Rather than seek to empower shareholders with more tools to govern the corporation for their benefit, this Article advocates for greater board involvement as a proper check on corporate activism. As Professor Bainbridge has convincingly argued elsewhere, placing these types of decisions squarely in the hands of the board is always the appropriate null hypothesis.[253] Specifically, this Article suggests that the SEC should encourage public companies that trade on stock exchanges in the United States to have a communications committee as a distinct operating committee of the company's board of directors, charged with oversight and monitoring of *all* spending on corporate speech.[254]

252. *See, e.g.*, SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU xix (2d ed., S. Ill. Univ. Press 1999) (1990).

253. *See* STEPHEN BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE (2008); *see also* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 550 (2003) ("[D]irector primacy asserts that . . . [n]either shareholders nor managers control corporations—boards of directors do."); *cf.* Ira M. Millstein & Paul W. MacAvoy, *The Active Board of Directors and Performance of the Large Publicly Traded Corporation*, 98 COLUM. L. REV. 1283, 1285 (1998) (describing the conglomerations of the early 1990s—an analog of present-day corporate activism—as an example of weak boards allowing managerial self-interest to prioritize expanding the size and scope of a company over shareholder value).

254. Closely held corporations and non-profit business are excluded under the assumption that the expected harm to shareholders does not exceed the expected costs of compliance. Further, like the other committees required by the national securities exchanges (e.g., audit, compensation, nominating), the communications committee should be composed of independent directors, meaning that a director neither has a pecuniary relationship with the company or any of its subsidiaries nor is an affiliated person of the company or any of its subsidiaries. *See generally* 17 C.F.R. § 240.10A-3(b) (2021) (audit committee); N.Y.S.E. Guide (CCH) § 303A.06–.07 (audit committee). Most importantly, each communications committee member must not participate in, or otherwise be involved with in any way, business decisions relating to expressive expenditures on corporate social responsibility: the independence of committee members with respect to this decision-making process is critical.

a) Structure of Communications Committee

To better understand how this corporate governance proposal might operate in practice, consider as an illustrative example the Lockheed Martin Corporation, a company deeply committed to corporate social responsibility. All corporate social responsibility programs at Lockheed Martin fall under the purview of the Senior Vice President of Ethics and Enterprise Assurance, who reports directly to the Chairman, President, and CEO.[255] The Senior Vice President of Ethics and Enterprise Assurance chairs the company's Sustainability Work Group.[256] Importantly, this working group comprises the Vice President of Government Affairs and the Director of Social Impact.[257] The company develops a five-year Sustainability Management Plan to set goals in specific priority areas that include ethical conduct, environmental stewardship, corporate culture, workforce diversity, and employee health and safety.[258] The plan is, in effect, an inward-facing document focused on how the firm's business practices can be improved to best serve important stakeholders, including employees, customers, and the environment. Attention is inwardly focused on the company itself and how its business practices impact stakeholders according to several different priority factors such as product safety, workforce diversity, and carbon management.[259]

The corporate governance proposal set forth here would modify Lockheed Martin's exemplary approach to corporate social responsibility by having the company draw a sharper distinction between expressive and inexpressive expenditures on corporate social responsibility. Specifically, the company can establish a separate working group dedicated entirely to the oversight of corporate speech. The Vice President of Government Affairs, who is responsible for managing and coordinating the company's political and public policy activities, and the Director of Social Impact, who is responsible for developing meaningful stakeholder engagements and overseeing charitable contributions, can be moved from the existing Sustainability Working Group to this new proposed working group. In addition, this group can also include, as key members, the Senior Vice President of Communications, the Vice President of Corporate

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255. LOCKHEED MARTIN, 2020 SUSTAINABILITY REPORT: PROPELLED BY PRINCIPLE 8 (2020), https://sustainability.lockheedmartin.com/sustainability/content/Lockheed_Martin_2020_Sustainability_Report.pdf.

256. *Id.*

257. *Id.*

258. *Id.*

259. *See id.*

Communications, and the Vice President of Branding and Marketing—none of whom appear to be a core part of the Sustainability Working Group.[260] The chair of this new working group can report directly to a board committee comprised entirely of independent directors, which may be the existing Nominating and Corporate Governance Committee or, preferably, a newly created Communications Committee as this Article has proposed.

