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# THE CONSERVATIVE CASE FOR ESG

*Richard W. Painter*[*]

*There is a growing consensus across the political spectrum that corporations should not just make money for shareholders but also advance the public good. Conservatives and liberals often disagree about what the public good is, or what the priorities of corporate governance should be, but both sides are discontent with corporations focusing only on profits.*

*This Article discusses reasons why political conservatives should support efforts to include environmental, social and governance (ESG) factors in corporate governance. Conservatives do not embrace contemporary ESG rhetoric which they associate with liberal social and economic viewpoints, but conservatives nonetheless oppose corporations maximizing profits at the public expense. For example, conservatives oppose corporations sending American jobs overseas, increasing U.S. economic dependence on China, and pulling back from doing business in Israel. Conservatives support faith-based corporations integrating religious values into their business model, for example by remaining closed on Sundays despite lost revenue. Patriotism is important for most conservatives, and probably much more important than profits.*

*This Article argues that the "corporate purpose" provisions in a bill introduced by Senator Elizabeth Warren, the Accountable Capitalism Act, should gain the support of conservatives in Congress with relatively minor amendments that would emphasize conservative corporate governance priorities without undermining the underlying principles in the bill. Encouraging corporate managers to take the public good into account is important to conservatives as well as liberals and preventing the "profit maximization" norm from overtaking corporate law should be a priority for both.*

[*] Richard W. Painter is the S. Walter Richey Professor of Corporate Law at the University of Minnesota Law School. He is also the former Associate Counsel to the President and chief White House ethics lawyer for President George W. Bush.

## INTRODUCTION

In March 2023, President Biden issued his first veto in office, vetoing a resolution rescinding a Labor Department regulation that allowed managers of corporate retirement funds to consider climate change and other environmental, social and governance (ESG) factors in making investment decisions.[1] Republicans in Congress, decrying "woke capitalism," insisted

[1] The congressional resolution disapproved of the Department of Labor's final rule titled "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights." 87 F.R. 73822 (Dec. 1, 2022), 29 C.F.R. § 2550. Biden stated in his veto message: "There is extensive evidence showing that environmental, social, and governance factors can have

that fund managers focus on their fiduciary duty to maximize investment returns for stockholders, not on political arguments about how corporations make profits.

Biden's veto fight with Congress fits within the standard explanation of the breakdown along party lines on the role of ESG in corporate governance. Liberals think ESG factors are important in investment and business decisions. Republicans (and a few conservative Democrats such as Senator Joe Manchin of West Virginia[2]) think ESG is bad. Conservatives believe fund managers and corporate managers should maximize profits and not consider anything else.

There is some truth to this account of the partisan divide. Florida recently passed a bill requiring managers of state pension funds to consider only "pecuniary factors" in making investment decisions,[3] a swipe at efforts to introduce ESG factors into portfolio analysis. The term "pecuniary factor" in Florida's law, however, is sufficiently ambiguous that it's not clear what types of ESG factors are out of bounds. In 2023, Attorneys General from 21 states sent a letter to proxy advisory firms, informing them that they were in violation of state law if they considered ESG factors pertaining to climate change when making recommendations for proxy voting of shares held by state pension funds.[4]

Many ESG initiatives are from the left. For example, in 2018, Senator Elizabeth Warren introduced the Accountable Capitalism Act,[5] a bill that created a mandatory federal charter for America's largest corporations and specified a corporate purpose to advance the public benefit, not just to earn profits for shareholders. The bill imposed a standard of conduct on officers and directors consistent with the public benefit. The bill furthermore required 40% of the corporation's directors to be elected by its employees, imposed restrictions on executive stock sales and corporate political spending, and empowered state attorneys general to petition for revocation of charters of

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a material impact on markets, industries, and businesses." President Joseph R. Biden, Jr., *Message to the House of Representatives – President's Veto of H.J. Res 30*, THE WHITE HOUSE (March 20, 2023), https://www.whitehouse.gov/briefing-room/presidential-actions/2023/03/20/message-to-the-house-of-representatives-presidents-veto-of-h-j-res-30/. [https://perma.cc/8V7B-BHN7].

[2] *See Manchin Votes for Bipartisan Challenge to Biden Rule Politicizing Americans' 401Ks, Statement of Senator Manchin,* OFF. OF SEN. JOE MANCHIN (March 1, 2023), https://www.manchin.senate.gov/newsroom/press-releases/manchin-votes-for-bipartisan-challenge-to-biden-rule-politicizing-americans-401ks. [https://perma.cc/XKX7-RA7M].

[3] *See* 2023 Fla. Laws Ch. 2023-28 (Government and Corporate Activism).

[4] *See* Letter from 21 state attorneys general to Institutional Shareholder Services, Inc. and Glass, Lewis and Co. (Jan. 17, 2023), https://attorneygeneral.utah.gov/wp-content/uploads/2023/01/2023-01-17-Utah-Texas-Letter-to-Glass-Lewis-ISS.pdf.

[5] *See* Accountable Capitalism Act, S. 3348, 115th Cong. (2018), https://www.warren. Senate .gov/imo/media/doc/Accountable%20Capitalism%20Act.pdf.

corporations that engage in egregious illegal conduct.[6] Senator Warren has not re-introduced the Accountable Capitalism Act in the current Congress, and perhaps there is little hope of getting such a bill past the Republican-controlled House of Representatives.

Political alignment on ESG, however, is not that simple. The purpose of this Article is to demonstrate that, in some situations, Republicans could be as enthusiastic about ESG as Democrats, and indeed could embrace ESG to promote the issues their conservative voters care about.

What if a congressional resolution or bill permitted pension fund managers to consider the threat to U.S. national security from investing in businesses in China? What about a bill that permitted pension fund managers to consider the moral imperative to invest in businesses in Israel even if profits are adversely impacted by the war against Hamas? What if a bill allowed pensions to divest from businesses that maximize profits by sending American jobs overseas or by using illegal immigrant labor inside the United States? Or to divest from businesses that fail to accommodate the religious freedom of their employees? Republican support undoubtedly would have been much greater for any of these proposals, whether they were labeled "ESG" or something else.

Indeed, a bill targeting profits of the socially liberal Disney Corporation easily sailed through Florida's GOP controlled legislature.[7] Although Governor Ron DeSantis is on the flip side of social issues from his liberal counterparts in the ESG movement, for him, social issues are more important than corporate profits, even the profits of Florida's largest private employer and taxpayer. The "S" in ESG stands for social issues, emphasizing the importance of sometimes prioritizing social issues over profits. In at least that respect, Governor DeSantis is a true ESG believer.

Party lines on ESG are drawn according to whose issue is at stake. The debate over the resolution President Biden vetoed was not really about ESG. It was about fossil fuels (just ask Senator Manchin how he would have voted on an ESG bill that, instead of bashing coal companies, encouraged fund managers to invest in West Virginia and elsewhere in rural Appalachia). The debate in Florida over the Disney Corporation, with Republicans doing everything they can to destroy corporate profits, is about social issues underlying Disney's spat with Governor DeSantis. For conservatives as well as liberals, such issues are a lot more important than profits. Nobody is running for president on a platform of "shareholder wealth maximization."

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[6] *Id.* Specific provisions of Senator Warren's bill are discussed in Part I of this Article.

[7] *See* HB 9-B, 2023 Leg. (Fla.) (bill to end self-governing status and special privileges provided to Walt Disney World through the Reedy Creek Improvement District and establish a new state-controlled district).

This Article discusses how the "corporate purpose" provisions of Senator Warren's bill, and the provisions on directors' and officers' fiduciary duties, align with the agenda of some Republicans in Congress. There is a growing consensus on both ends of the political spectrum that corporations should not just make money for shareholders but also further the public good. There is sharp disagreement about what the public good is, but Republicans and Democrats alike attack corporations that undermine the nonmonetary values politicians and their supporters believe in. Both sides accuse corporations of focusing only on profits at the expense of nonmonetary policy priorities.

There is also growing evidence that conservatives are frustrated with corporate conduct they believe harms the public interest.[8] Florida Senator Marco Rubio's vocal attacks on Amazon for its poor labor record reflect a new breed of Republican populists looking for working class support against big business.[9] Bills that severely regulate the conduct of social media companies have been introduced by members of Congress of both political parties.[10]

Admittedly there are powerful cross currents in the conservative movement opposing ESG initiatives, which have been described by Florida Governor Ron DeSantis as "woke capitalism."[11] Telling corporations to stay out of politics and focus on profits has been an "anti-woke" siren song, except

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[8] *See, e.g.*, Joseph A. Wulfsohn & Nikolas Lanum, *Russia-Ukraine crisis: GOPers slam Big Tech for banning conservatives but allowing Kremlin to push disinfo*., FOX NEWS (Feb. 28, 2022), https://www.foxnews.com/media/big-tech-cpac [https://perma.cc/Q7BQ-4QCL].