As this example illustrates, the advantage of drawing a sharper distinction between expressive and inexpressive expenditures on corporate social responsibility is that certain officers of the company who may not actively participate in the development of the firm's corporate social responsibility initiatives, especially those in the communications and marketing departments, are now an integral part of a formal process intended to ensure that spending on corporate speech is undertaken solely based upon the best interests of the firm's stockholders, and not upon the personal agendas of individual officers or other stakeholders of the firm. Moreover, isolating expressive expenditures on corporate social responsibility in this fashion allows the company to squarely focus on corporate behavior with a high risk of shareholder harm. A separate and distinct assessment reduces the risk that a consideration of the expected impact of corporate speech on corporate profits becomes lost in a complex and wider-ranging analysis of how the company's internal business practices can best serve the interests of corporate stakeholders beyond the firm's stockholders.

b) Responsibilities of Communications Committee

The primary responsibility of this proposed communications committee is to ensure that spending on corporate speech promotes the best interests of the firm's shareholders, and not the interests of other corporate stakeholders, including management. For this proposal to have teeth, the board must be required to *preapprove* certain expenditures. Although a board can certainly review expenditures on corporate social responsibility after-the-fact and convey disagreement with certain expenditures to provide future guidance to management, this proposed committee serves as a much more effective disciplining mechanism if management must seek approval for specific spending on corporate speech in advance.

Although this proposal may open the board up to charges of impermissibly micromanaging the company's officers who properly run the daily operations of a corporation, the board can take steps to minimize this

260. *See id.*

possibility. In the case of charitable donations, for example, preapproval can be sought only for donations exceeding a certain threshold amount. Preapproval by the board is particularly important in connection with public statements by management on social or political issues unrelated to the company's business. The communications committee should help management understand why a discussion with the committee is expected before either management, or the corporation itself, takes a position on certain social or political issues. As Harvey Golub, former chair and CEO of American Express, persuasively argues in a *Wall Street Journal* opinion piece, "[CEOs] always speak for and represent the companies they head. As CEOs they have the right, and, perhaps the obligation, to speak out on matters affecting their organizations, but unless they have asked their boards for approval before speaking, they don't have that right on *unrelated* matters."[261]

In assessing whether spending on corporate speech benefits the company's shareholders, management and the communications committee can first informally meet to weigh the arguments for and against making the expenditure. If management continues to insist on the expenditure after this initial meeting, then the committee can engage in a traditional corporate social responsibility analysis to reach a rational business judgment about whether taking a particular ideological position is, in fact, for the long-term benefit of shareholders.[262] Following this analysis, if the expenditure is approved by the communications committee, then the committee would be required to formally justify its approval, carefully explaining, in writing and with specificity, how the expenditure directly promotes the best interests of the firm's shareholders. In the case of a corporate contribution to an issue advocacy group, for instance, the committee must explain how the specific policy outcome advanced by the issue advocacy group is likely to promote the best interests of the firm's shareholders. If the company, for example, has spent money in support of a public policy initiative to "raise taxes on the top 1 percent of Americans," then the committee must be able to explain how this desired change to the prevailing tax structure can be expected to

261. Harvey Golub, Opinion, *Politics Is Risky Business for CEOs*, WALL ST. J. (Apr. 12, 2021, 6:19 PM ET) (emphasis added), https://www.wsj.com/articles/politics-is-risky-business-for-ceos-11618265960.

262. *See generally* Sapna Maheshwari, *The Delicate Dance of a Progressive C.E.O. in the Trump Era*, N.Y. TIMES (Jan. 15, 2018), https://www.nytimes.com/2018/01/15/business/media/sonic-drive-in-clifford-hudson.html (discussing the caution required by Sonic's leadership in taking particular ideological positions on public policy issues).

directly benefit the company's stockholders, rather than benefit society in some more abstract sense.[263]

In addition, the communications committee can specifically check for potential misdirection by management (e.g., green-washing, woke-washing).[264] In the short run, corporate managers have an incentive to misrepresent the firm's true social impact, communicating to its stakeholders, especially its customers and investors, a message of corporate social responsibility that does not accurately portray the company's business practices.[265] At some point, however, these stakeholders may come to realize in the long run the extent to which the company's expressive expenditures on corporate social responsibility do not correspond with the firm's actual business practices. To avoid the negative financial outcomes that are likely to result when the firm's stakeholders become aware of such a disconnect, the board can ask management whether the proposed expenditure on corporate advocacy accurately depicts, without any additional action by the firm, existing business operations, or whether the proposed expenditure potentially exposes the company to the credible charge that its outward-facing communications are false or misleading and misrepresent the company's true internal business practices.