[9] *See, e.g.*, Marco Rubio, *Amazon should face unionization drive without Republican support*, USA TODAY (Mar. 12, 2021), https://www.usatoday.com/story/opinion/2021/03/12/amazon-union-not-helping-working-class-economy-column/6947823002/ [https://perma.cc/AC5F-XDLX] ("For the past several years, Amazon has waged a war against working-class values. The Silicon Valley titan uses anticompetitive strategies to crush small businesses, bans conservative books and blocks traditional charities from participating in its AmazonSmile program. Not surprisingly, it has also bowed to China's censorship demands…. But the days of conservatives being taken for granted by the business community are over. Here's my standard: When the conflict is between working Americans and a company whose leadership has decided to wage culture war against working-class values, the choice is easy — I support the workers. And that's why I stand with those at Amazon's Bessemer warehouse today.").

[10] *See, e.g.*, Cecilia Kang & David McCabe, *Efforts to Rein in Big Tech May be Running out of Time*, N.Y. TIMES (Jan. 20, 2022), https://www.nytimes.com/2022/01/20/ technology/big-tech-senate-bill.html [https://perma.cc/87SG-ECCM].

[11] Governor DeSantis persuaded the Florida State Board of Administration to adopt a resolution prohibiting consideration of political factors when investing state employees' pension money. James Call, *Gov. Ron DeSantis moves to prohibit state investments in 'woke' agenda*, TALLAHASSEE DEMOCRAT (Aug. 29, 2022), https://www.tallahassee.com/story/news/politics/elections/2022/08/23/florida-retirement-fund-frs-governor-ron-desantis-pension-fund-woke/7866802001/. [https://perma.cc/R9R7-RAH7].

that, for Republicans as well as Democrats, corporate campaign contributions are always welcome.[12]

DeSantis's current war with the Disney Corporation, which began over Disney's opposition to anti-gay and anti-transgender legislation in Florida, could be characterized as a GOP attack on ESG in corporate governance. But that's wrong. First, Disney could very well have been acting out of profit-maximizing motives, as many of its customers and employees care about these issues. Being headquartered in a state with "reactionary" laws is probably bad for profits–even worse if Disney does not vigorously protest. Second, to the extent that the battle between DeSantis and Disney is over ESG, it's over whose vision of ESG should prevail. DeSantis is no champion of corporate shareholder wealth maximization, as he sets about to destroy Disney's shareholder wealth by threatening, among other things, to build a prison near its theme park.[13] DeSantis has an ESG vision of his own, and he will fight to advance it.

Other conservatives, including Senator Rubio, are demanding more corporate social responsibility on issues such as protecting American workers from job loss and low wages, and scaling back economic transactions with China out of concern for human rights and national security. As liberal ESG initiatives addressing climate change and racial diversity gain momentum, with support from securities exchanges[14] and institutional investors,[15] conservatives concerned about protecting American jobs and confronting China will not want their own ESG agenda to be left behind.

This raises the possibility that liberals in Congress could work together with some conservatives to present a united front against the ideology of corporate profit maximization. Of course, the two sides' ESG priorities differ. Conservatives emphasize a corporation's duty of loyalty to the United States, particularly the duty to avoid helping economic and military rivals of the United States. Conservatives strongly oppose communist regimes and strongly support Israel. Conservatives want to allow corporations such as Chick-Fil-A and Hobby Lobby to prioritize the religious

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[12] *See* Taylor Giorno, *Florida Gov. Ron DeSantis' war chest dwarfs fundraising by Democratic gubernatorial challenger Rep. Charlie Crist*, OPEN SECRETS (Aug. 26, 2022), https://www.opensecrets.org/news/2022/08/florida-gov-ron-desantis-war-chest-dwarfs-fundraising-by-democratic-gubernatorial-challenger-rep-charlie-crist/.

[13] Greg Allen, *Florida Gov. DeSantis said he may put a prison next to Disney parks amid dispute*, NPR (April 18, 2023, 4:08PM), https://www.npr.org/2023/04/18/1170709950/florida-gov-desantis-said-he-may-put-a-prison-next-to-disney-parks-amid-dispute. **[**https://perma.cc/D3WD-NNYA**].**

[14] *See, e.g.*, Nasdaq, Amendment 1 to Proposal to Advance Board Diversity and Enhance Transparency of Diversity Statistics Through New Proposed Listing Requirements (Form 19b-4) (Feb. 26, 2021). The NASDAQ final rule as approved by the SEC is NASDAQ Rule 5605(f).

[15] The role of institutional investors in promoting ESG proposals is discussed in this Article at text accompanying notes 117-127, *infra*.

values of their controlling shareholders, a cause faith based companies fought hard for in the courts.[16] Conservatives would not want these controlling shareholders to lose to minority shareholder suits based on a principle of "profit maximization." Liberals emphasize the importance of corporations fighting climate change (though an increasing number of Evangelical Christian voters are also worried about climate change).[17] Both liberals and conservatives believe corporations should not maximize profits by sending American jobs overseas. The common theme for politicians on the left, right and center is that corporations should not just make money. Corporate capitalism works best when corporations also support the interests of workers, customers and suppliers, and their country.

For reasons explained in this Article, the "corporate purpose" and fiduciary duty provisions of Senator Warren's Accountable Capitalism Act would not impose substantial new legal burdens on corporations. Conservatives who oppose excessive regulation of business have little to fear. Regulation of corporate conduct may come from other legislation such as environmental laws or labor laws. Some of those laws are supported by conservatives (particularly laws restricting corporations from sending jobs overseas) and some are not. But government regulation of corporate conduct is not part of the corporate purpose and fiduciary duty provisions of the Accountable Capitalism Act that are the focus of this Article.

Warren's bill tells corporations they have a public benefit purpose besides just making profits. The bill provides some (but not much) detail on factors to consider in determining that public benefit purpose. The bill tells corporate officers and directors they should consider that purpose in managing the corporation. Without changing any of the existing language in the bill, Congress could add to the list of public benefit factors enumerated in the bill some factors that are appealing to political conservatives (such as promoting national security). Such amendments would broaden the bipartisan appeal of the bill and are proposed in this Article.

The "public benefit" provision of the bill is not an inflexible mandate enforceable in the courts. The bill does not impose a particular vision of the public benefit, and as explained in this Article, the bill will not expose corporate managers to credible lawsuits from shareholders who disagree with their vision of the public benefit. What the bill does is provide a firm legal

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[16] *See* discussion in Part V, *infra*, of Burwell v. Hobby Lobby Stores, 573 U.S. 682 (2014).

[17] *See* Mark Silk, *Evangelicals are Losing their Climate Skepticism*, RELIGION NEWS SERVICE, April 28, 2021, https://religionnews.com/2021/04/28/evangelicals-are-losing-their-climate-skepticism/ **[**https://perma.cc/JG3L-NEVX**]** ("In 2014, Pew reported that just 28% of white evangelicals attributed global warming to human activity. Last October [2020], by contrast, 44% of them said climate change was due "mostly to human activities," according to a Climate Nexus poll.").

basis for directors and officers to consider the public benefit as well as profits and not get sued by shareholders for doing so.

If corporate behavior does not change, the Accountable Capitalism Act has another expressive aspect: it articulates a rationale for future federal or state regulation of corporations whose conduct undermines the public benefit. Whether conservatives would support such regulatory measures remains to be seen. The anti-BDS (boycotts directed at Israel) legislation introduced by Senator Rubio[18] shows that Republicans join Democrats in combatting some forms of corporate conduct that they believe violates fundamental values. Restrictions on corporate transactions with China and other foreign countries are also popular with conservatives and some liberals (particularly labor unions). It is not clear how much new regulation conservatives will support, but in today's more populist, nationalistic, and moralistic political environment, conservatives will not uncritically support profit maximization by unregulated global corporations.

This Article uses the Accountable Capitalism Act as a foil for conservatives, asking what portions of Senator Warren's bill, if phrased with somewhat different language but little change in actual meaning, might appeal to Republicans in Congress. This question is important because bipartisan support for the bill, or another bill like it, could fundamentally change outlooks on corporate governance. What aspects of ESG could the left and right agree upon? The answer suggested in this Article is that once each side's specific ESG issues are set aside, and the philosophical underpinnings of ESG are examined, there is room for consensus. Both sides have ESG issues that are important to them, and both sides reject the notion that corporations should only focus on making money.

This Article sets aside, and does not consider, the bill's more specific provisions for employee representation on corporate boards, executive stock sales, political spending, and charter revocation for illegal conduct. The "codetermination" approach to shared corporate governance with labor is implemented in some countries, such as Germany, and has advantages and disadvantages that have been written about elsewhere.[19] However, unlike the corporate purpose and fiduciary duty provisions of the Accountable Capitalism Act, the codetermination provisions would involve a substantial overhaul of corporate governance and would be difficult to pass in Congress. Conservatives might object, although the political lines between the C-suite and the shop floor are not what they used to be. Senator Rubio's embracing the cause of Amazon workers against management shows that stereotypical

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[18] *See* The Israel Anti-Boycott Act, H.R. 1697 & S. 720, 115th Cong. (2017); Combating BDS Act, S. 1, 116th Cong. (bills intended to counter the BDS movement co-sponsored by Senator Marco Rubio).