Importantly, not only does this proposed communications committee help minimize agency costs between a firm's shareholders and its corporate managers, but it also serves to reduce corporate participation in wasteful ideological conflict.[266] As discussed, broad corporate speech rights place public business corporations under tremendous pressure to take a public stance on social or political issues unrelated to the company's business.[267] The firm can choose to stay silent, to concede the fight, and to allow hostile forces to mischaracterize its ideological viewpoints. Or the firm can expend costly corporate resources to participate in an ideological conflict that accomplishes very little. In either case, the company loses. To avoid this

263. *See* Leahy, *supra* note 94, at 1211. If a firm, for example, sells mass-market knock-off designer clothing, then the committee might argue that reducing income inequality is likely to produce higher disposable incomes among its customers, leading to increased sales and corporate profits. *See id.*

264. *See, e.g.*, Francesca Sobande, *Woke-Washing: 'Intersectional' Femvertising and Branding 'Woke' Bravery*, 54 EUR. J. MKTG. 2723, 2738–39 (2020) (exploring how public business corporations can fail to live up to the social or political values professed in advertising campaigns or public statements). *See generally* VIVEK RAMASWAMY, WOKE, INC.: INSIDE CORPORATE AMERICA'S SOCIAL JUSTICE SCAM (2021).

265. *See* Vredenburg et al., *supra* note 215.

266. *See id.*

267. *See id.*

no-win situation, a public business corporation must have some type of commitment mechanism that restricts its freedom to engage in corporate speech; a corporation's hands must be tied in some way.[268] Here, the board of directors serves as this commitment mechanism: in response to external pressure to comment publicly on a social or political issue unrelated to the company's business, a firm can point to its board of directors as the exclusive source of its corporate silence, stating that the board has expressly concluded that corporate speech on this particular social or political issue is not in the best interests of the firm's shareholders and that the company must stay silent as a result.[269]

3. Mandated Disclosure

Finally, one of the main contributions of the present Article is to observe that corporate social responsibility often requires a public business corporation to engage in some form of protected speech to promote social or political issues unrelated to company's business practices. As discussed, conceiving of a public corporation as a person capable of acting "good" or being somehow socially moral fails to appreciate that the shareholders of a public business corporation cannot plausibly be thought to have joined together for shared associational reasons unrelated to profit and pitches a public corporation into ideological conflicts better resolved through more conventional democratic processes.[270] When a public business corporation is asked to take a public stance on issues unrelated to the company's business, a task for which this legal construct is sorely ill-suited, the outcomes can be painfully absurd. Why is an ice-cream company, for instance, taking a public position on complex public policy issues related to policing practices and crime control, without any meaningful elaboration?[271] Why is a fast-food hamburger chain publicly committing to increasing visibility around issues of mental health and well-being?[272] Why is a manufacturer of orange juice feigning a mental health crisis, tweeting

268. *See generally* Isabelle Brocas et al., *Commitment Devices Under Self-Control Problems: An Overview*, *in* THE PSYCHOLOGY OF ECONOMIC DECISIONS. VOL. 2: REASONS AND CHOICES 49 (Isabelle Brocas & Juan D. Carrillo eds., 2004).

269. As this response becomes the social norm, the incentive to make such requests of a public business corporation in the first instance should diminish correspondingly.

270. *See* Gordon, *supra* note 104, at 1521–22.

271. *See* Ben & Jerry's, *supra* note 186.

272. *See* Kaitlyn Tiffany, *Burger King Is the Latest Brand to Use Depression as a Marketing Tool*, VOX (May 2, 2019, 2:40 PM EDT), https://www.vox.com/the-goods/2019/5/2/18527110/burger-king-unhappy-meals-steakumms-sad-brand-twitter.

morosely, without any context provided, that "I can't do this anymore"?[273] Rather than engage in corporate speech to promote social or political issues unrelated to the company's business, a public business corporation can better promote corporate social responsibility by turning inward and focusing exclusively on inexpressive expenditures on internal business practices; corporate social responsibility is better implemented through concrete corporate action, through tangible changes to existing business practices, and not through corporate speech. A truly socially responsible corporation, rejecting shareholder primacy as its operating model of corporate governance, chooses to structure its business operations such that corporate profits are sacrificed to make other corporate stakeholders better off.[274]

A complete reimagining of the modern public corporation, with some form of stakeholder primacy replacing shareholder primacy as the operating model of corporate governance, raises a number of perhaps insurmountable difficulties. A less ambitious view of corporate social responsibility, however, sees this form of private business self-regulation not as a fundamentally new organizing model of corporate governance, but as a promising customer or investor phenomenon in which a public business corporation maximizes profits subject to certain binding ethical or moral constraints imposed upon it by socially conscious corporate stakeholders. Rather than push companies to advocate in support of social or political issues unrelated to their business, corporate stakeholders, if able to act collectively, can compel public companies to operate in a manner that provides measurable concrete benefits to society beyond corporate profits.[275] Through their individual investment or consumption decisions, corporate stakeholders can force public business corporations to employ a more diverse workforce, to manufacture their products in more environmentally sustainable ways, or to pay equitable wages that do not reflect gender or racial bias. Surely this type of inward-looking corporate action is the desired outcome of any meaningful corporate social

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273. *See* SUNNYD (@sunnydelight), TWITTER (Feb. 3, 2019, 8:24 PM), https://twitter.com/sunnydelight/status/1092247574336163840.