[19] *See e.g.*, Jens Dammann & Horst G. M. Eidenmueller, *Corporate Law and the Democratic State*, 2022 U. ILL. L. REV. 963 (2022).

Republican-Democrat political allegiances in the workplace are fluid. For now, "codetermination" is an idea likely to be unpopular with conservatives, but that could change.

Legal restrictions on executive stock sales[20] and on corporate political spending[21] have also been written about elsewhere and will not be addressed here. Conservatives traditionally have favored corporate political spending, including Supreme Court decisions that protect it, although conservatives also assume, as Justice Kavanaugh held in 2011 as an appeals court judge, that foreign controlled corporations will not be permitted to engage in electioneering communications in the United States.[22] Conservatives also have been extraordinarily hostile to corporations that engage in political communications they disagree with.[23] It is not unforeseeable that

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[20] *See e.g.*, David F. Larcker et al., *Gaming the System: Three 'Red Flags' of Potential 10b5-1 Abuse* (January 19, 2021), Rock Center for Corporate Governance at Stanford University Working Paper Forthcoming, (discussing trading behavior of corporate executives that undermines the purpose of the SEC's rule establishing an affirmative defense to insider trading allegations). Available at SSRN: https://ssrn.com/abstract=3769567.

[21] *See e.g.,* Christopher Poliquin & Young Hou, The Value of Corporate Political Donations: Evidence from the Capitol Riot (Jan. 11, 2022), https://ssrn.com/abstract =4005515 (using event study of stock prices to find that suspension of corporate political spending had small effects on firm value); Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEORGETOWN L. J. 923 (2013) (discussing emergence of voluntary disclosure of corporate political spending in some instances and why voluntary disclosure is not a substitute for SEC rules).

[22] *See* Bluman v. FEC, 800 F. Supp. 281 (D.D.C. 2011) (Brett Kavanaugh, J., sitting by designation) (upholding ban on contributions by foreign nationals, 52 U.S.C. § 30121 and holding that the First Amendment protections in *Citizens United* do not apply to electioneering expenditures by foreign entities), *aff'd without opinion*, United States Supreme Court, Docket No. 11-275 (2012). As this author has observed elsewhere, the wide range of business relationships between U.S. corporations and foreign corporations make this ban on foreign corporation electioneering expenditures difficult to enforce if U.S. corporate electioneering expenditures are virtually unlimited. *See* RICHARD W. PAINTER, TAXATION ONLY WITH REPRESENTATION: THE CONSERVATIVE CONSCIOUS AND CAMPAIGN FINANCE REFORM (2016).

[23] *See* Andrew Atterbury, *Disney Pledges to Stop Florida Campaign Donations over "Don't Say Gay" Bill*, POLITICO (March 11, 2022) ("A rift between Walt Disney Co. and Florida's Republican leaders escalated on Friday when the California-based entertainment giant pledged to stop donating to political campaigns in the state over the controversial legislation branded the 'Don't Say Gay' bill."), https://www.politico.com/news/2022/03/11/disney-pledges-to-stop-florida-campaign-donations-dont-say-gay-00016705**.** [https://perma.cc/8JY3-9GXT]**.** According to data posted on Open Secrets, Disney's campaign expenditures, roughly split between the two parties, have dropped off significantly since 2016. PAC Profile: Walt Disney Co, OPEN SECRETS, https://www.opensecrets.org/political-action-committees-pacs/walt-disney-co/C00197749/summary/2020 (last visited Dec. 7, 2023). Culture wars and other turmoil in politics may be alienating some corporate managers from making electioneering expenditures. Loyalty of corporations to Republicans also is no longer to be taken for granted.

conservatives in the future could join liberals in calling for a more general retreat of corporations from political spending.

Part I of this Article discusses specific provisions of the Accountable Capitalism Act with a focus on its corporate purpose and fiduciary duty provision. Part II discusses traditional corporate law, which provides that directors and officers in almost all situations may, but do not have to, consider their own moral principles and views about social benefit and non-shareholder constituencies in corporate decision making. Part III discusses the debate over corporate purpose that has emerged around the academic theory of "shareholder primacy." Part IV discusses pushback against the shareholder primacy theory over the past 20 years as the United States and the world have confronted a series of crises including terrorism, war, financial meltdown, climate change, political instability, and pandemic. Much of this pushback has been from the left of the political spectrum, but some issues, particularly the impact of corporate decisions on jobs in the United States and national security, are of concern on the right of the political spectrum.

Part V focuses on the conservative agenda for accountable capitalism, those aspects of "profit maximizing" corporate conduct that are most likely to worry conservative voters and their representatives in Congress. These concerns include corporations reinforcing the economic and military power of nations hostile to the United States, contributing to political oppression in communist regimes and potentially divesting from Israel in the face of war and the uncertainty of a wartime economy. Conservatives also worry about protecting the religious freedom of employees and the faith-based business purpose of some corporations' controlling shareholders.[24] This includes ensuring corporate managers have a free hand to stand up to boycotts even at the expense of profits. To bolster bipartisan support in Congress for the Accountable Capitalism Act or a similar bill, amendments could be offered that recognize aspects of corporate conduct of concern to conservatives while not detracting from the overall purpose of the bill.

Part VI points out that the corporate purpose and fiduciary duty standards in the Accountable Capitalism Act do not infringe on federalism or conflict with traditional standards of fiduciary duty under state corporate law. Corporate governance rules (election and removal of directors, conflicts of interest of officers and directors, procedural, and substantive law for shareholder derivative suits, etc.) remain under state law. The Accountable Capitalism Act will push back against a noticeable and worrisome trend

[24] This Article does not propose expansion of the Religious Freedom Restoration Act or any other provision of federal law that could preempt generally applicable state and federal law mandating non-discrimination or other specific corporate conduct. The focus instead is on enabling directors and officers to consider personal moral values, not just profits, in making corporate decisions within the bounds of applicable law. See discussion in Part V.

toward profit maximization and shareholder primacy theory in isolated caselaw in Delaware, President Biden's home state and a much-favored state of incorporation for companies worldwide. States that adhere to traditional corporate fiduciary law, instead of the newer academic theory of "shareholder primacy" and profit maximization, will experience little conflict between their law and the Accountable Capitalism Act.

This Article concludes that conservatives in Congress should support corporate purpose and fiduciary duty provisions similar to those in the Accountable Capitalism Act (perhaps a "Warren-Rubio Corporate Purpose Act of 2024"). It remains uncertain whether these provisions alone, without a more robust enforcement mechanism, will suffice to motivate corporations to pursue the public benefit as well as profits. But conservatives and liberals should agree that good corporate governance is about more than just making money.

## I. THE ACCOUNTABLE CAPITALISM ACT

Senator Warren's Accountable Capitalism Act[25] embodies several objectives, but a central focus of the bill is to clearly state a corporate purpose of "general public benefit" for America's largest corporations, require those corporations to get a federal charter, and impose a federal standard of conduct for directors and officers parallel to the fiduciary duties those directors and officers have under state law.

The Accountable Capitalism Act defines a "large entity" as a corporation or other limited liability company that has gross receipts of over $1 billion a year,[26] and requires such organizations to obtain a federal charter to become a "United States Corporation" from a new Office of United States Corporations established by the Act within the Department of Commerce.[27] The Director of the Office is appointed by the president for a four year term unless removed by the president before the end of that term.[28] The Office is empowered to grant and revoke the charters of United States Corporations. A "large entity" that fails to obtain a charter at a United States Corporation will not be treated as a corporation or other limited liability entity for purpose of federal law.[29] This would have severe tax consequences and severely compromise limited liability that is essential to the business model of such entities. For reasons explained later in this Article, this federal charter requirement, and the accompanying Office of United States Corporations, are not a necessary component of the bill and could be omitted without disturbing the corporate purpose provisions at its core.

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[25] *See* Accountable Capitalism Act, *supra* note 5.
[26] *Id.* § 2(2)A.
[27] *Id.* § 3.
[28] *Id.* § 3(b).
[29] *Id.* § 4(2).

The Accountable Capitalism Act then defines the purpose of the United States Corporation to include the "general public benefit" which is defined as "a material positive impact on society resulting from the business and operations of a United States corporation, when taken as a whole."[30]

The Act provides that "A United States corporation shall have the purpose of creating a general public benefit, which shall be— (A) identified in the charter of the United States corporation; and (B) in addition to the purpose of the United States corporation under the articles of incorporation in the State in which the United States corporation is incorporated, if applicable."[31] This arrangement establishes a federal corporate charter for the company parallel to its charter under state law and the "general public benefit" as a parallel purpose to the stated purpose the corporation has under state corporate law.

The Act then, in a section titled the "Standard of Conduct for Director and Officers," establishes fiduciary duties that exist side by side with the fiduciary duties that directors and officers have under state corporate law. First, the Act sets forth as a general principle that:

> In discharging the duties of their respective positions, and in considering the best interests of a United States corporation, the board of directors, committees of the board of directors, and individual directors of a United States corporation— (A) shall manage or direct the business and affairs of the United States corporation in a manner that— (i) seeks to create a general public benefit; and (ii) balances the pecuniary interests of the shareholders of the United States corporation with the best interests of persons that are materially affected by the conduct of the United States corporation.[32]

Officers of the corporation have the same duties with respect to areas of the corporation's business in which they are authorized to act. Enumerating the specific interests to be considered, the Act provides that the directors and officers in carrying out subparagraph A above:

> (i) shall consider the effects of any action or inaction on— (I) the shareholders of the United States corporation; (II) the employees and workforce of— (aa) the United States corporation; (bb) the subsidiaries of the United States corporation; and (cc) the suppliers of the United States corporation; (III) the interests of customers and subsidiaries of the United States corporation as beneficiaries of the general public benefit purpose of the

[30] *Id.* § 5(a)(1).
[31] *Id.* § 5(b).
[32] *Id.* § 5(c).

> United States corporation; (IV) community and societal fac-tors, including those of each community in which offices or facilities of the United States corporation, subsidiaries of the United States corporation, or suppliers of the United States corporation are located; (V) the local and global environment; (VI) the short-term and long-term interests of the United States corporation, including— (aa) benefits that may accrue to the United States corporation from the long-term plans of the United States corporation; and (bb) the possibility that those interests may be best served by the continued independence of the United States corporation; and (VII) the ability of the United States corporation to accomplish the general public benefit purpose of the United States corporation.

The officers and directors also:

> (ii) may consider— (I) other pertinent factors; or (II) the interests of any other group that are identified in the articles of incorporation in the State in which the United States corporation is incorporated, if applicable; and (iii) shall not be required to give priority to a particular interest or factor de- scribed in clause (i) or (ii) over any other interest or factor.[33]

The Act further provides that neither an officer nor director of a United States corporation shall be held liable for money damages for action or inaction in performing the duties set forth in the Act or for the failure of the corporation to pursue or create a public benefit.[34] The directors and officers also do not have a fiduciary duty to any specific person who is a beneficiary of the general public benefit purpose of the United States corporation.[35] The Act incorporates a "business judgment rule"[36] very similar

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[33] *Id.* § 5(c)(1), (2).
[34] *Id.* § 5(c)(3).
[35] *Id.* § 5(c)(4).
[36] *Id.* § 5(c)(5). ("BUSINESS JUDGMENTS.—A director or an officer of a United States corporation who makes a business judgment in good faith shall be deemed to have fulfilled the duty of the director under paragraph (1) or the officer under paragraph (2), as applicable, if the director or officer— (A) is not interested in the subject of the business judgment; (B) is informed with respect to the subject of the business judgment to an extent that the director reasonably believes to be appropriate under the circumstances; and (C) rationally believes that the business judgment is in the best interests of the United States corporation.").

to the business judgment rule in state corporate law, including the ABA Model Business Corporation Act.[37]

The Act allows for private enforcement of its provisions, but only in a derivative suit brought by shareholders (2% of the United States corporation's stock or 5% of the stock of a subsidiary controlled by the United States corporation).[38] The Act does not allow for derivative suits by other constituencies of the corporation. The Act also does not specify a way for a court in a derivative suit to assess whether directors and officers gave sufficient weight to the public benefit or any other non-shareholder interest in a particular instance, leaving the business judgment rule essentially intact. It appears that the only directors and officers liable for breach of duty under the Act are those who can be proven not to have considered the public benefit at all in making corporate decisions. These derivative suit provisions are among the weakest parts of the bill and, even if they are not concrete enough to be the basis for successful derivative suits, they could be omitted from the bill if needed to gain conservative support in Congress.

As explained in Part II of this Article, the additional fiduciary duties in the Act do not come into conflict with fiduciary duties in the corporate law except possibly isolated caselaw in Delaware that appears to emphasize shareholder primacy. But the Act does preempt state corporate law if it were to seek to impose a shareholder primacy norm (whether Delaware is moving in that direction is a complex question discussed further in Part II of this Article). The Act expressly provides that, otherwise, "the law of the State in which a United States corporation is organized shall apply with respect to the United States corporation."[39]

The Act includes other provisions that would be more controversial and probably would need to be severed to build bipartisan support for the corporate purpose provisions at its core. One of the more controversial mechanisms the Act uses to implement the corporate purpose is employee representation on the board of directors. The Act thus provides that "Not less than 2/5 of the directors of a United States corporation shall be elected by the employees of the United States corporation."[40]

In addition, the Act prohibits officers and directors of a United States corporation from selling securities in the corporation, including stock options, for five years after they acquire ownership of those securities.[41] The Act also provides that a United States corporation may not spend more than

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[37] *See* American Bar Association Model Business Corporation Act, §§ 8.30 (Standards of Conduct for Directors), 8.31 (Standards of Liability for Directors).
[38] Accountable Capitalism Act, *supra* note 5, § 5(d).
[39] *Id.* § 5(e).
[40] *Id.* § 6.
[41] *Id.* § 7 (Executive Compensation).

$10,000 of corporate funds on an ”electioneering communication”[42] or “independent expenditure”[43] in an election without the consent of both a 75% supermajority of its directors and a 75% supermajority of its shareholders.[44]

This provision, coupled with the 2/5 representation of employees on the board of directors essentially gives directors elected by employees a veto power over corporate political spending that otherwise would be permitted under the Supreme Court’s decision in *Citizens United v. FEC*.[45] The provision presumably is constitutional under the First Amendment as construed in *Citizens United*, because it merely requires director and shareholder authorization of political spending rather than prohibiting it, although critics of the bill will surely argue that the supermajority provisions amount to a de facto prohibition on some corporate political spending.

The Act also provides that state attorneys general may petition the Office of United States Corporations for revocation of the federal charter of a corporation. The only factor unenumerated in the bill to consider for revocation of a charter is whether the corporation “has engaged in repeated, egregious, and illegal misconduct that has caused significant harm” to its customers, employees, shareholders, business partners or the community.[46] Legal conduct that does not serve the public benefit presumably is not grounds for charter revocation.

Recognizing that portions of the Act, particularly the provisions concerning political spending and arguably the provisions concerning election of employee directors, present difficult constitutional questions, the Act provides for “severability” so provisions that do withstand constitutional scrutiny have the full force of the law even if other provisions are held to be unconstitutional.

The Accountable Capitalism Act has not advanced in the Senate and neither has any parallel companion bill advanced in the House. The more intrusive provisions of the bill may be “politically severable” in that they may not survive in Congress. This Article examines only the corporate purpose and fiduciary duty provisions of the bill. Although these provisions have less legal force without the other provisions, particularly employee representation on boards of directors, the corporate purpose and fiduciary duty provisions standing alone would have some impact on corporate governance. These provisions are likely to be the most politically popular parts of the bill because members of Congress from both political parties are elected to represent the

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[42] Federal Election Campaign Act of 1971, 52 U.S.C. § 30104(f)(3)).
[43] Section 301 of the Federal Election Campaign Act of 1971, 52 U.S.C. § 30101.
[44] Accountable Capitalism Act, *supra* note 5, § 8 (Political Spending).
[45] 558 U.S.C. § 310 (2010).
[46] Accountable Capitalism Act, *supra* note 5, § 9 (state attorney general standing to petition for revocation of the charter of a United States corporation).

public, particularly American workers,[47] and are critical of corporate profit maximizing behavior that they think harms the national interest.

Also, as explained in this Article, the corporate purpose and fiduciary duty provisions of the bill, standing alone, are not a radical departure from state corporate law which allows, but does not require, corporate directors and officers to consider corporate purpose other than profit maximization.[48] Changing this "may" to a "must" is not an enormous change in directors' and officers' fiduciary duties, particularly when the bill explicitly provides that directors and officers may use their business judgment to balance these interests as they see fit and determine in each instance which interests are most important. Because shareholders hire and fire corporate directors, profits will not lose their place on the priority list, even if directors consider other priorities too.

## II. TRADITIONAL UNDERSTANDINGS OF CORPORATE PURPOSE

### *A. Traditional American Corporate Law*

The shareholder primacy norm—the theory that corporate directors and officers should only consider profits and shareholder wealth in making decisions[49]—in most jurisdictions simply is not the law.

Corporate caselaw generally supports the proposition that directors and officers can use their business judgment to decide what is best for the corporation provided the directors and officers do not have conflicts of interest and do not minimize the importance of shareholder interests.