274. *See generally* Elhauge, *supra* note 16, at 744–45. In the case of our hypothetical toothpaste manufacturer, the company acts in a truly socially responsible manner not through the exercise of its corporate speech rights, but in adopting the low-pollution production technology, notwithstanding decreased corporate profits, to reduce the negative externalities imposed upon the local community in the form of socially harmful water pollution.

275. *See, e.g.*, Leslie King & Elisabeth Gish, *Marketizing Social Change: Social Shareholder Activism and Responsible Investing*, 58 SOCIO. PERSPS. 711, 716–17 (2015).

responsibility initiative. Socially conscious corporate stakeholders cannot wish a company merely to engage in some elaborate public relations charade in which the firm strives to convince the general public that it is a "good" company deeply concerned about its broader social impact, while at the same time conducting its business in a manner entirely inconsistent with its corporate brand marketing. Corporate action, and not corporate speech, must be the end goal.

For stakeholder preferences to act as a binding constraint in this manner, however, stakeholders, in assessing whether a public company has satisfied specific ESG criteria, must be reasonably informed as to the firm's internal business practices related to such ESG criteria.[276] In theory, a company can be relied upon to voluntarily disclose this privately held information to the relevant stakeholders.[277] More likely, some type of mandatory disclosure regime no different than for information materially related to a public company's financial condition or operating results is required to make ESG-related information publicly available.[278] Accordingly, corporate social responsibility from the perspective of a public business corporation reduces to a matter of corporate accounting and reporting likely falling under the purview of the firm's audit committee. Given mandated disclosure of information related to internal ESG-related business practices, the question facing a public business corporation thus becomes to what extent must the business operate to satisfy the socially conscious

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276. In the case of our hypothetical toothpaste manufacturer, consumers and investors must know whether the firm has adopted the low-cost technology or the high-cost technology. If the firm has chosen the low-cost technology, then the firm has an incentive to keep quiet—or more insidiously, to actively create a false or misleading public impression that the firm has chosen the high-cost technology.

277. *See, e.g.*, Hank Boerner, *Public Companies Respond to Investor Expectations, Expanding Voluntary Disclosure on ESG Issues*, 19 CORP. FIN. REV. 32 (2014). *See generally* Sanford J. Grossman, *The Informational Role of Warranties and Private Disclosure About Product Quality*, 24 J.L. & ECON. 461 (1981).

278. *See, e.g.*, Virginia Harper Ho, *Disclosure Overload? Lessons for Risk Disclosure & ESG Reporting Reform from the Regulation S-K Concept Release*, 65 VILL. L. REV. 67, 75–83 (2020); Ruth Jebe, *The Convergence of Financial and ESG Materiality: Taking Sustainability Mainstream*, 56 AM. BUS. L.J. 645, 696–702 (2019); *see also* Allison Herren Lee, Acting Chair, SEC, Speech to the Center for American Progress: A Climate for Change: Meeting Investor Demand for Climate and ESG Information at the SEC (Mar. 15, 2021), https://www.sec.gov/news/speech/lee-climate-change (announcing that the SEC is taking steps to develop a mandatory reporting ESG disclosure framework). *But see generally* OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2016) (arguing that mandatory disclosure rarely works).

preferences of a broad set of corporate stakeholders beyond its stockholders. This is a question necessarily motivated by profit maximization and not ethical or moral concerns and which—unlike the question of whether now is the right time for a corporate manager to publicly communicate some personal stance on a social or political issue unrelated to the company's business—is the right type of question that a public corporation should ask in seeking to conduct its business in a more truly socially responsible manner.

V. Conclusion

This Article has advanced the claim that expenditures by a public business corporation on the promotion of social or political issues unrelated to the company's business generally do *not* maximize corporate profits and has termed such spending corporate activism. Corporate activism was modeled as the product of both agency costs and ideological conflict that derive from the U.S. Supreme Court's expansion of corporate speech rights under the First Amendment. To protect shareholders against corporate activism, the Court has relied upon various disciplining mechanisms that were deemed largely not up to the task. This Article has offered a different solution, placing the responsibility squarely upon the board of directors of public business corporations to prevent expressive expenditures on corporate social responsibility that do not advance the best interests of the firm's shareholders. If the board is required to formally assess all spending on corporate speech in a comprehensive manner and to justify its approval of any such expenditure, in writing, specifically explaining how the firm's shareholders directly stand to benefit, the claim is that this more exacting scrutiny by the firm's board of directors will reduce the frequency with which public business corporations engage in corporate activism to the detriment of its stockholders.