Consider these scenarios:

- The board of directors of a corporate sports franchise decides that home games may only be played at times of day and days of the week that minimize traffic and noise problems in the area surrounding the stadium. The rationale is that the corporation has a duty to preserve the quality of the neighborhood even if doing so might reduce its profits from ticket sales and T.V. coverage of games.
- The board of directors of a fried chicken franchise decides that its restaurants will be closed on Sunday to honor the Christian

[47] *See e.g.*, Rubio, *supra* note 4 (statement of Senator Marco Rubio siding with Amazon warehouse workers seeking to unionize).
[48] *See infra* Part II.
[49] The origins and theoretical underpinnings of the shareholder primacy norm are discussed further in Part III, *infra*.

Sabbath even if profits will be reduced from the loss of Sunday sales.

- The board of directors of a manufacturer decides to raise wages for assembly line workers and to lower the price of its products so more Americans can afford to buy them. This measure will temporarily reduce profits, and the impact on long term profits is uncertain, leading some shareholders to claim that the directors are breaching their fiduciary duty to shareholders.
- A pharmaceutical company is deciding whether to cut costs and increase profits by outsourcing testing and manufacturing processes to China. There is a small risk that, because of a trade war or military conflict, there could be a supply chain interruption precipitating a shortage of life-saving drugs. But the projected loss of profits from such a scenario would be relatively small and short lived. The shareholder wealth maximizing course of conduct is probably to outsource these processes and take the chances of a supply interruption.
- National drug store chains with franchises in different parts of the United States decide whether to market an abortion inducing drug for delivery by mail. The effect on profits differs for each chain as consumer boycotts are threatened by both sides of the abortion debate. Absent a federal or state law legalizing or prohibiting shipment of the drug, do the directors and officers of each drug store chain have discretion to base their decision in part on what they think is the right thing to do, or must anticipated impact on profits be the controlling factor?
- A manufacturing company has an opportunity to close a plant and move 3,000 jobs overseas. The substantial cost savings will benefit shareholders because plant closing laws only require the company to absorb a small fraction of the cost of unemployment in the affected community. Some directors think it would be "morally wrong" and "unpatriotic" to close the plant. Others say that shareholder wealth maximization is the priority, and the plant should be closed.
- A bank is considering a risky plan for securitizing mortgages. The plan is probably legal. The plan is also extremely profitable, and most of the risk will be borne by persons other than the bank: investors in securitized mortgages, borrowers who are encouraged to borrow too much by loan originators, and the economy. Some of the bank's officers and directors believe the plan would be bad for the bank's "conservative"

> business reputation and don't want to cause economic harm to others or destabilize the economy. The bank's chief financial officer, however, projects that profits will be substantially higher if the plan is implemented and that, so long as it is legal, the directors' fiduciary duty is to prioritize the economic interests of shareholders.

What should the directors and officers do in each of these situations? What does the law require or permit them to do?

The seminal case *Shlensky v. Wrigley*[50] resembles the first of the above scenarios. William Wrigley, the owner and controlling shareholder of the Chicago Cubs baseball club, refused to have night baseball games because of traffic, noise, and other adverse impact on the surrounding neighborhood. Other shareholders sued for breach of fiduciary duty, arguing that Wrigley and the directors had a fiduciary obligation to maximize profits. The Court held that:

> the directors are chosen to pass upon such questions and their judgment unless shown to be tainted with fraud is accepted as final. The judgment the directors of the corporation enjoys the benefit of a presumption that it was formed in good faith and was designed to promote the best interests of the corporation they serve.[51]

Wrigley and the other directors had no fiduciary duty to maximize shareholder profits if they believe a proposed course of action—here, night baseball games—was contrary to the interest of the corporation.

As discussed in Part V of this Article, the second scenario could arise if Chick-Fil-A or a like-minded restaurant chain were to have minority shareholders who believed profits should be prioritized over the company's Sunday closing policy. The holding in *Shlensky v. Wrigley* suggests that Sunday closing, like night baseball games, is a matter within the discretion of the directors elected by the majority shareholders.

A century ago, in the 1920s, the Michigan Supreme Court ruled in a case that resembled the third of the above scenarios and involved Henry Ford's management of Ford Motor Company.[52] The Court repudiated Ford's refusal to pay a dividend to shareholders and his cavalier dismissal of

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[50] 237 N.E. 2d 776 (Ill. App. 1968). The court explained: Plaintiff allege[d] that Wrigley ha[d] refused to install lights, not because of interest in the welfare of the corporation but because of his personal opinions "that baseball is a 'daytime sport' and that installation of lights and night baseball games will have a deteriorating effect upon the surrounding neighborhood"; *Id.* at 778.

[51] *Id.* at 779 (quoting Davis v. Louisville Gas & Electric Co., 142 A. 654, 659 (Del. Ch. 1928)).

[52] Dodge v. Ford Motor Co., 204 Mich. 459, 170 N.W. 668 (Mich. 1919).

shareholders' interests, which he claimed should be secondary to paying higher wages to workers and making more cars for customers.[53] The *Ford Motor* court, however, gave the shareholders only limited relief, namely payment of a dividend out of profits that had already been earned. Ford was not told to cut wages, to raise the price of his cars, or to curtail his plans to expand production.

Some of the language in the lengthy *Dodge v. Ford Motor* opinion appears to support the shareholder primacy norm,[54] but for several reasons, this case is an outlier. The court ruled in a unique situation: a controlling shareholder of a corporation operating the corporation principally for other purposes and merely for the "incidental benefit of shareholders."[55] The court did not require all corporate expenditures to be justified by a profit motive,[56] but the case is a reminder that shareholders are not irrelevant, that directors and officers, and controlling shareholders such as Henry Ford, owe a fiduciary duty to shareholders, and that a controlling shareholder refusing to allow minority shareholders a reasonable share in the profits of an enterprise is impermissible.

Henry Ford, the controlling shareholder, was a very problematic defendant in three respects: He cavalierly dismissed the interest of his minority shareholders altogether; he had conflicts of interest on account of his own ego and political ambitions; and he was an aspiring monopolist rather than a credible spokesperson for corporate social responsibility. Ford ran for U.S. Senate as a Democrat in 1918, the year before the case was decided,

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[53] *Id.* at 683 (quoting Henry Ford as stating, "My ambition . . . is to employ still more men, to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this we are putting the greatest share of our profits back in the business.").

[54] The most often quoted passage from the case is the following: "A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end and does not extend to a change in the end itself, to the reduction of profits or to the nondistribution of profits among stockholders in order to devote them to other purposes." *Id*. at 507.

[55] "As we have pointed out, and the proposition does not require argument to sustain it, it is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefiting others, and no one will contend that if the avowed purpose of the defendant directors was to sacrifice the interests of shareholders it would not be the duty of the courts to interfere." *Id*.

[56] "The difference between an incidental humanitarian expenditure of corporate funds for the benefit of the employees, like the building of a hospital for their use and the employment of agencies for the betterment of their condition, and a general purpose and plan to benefit mankind at the expense of others, is obvious. There should be no confusion (of which there is evidence) of the duties which Mr. Ford conceives that he and the stockholders owe to the general public and the duties which in law he and his codirectors owe to protesting, minority stockholders." *Id.* at 506-07.

creating the appearance that he was trying to buy votes from labor. Ford Motor also had considerable monopoly power before the rise of General Motors in the 1920s; keeping wages relatively high and producing a large volume of cars was a way of protecting that monopoly.[57] Ford's aggressive price cutting was aimed, in part, at squeezing out other auto manufacturers, including the plaintiffs in the *Ford Motor* case—the Dodge brothers, who were not only his shareholders but also his competitors. Ford also used his "business judgment" as owner of a different corporation, the Dearborn Independent newspaper, from 1919 to 1927, to publish violently anti-Semitic editorials.[58] Thus, a judicial rebuke to Henry Ford a hundred years ago is hardly a rebuke to the concept of corporate managers considering ESG factors and corporate social responsibility.

Furthermore, Ford was not required to maximize corporate profits. He was only required to pay a dividend to shareholders *out of profits already made*. He could not change the corporate purpose to ignore shareholders' interests altogether, yet the Court still deferred in most other respects to his business judgment in the management of Ford Motor.[59]

Even this limited relief—a mandatory dividend—was an outlier in corporate governance caselaw. Most courts have followed *Wrigley* in giving wide discretion to directors to make business decisions under the "business judgment rule," and in the case of publicly held corporations, this includes decisions about when to declare a dividend and how much.[60]

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[57] *See* Mark Roe, *Dodge v. Ford: What Happened and Why?,* 74 VAND. L. REV. 1755, 1785 (2021) ("Ford's monopoly both gave Ford cash-spending capacity and created a valuable but vulnerable market position that needed protection – by building bigger and keeping labor loyal").

[58] *See* Bill McGraw, *Henry Ford and the Jews, the Story Dearborn Didn't Want Told*, BRIDGE MICH. (Feb. 4, 2019), https://www.bridgemi.com/michigan-government/henry-ford-and-jews-story-dearborn-didnt-want-told ("Showing the marketing expertise that had catapulted Ford Motor into one of the world's most famous brands, Henry Ford's lieutenants vastly widened the reach of his attacks by packaging the paper's anti-Semitic content into four books. Experts say 'The International Jew' distributed across Europe and North America during the rise of fascism in the 1920s and '30s, influenced some of the future rulers of Nazi Germany.").

[59] "We are not, however, persuaded that we should interfere with the proposed expansion of the business of the Ford Motor Company. In view of the fact that the selling price of products may be increased at any time, the ultimate results of the larger business cannot be certainly estimated. The judges are not business experts. It is recognized that plans must often be made for a long future, for expected competition, for a continuing as well as an immediately profitable venture. The experience of the Ford Motor Company is evidence of capable management of its affairs." Dodge v. Ford Motor, 204 Mich. 459 at 507-508.

[60] Cases involving closely held corporations are more problematic if the controlling shareholder refuses to pay dividends while diverting corporate assets to other purposes including salaries for the controlling shareholder and the controlling shareholder's family and business associates. Conflict of interest has always been an exception to the business judgement rule, and in some of these cases, courts will order payment of a dividend. *See*

The fourth scenario above is an alarming one, particularly for political conservatives and others concerned about America's growing dependence on China and other countries for key economic inputs such as raw materials, computer chips, and lifesaving drugs. Foreign supply chain dependence could increase profits (so long as there is no trade war or other conflict) but could, in the long run, be catastrophic for the American economy. Under traditional corporate law, directors and officers have discretion to decide how much to depend on imports, and it is unlikely that a court would require a corporation to explain how that policy increases profits or to stipulate that profits were the only consideration in setting the policy.[61] As discussed below, however, some language about shareholder primacy in recent Delaware caselaw is concerning and could encourage corporations to maximize profits at the expense of the security of the national supply chain.

The fifth scenario is timely with reversal of *Roe v. Wade* in 2022. Corporate actors, from drug store chains to health care providers, will decide whether to expand or constrict access to abortion and abortion-inducing drugs within the confines of federal and state law. There probably will be consumer boycotts, lawsuits, federal and state investigations, and other actions that impact profits regardless of what a corporation decides to do. Corporate officers and directors will have strong moral and philosophical views on both sides of the issue. The question addressed here is not who is right on the abortion issue, but whether corporate law, under the guise of the shareholder primacy norm, should be a weapon to force directors and officers to focus only on profits, abandoning their own principles, when making decisions. The business judgment rule in most jurisdictions gives directors and officers considerable leeway to act on principle, not just with an eye toward profits, although, once again, dicta in recent Delaware caselaw discussed below is concerning.

With respect to the remaining scenarios described above, there is no caselaw requiring directors and officers to prioritize shareholder profits over preserving jobs in the United States or protecting the safety and stability of the American financial system. Shareholders suing to challenge decisions of disinterested directors know they will likely lose unless they can show that

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Douglas Moll, *Shareholder Oppression & Dividend Policy in the Close Corporation*, 60 WASH. & LEE L. REV. 841 (2003) (discussing the basic types of dividend disputes that arise in close corporations and providing guidance to courts for resolving these disputes). *See also* Victor Brudney, *Dividends, Discretion, and Disclosure*, 66 VA. L. REV. 85 (1980) (examining judicial review of dividend policy); Daniel R. Fischel, *The Law and Economics of Dividend Policy*, 67 VA. L. REV. 699 (1981) (providing an overview of dividend decision process).

[61] *See* Dodge v. Ford Motor, *supra* note 59 (explaining the business judgment rule and that the Court would not "interfere with the proposed expansion of the business of the Ford Motor Company." Likewise, a court very likely would not interfere with corporate directors' business judgment in deciding how much to rely on parts imported from China).

the directors were reckless in making decisions. Shareholders who want different management of a corporation instead use mechanisms provided for by state corporate law, such as removal of directors and election of new ones.[62]

Delaware is a leader in articulating fiduciary standards in American corporations. Since the 1980s, Delaware courts have given corporate directors wide discretion to consider non-shareholder constituencies' interests in a range of circumstances, including defending companies against hostile takeovers,[63] although this discretion is narrowed considerably, and shareholder interests must be prioritized if the directors decide to put the company up for sale.[64]

In 2010, however, the Delaware Chancery Court in *E-Bay v. Newmark* ruled that corporate directors could not go so far as to operate a company as a public benefit corporation when it had been established as a for-profit corporation and had raised capital from shareholders with that expectation.[65] Like *Ford Motor* 90 years earlier, this was a case brought by a competitor (E-Bay competed with Craigslist in online classified advertising). E-Bay was also a minority shareholder in Craigslist. Jim and Craig, controlling shareholders of Craigslist caused the board of directors to implement measures to retaliate against their minority shareholder E-Bay for competing with Craigslist in online advertising. As justification for one of these measures, a "rights plan" (e.g. a poison pill defense against, among other things, a potential hostile takeover), Jim and Craig argued that they were using the rights plan to defend the public benefit corporate purpose of E-Bay. The Court rejected this argument in broad language that could be construed to endorse a shareholder primacy norm:

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[62] *See e.g.,* Del. Gen Corp Law Section 141(k) (providing for shareholder removal and election of directors).

[63] Paramount Commc'n, Inc. v. Time, 571 A.2d 1140 (Del. 1989). The court held, "absent a limited set of circumstances as defined under *Revlon*, a board of directors, while always required to act in an informed manner, is not under any per se duty to maximize shareholder value in the short term, even in the context of a takeover." *Id*. at 1150. *See also* Unocal v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985) (holding that in responding to a tender offer, directors may consider its impact on non-shareholder constituencies). The Court explained: If a defensive measure is to come within the ambit of the business judgment rule, it must be reasonable in relation to the threat posed. This entails an analysis by the directors of the nature of the takeover bid and its effect on the corporate enterprise. Examples of such concerns may include: inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on "constituencies" other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally), the risk of nonconsummation, and the quality of securities being offered in the exchange. *Id.* at 955.

[64] *See* Paramount Commc'n, v. Time 571 A.2d at 1150–51 (explaining and distinguishing the application of "Revlon duties" in the sale of a company, set forth in Revlon Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986)).

[65] E-Bay v. Newmark, 16 A.3d 1 (Del. Ch. 2010).

> Jim and Craig did prove that they personally believe craigslist should not be about the business of stockholder wealth maximization, now or in the future. As an abstract matter, there is nothing inappropriate about an organization seeking to aid local, national, and global communities by providing a website for online classifieds that is largely devoid of monetized elements. Indeed, I personally appreciate and admire Jim's and Craig's desire to be of service to communities. The corporate form in which craigslist operates, however, is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment. Jim and Craig opted to form craigslist, Inc. as a *for-profit Delaware corporation* and voluntarily accepted millions of dollars from eBay as part of a transaction whereby eBay became a stockholder. Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders. The "Inc." after the company name has to mean at least that. Thus, I cannot accept as valid for the purposes of implementing the Rights Plan a corporate policy that specifically, clearly, and admittedly seeks *not* to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders—no matter whether those stockholders are individuals of modest means or a corporate titan of online commerce."[66]

Before jumping to conclusions about Delaware's approach to shareholder primacy, it is important to recognize what the Court said and did not say in *E-Bay*. The Court said that the for-profit corporate form of organization "is not an appropriate vehicle for *purely* philanthropic ends," and that the fiduciary duties and standards accompanying that form "*include* acting to promote the value of the corporation for the benefit of its stockholders."[67] The opinion does not say that a for-profit corporation cannot undertake philanthropic ends in addition to promoting the value of the company for shareholders or cannot pursue a business purpose that includes public benefit in addition to shareholder value. There is a big difference between a corporate policy "that specifically, clearly, and admittedly seeks *not* to maximize the economic value" of a corporation for its

[66] *Id.* at 34.
[67] *Id.* (emphasis added).

stockholders and a corporate policy that seeks *only* to maximize economic value for shareholders.[68]

Furthermore, the *E-Bay* court reviewed the validity of a poison pill, an anti-takeover device that has received special scrutiny from courts because managers all too often use poison pills and other anti-takeover devices to entrench themselves at the expense of their shareholders. The Court noted that the considerable deference shown to corporate management in an earlier case upholding takeover defenses, *Time Warner*,[69] was not unlimited: "*Time* did not hold that corporate culture, standing alone, is worthy of protection as an end in itself. Promoting, protecting, or pursuing non-stockholder considerations must lead at some point to value for stockholders." The Court also went out of its way to distinguish business decisions outside the takeover defense context, in which courts generally do not intervene: "[T]his Court will not question rational judgments about how promoting non-stockholder interests—be it through making a charitable contribution, paying employees higher salaries and benefits, or more general norms like promoting a particular corporate culture—ultimately promote stockholder value."[70]

Although some of its language is quite broad, the *E-Bay* holding should not be construed too broadly to infer a shareholder primacy norm in other contexts. A corporation that makes quality products for its customers and looks after the interest of its customers is hardly a "public benefit" corporation instead of being a for-profit corporation. The *E-Bay* case does not say that a corporation that seeks to reduce its carbon footprint voluntarily, that refuses to rely on suppliers using forced labor abroad, or that closes its stores and offices on Sundays, even at the expense of profits, is violating a fiduciary duty to shareholders. But the broad language in *E-Bay* is worrisome from the perspective of the traditional view that corporations benefit employees, customers, and the community in addition to making profits, and that it is up to directors and officers to decide how best to balance these priorities. And there is no telling in which direction—further toward shareholder primacy or back toward the traditional business judgment rule—Delaware courts will go in the future.

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[68] As an imperfect analogy, consider a law school applicant who says in the application essay that as a student they will "specifically, clearly, and admittedly seek *not* to maximize" their GPA and another applicant who says they will "specifically, clearly, and admittedly *only* seek to maximize" their GPA. The law school admissions committee might have good reason to reject both applicants in favor of other applicants who show commitment to maximizing their academic performance while at the same time pursuing other objectives, including service to the law school and to the legal profession, even if those other objectives might, at times, compromise single minded pursuit of GPA.

[69] Paramount Commc'n, v. Time, *supra* note 64.

[70] E-Bay, *supra* note 66, at 33.

One complicating factor in Delaware and other states is the introduction of the Benefit Corporation or B Corporation, which expressly states in its charter a public purpose. A B Corporation goes further in promoting the public interest than a regular C Corporation.[71] Shareholders in a B Corporation cannot expect profits to the same extent they would in a C Corporation because a B Corporation's primary objective stated in its charter will be the public benefit.

The availability of the B Corporation form of organization, however, should not change corporate law precedent that, with the few exceptions discussed above, allows directors of a for-profit corporation to use their business judgment to balance profit making with the public benefit. Nowhere did the Delaware legislature, or the legislature of any other state, turn the traditional C Corporation into a G Corporation ("Greed is Good" corporation) simply because of the newfound availably of the B Corporation. Doing so would be an extreme departure from legal precedent.

*B. Can Traditional American Corporate Law Survive State Legislatures Fueled by Populism on the Left and the Right?*

Finally, with the rise of populism in both political parties, public perceptions of corporate greed could fundamentally alter traditional American corporate law. States other than the state of incorporation may assert a role in regulating corporate governance.

The United States is unique in allowing corporations to organize in one state (for example, Delaware) while headquartered and doing most of their business in other states. Such is the "incorporation theory" or "internal affairs doctrine" of corporate law under which other states defer to corporate governance laws of the state of organization and the decisions of its courts. Many countries reject this approach and adhere to the "seat theory," allowing the jurisdiction where a corporation is headquartered to impose its law on corporate governance. Germany and some other countries use this power to require labor representation on boards of corporations headquartered within their borders[72] (the Accountable Capitalism Act includes similar board representation requirements, but this Article does not address those provisions, focusing instead on the corporate purpose provisions that conservatives in Congress are more likely to support).

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[71] *See generally* Brett H. McDonnell, *Benefit Corporations and Public Markets: First Experiments and Next Steps*, 40 SEATTLE U. L. REV. 717 (2017) (weighing the costs and benefits of going public for a benefit corporation).

[72] *See* Grant M. Hayden & Matthew T. Bodie, *Codetermination in Theory and Practice*, 73 FLA. L. REV. 321 (2021) (discussing effectiveness of laws requiring labor representation on corporate boards in Germany and other countries).

California is already passing laws that purport to override corporate law in other states on election of directors. For example, California imposed a quota system to require racial and gender diversity on boards of corporations headquartered in California, a law later struck down as unconstitutional by a federal court.[73] There are many different directions where California's approach to corporate governance could go. California could require labor, environmental group or even government representation on corporate boards or could require California headquartered companies to tie executive compensation to a multiple of average employee compensation. The list of possibilities is endless, and such proposals probably would not pose the same constitutional problems as the quotas in California's board diversity law.

While liberals set corporate governance priorities in California, conservative politicians might wield their power in other states to intrude on corporate governance, as Florida Governor DeSantis already has in the case of the Disney Corporation. Whether Disney confronted Governor DeSantis on sexual orientation and gender identity issues to please its employees and customer base and increase profits or because Disney was acting out of moral principle, or both, is not particularly relevant. DeSantis is more than willing to impose his very different moral vision on the company, or at least require the company to desist from interfering with his implementing it. Disney is uniquely vulnerable to government interference in its internal affairs because Florida previously granted the corporation broad and highly unusual local government authority in communities surrounding its theme park.[74] But the Disney battle demonstrates that the days of Republican politicians deferring to the C-suite of corporate America are over. Disney's Delaware corporate charter won't save it from the wrath of an angry Governor, and Disney's

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[73] *See* All. for Fair Bd. Recruitment v. Weber, 2:21-cv-01951-JAM-AC (E.D. Cal. Jun. 15, 2023) (holding that California Assembly Bill 979 requiring racial, ethnic, and sexual orientation diversity on boards of public corporations located in California violates the Equal Protection Clause of the Fourteenth Amendment). California's board diversity statute was also struck down by a California state court on equal protection grounds, but not because it conflicted with corporate law in Delaware or any other state. *See Crest v. Padilla*, Case No. 20 STCV 37513 (Cal. Superior Court, County of Los Angeles, May 13, 2022) (striking down, under the Equal Protection Clause of the California Constitution, California Corporations Code Section 301.4, which required corporations with principal executive offices in California to have a minimum number of directors from an underrepresented community). For general overview of California's gravitation toward some aspects of the seat theory of corporate governance, *see* Jill E. Fisch and Davidoff Solomon, *Steven, Centros, California's 'Women on Boards' Statute and the Scope of Regulatory Competition*, 20 EURO. BUS. ORG. L. REV. 493 (2019) (discussing California's regulation of the internal affairs of corporations headquartered in California).

[74] *Disney World Board Picked by DeSantis Says Predecessors Stripped Them of Power*, NPR (Mar. 29, 2023), https://www.npr.org/2023/03/29/1166925827/disney-world-board-desantis -power-florida. [https://perma.cc/MBX7-SHC5].

extremely high executive pay (as much as $27 million annually for CEO Bob Iger[75]) only reinforces the image of corporate greed and plays into DeSantis's hands.

The rhetoric of the shareholder primacy norm thus could make it very difficult for corporations to defend themselves in the political arena. Delaware courts, if they expand the *E-Bay* doctrine not only to allow, but to require, managers to prioritize profits over all else, could clash with public sentiment in other states and exacerbate the image of corporations only caring about money. This in turn could accelerate a trend toward more regulation of corporate governance by states other than the state of incorporation. Ironically, too much corporate governance theory framed only by the profit motive could undermine profit making and bring about an end to American corporate law as we know it.

Such is a world neither liberals nor conservatives should want to live in. The drumbeat of rhetoric prioritizing only corporate profits isn't helping.

## III. THE SHAREHOLDER PRIMACY DEBATE

One reason the shareholder primacy has relatively little support in the caselaw is that it is an academic theory of relatively recent origin.
Milton Friedman, in a 1970 *New York Times* op-ed, famously articulated the view that corporations should focus exclusively on profits for shareholders,[76] a "shareholder primacy" view of corporate governance that became popular with many scholars of law and economics.[77] The theory is that directors and officers should focus on shareholder wealth maximization while other bodies of law—contract law, labor law, antitrust law, environmental law, and consumer safety law—protect the public interest and the interests of non-shareholder constituencies.

As Friedman explained in his 1970 op-ed:

> The businessmen believe that they are defending free enterprise when they declaim that business is not concerned "merely" with profit but also with promoting desirable "social" ends; that business has a "social conscience" and takes seriously its responsibilities for providing employment,

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[75] Christopher Palmeri, *Iger to Receive $27 Million Yearly for Return as Disney CEO*, BLOOMBERG LAW (Nov. 21, 2022), https://news.bloomberglaw.com/esg/disneys-iger-to-receive-27-million-annually-for-return-as-ceo [https://perma.cc/2P5A-LFN9] (reporting that Disney will pay Bob Iger about $27 million annually for returning as chief executive officer under a new two-year deal).

[76] Milton Friedman, *A Friedman Doctrine: The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG. (Sept. 13, 1970), at 33.

[77] *See, e.g.*, FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1996) (embracing the shareholder primacy view of corporate governance).

> eliminating discrimination, avoiding pollution and whatever else may be the catchwords of the contemporary crop of reformers. In fact they are—or would be if they or anyone else took them seriously— preaching pure and unadulterated socialism.[78]

As much as Friedman complains about "socialism," the first thing that should worry political conservatives about his essay is that, by characterizing corporations as focused only on money making and eschewing voluntary corporate action for the public benefit, Friedman invites government regulation as the only viable vehicle for changing corporate conduct. His normative description of profit obsessed corporate actors justifies the very type of government regulation he equates with "socialism."

Friedman's essay also was a departure from the traditional view of corporate governance described in Part II of this Article. The late Professor Lynn Stout pushed back against the shareholder primacy norm and summarized the traditional view of corporate governance in her 2012 book, where she discussed the harm to corporations, the public, and investors from the "myth" of shareholder primacy.[79] Professor Josephine Nelson and Professor Stout again applied the traditional understanding of corporate purpose to specific questions of business ethics in a book published in 2022.[80]

A subset of legal academics, however, still stubbornly adheres to shareholder primacy theory. For example, Edward Rock, the Martin Lipton Professor of Law at NYU Law School, goes so far as to compare famed Wall Street corporate lawyer Martin Lipton (the same Lipton who endowed Rock's professorship), a critic of shareholder primacy theory, to Vladimir Lenin.[81] Rock's invocation of Marxism to attack Lipton may have superficial appeal to conservatives, but the facts are otherwise. Lipton is a longtime defender of the discretion of corporate officers and directors to manage their

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[78] Friedman, *supra* note 76, at 33.

79 *See, e.g.*, LYNN STOUT, SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (2012). This is a very large topic in corporate governance that has engaged a wide range of viewpoints in academia, in the investor community, and with management.

[80] *See* J.S. NELSON & LYNN A. STOUT, BUSINESS ETHICS: WHAT EVERYONE NEEDS TO KNOW 99 (2022) (published after Professor Stout's death in 2018 while the book was in progress).

[81] Edward B. Rock, *For Whom is the Corporation Managed in 2020?: The Debate over Corporate Purpose* 22 (Eur. Corp. Governance Inst., Law Working Paper No. 515, 2020), https://ssrn.com/abstract=3589951 (stating: "From this perspective, Lipton's memos on corporate purpose and his 'New Paradigm' can be understood as an attempt to change the beliefs and attitudes of investors and managers (including directors) to a set of beliefs and attitudes 'appropriate to their objective situation.' Moreover, as with Lenin's view of the proletariat, because they may not naturally develop these beliefs and attitudes, it falls to a vanguard party to introduce and cultivate them." In a footnote to this passage in his article, Rock states "This casts Marty Lipton as the Vladimir Lenin of U.S. corporate governance, an odd but not entirely inappropriate characterization.").

corporations. Rock seems determined to coerce corporate managers to run their companies according to an academic theory. Many businesspeople believe, as Lipton does, that directors and officers should run corporations until they are replaced by shareholders. Profits are usually their primary consideration, but sometimes officers and directors will prioritize non-shareholder interests because they think that is in the best interests of the corporation or simply the right thing to do.

Shareholder primacy theory in layperson language translates into "greed is good." The impact of this ideology differs by industry. In 2008, we learned all about investment bankers who prioritize profit maximization above other business objectives.[82] But imagine the following announcement from the cockpit of an airplane: "while we believe that this airline is in compliance with FAA safety regulations, our primary fiduciary responsibility is to increase revenue, cut costs and increase profits for our shareholders." Many passengers (conservatives and liberals alike) would deplane.

Likewise, a corporate hospital chain would not say that shareholder wealth maximization is its principal business purpose and the principal duty of its directors and officers. Political conservatives who value protecting human life also would disagree with profit maximization in health care, considering some cost-saving measures to be off the table, whether at the beginning or at the end of life. An automobile manufacturer would not publicly say that shareholder profits are more important than automobile safety. The same goes with respect to a grocery store chain, a pharmaceutical or medical device company, a for-profit pre-school, and companies in many other industries. One irony of shareholder primacy theory is that corporate managers who really believe in this theory can only maximize shareholder profits if they lie to their customers, suppliers, employees, and regulators about where their priorities are. Shareholder primacy theory, in its purist iterations, has not made its way out of academia and into corporate directors' and officers' public statements, and for good reason.

If, however, judges begin to believe that the sole purpose of a corporation is making profits, some may seek to enforce the shareholder primacy theory, perhaps going beyond unique facts of rare cases such as *E-Bay* and applying the broader language in *E-Bay* when the occasion may arise. This would make corporate directors and officers a target for litigation, yet another reason political conservatives should fear excessive application

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[82] *See* CLAIRE A. HILL & RICHARD W. PAINTER, BETTER BANKERS, BETTER BANKS: PROMOTING GOOD BUSINESS THROUGH CONTRACTUAL COMMITMENT 4 (2015) (emphasizing the important role of bankers as stewards of the solvency of their firms and the stability of our financial system and contractual mechanisms that can be used to hold them more faithfully to that purpose). *See also* Richard W. Painter, *The Moral Responsibility of Investment Bankers*, 8 ST. THOMAS U. L. REV. 5, 20–22 (2011) (applying Catholic social thought to the work of investment bankers).

of the shareholder primacy theory. As discussed in Part V of this Article, many conservatives also would not want a company such as Chick Fil-A to discontinue its Sunday closing policy under threat of minority shareholders suing management for choosing sabbath observance over profits. Given that many judges are more sympathetic to liberal secular visions of public benefit than the vision of corporations like Chick-Fil-A, "shareholder primacy" is hardly an area where conservatives would want to invite judicial meddling in corporate affairs.

Curiously, this shareholder primacy theory is almost never talked about for general partnerships and forms of business organization other than corporations. Making profits is a purpose of most partnerships, but it is not the only purpose. A law firm considers profits when deciding whether to represent a client but that is not the only factor. A firm represents some clients pro-bono, represents other clients for a reduced fee, and may refuse to represent some very lucrative clients because lawyers in the firm don't believe those clients' cases are consistent with their professional values, their moral values (including their religious values), or the public good.[83] Law firms that don't want to encourage work on a day of sabbath observance for lawyers in the firm close their offices on the sabbath. Nobody argues that a law firm must either be Greed is Good LLP or Pro Bono LLP and, in fact, many law firms are somewhere in between. Lawyers who want to make more money elsewhere are free to leave.

Same for an accounting partnership, a medical practice partnership, a financial services partnership, or a partnership in manufacturing, hospitality, or any other industry. Partners have the right to decide what their priorities are, consistent with their personal values, which likely include, but are not limited to, making money. Many LLC's operate according to similar norms. Yet shareholder primacy theory assumes that once the corporate form of organization is used, a "greed is good" ideology should magically take over and make profits the sole objective. As explained in Part II of this Article, traditional corporate law does not say so, but proponents of shareholder primacy think it should. Many corporate managers, and political conservatives suspicious of radical changes in the law, would probably think otherwise.

## IV. THE PROBLEMS WITH SHAREHOLDER PRIMACY

This Part IV discusses problems with the shareholder primacy theory that should be particularly worrisome for corporate officers and directors, as well as political conservatives.

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[83] *See generally* Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. CAL. L. REV. 507 (1994).

*A. The Management Autonomy Problem*

Shareholder primacy theory implies that fiduciary law, and ultimately judges, should tell managers what their business priorities are. The theory also implies that government regulation of corporate conduct is the principal means of protecting the public from negative externalities of corporate activity because self-restraint by profit-maximizing managers is not to be expected.

After the 2008 financial crisis,[84] and the onslaught of regulation that followed, corporate managers pushed back on this assumption by rejecting shareholder primacy theory. An "either/or" approach to shareholder primacy vs. stakeholder capitalism was repudiated by the Business Roundtable, an organization of leading corporate CEOs.[85] The Roundtable's *Statement on the Purpose of a Corporation specifically* states:

> While each of our individual companies serves its own corporate purpose, we share a fundamental commitment to all of our stakeholders. We commit to:
>
> - Delivering value to our customers. We will further the tradition of American companies leading the way in meeting or exceeding customer expectations.
> - Investing in our employees. This starts with compensating them fairly and providing important benefits. It also includes supporting them through training and education that help develop new skills for a rapidly changing world. We foster diversity and inclusion, dignity and respect.
> - Dealing fairly and ethically with our suppliers. We are dedicated to serving as good partners to the other companies, large and small, that help us meet our missions.
> - Supporting the communities in which we work. We respect the people in our communities and protect the environment by embracing sustainable practices across our businesses.
> - Generating long-term value for shareholders, who provide the capital that allows companies to invest, grow and

[84] *See* discussion of corporations' "political problem" in subsection (vi) below.

[85] *See Business Roundtable Redefines Purpose of a Corporation to Promote an Economy that Serves All Americans*, BUS. ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/SNY8-CEBH]. There are divergent views about how much members of the Roundtable and other business executives prioritize social welfare in management decisions. Regardless, the Roundtable's statement about corporate purpose is consistent with Condon's observations about convergence of some aspects of societal welfare, general economic health, and asset values.

> innovate. We are committed to transparency and effective engagement with shareholders.
>
> Each of our stakeholders is essential. We commit to deliver value to all of them, for the future success of our companies, our communities and our country.[86]

This language is not that different from the definition of corporate public benefit in the Accountable Capitalism Act quoted in Part I of this Article.

The Business Roundtable historically has been one of the most conservative organizations in the country. Juxtapose the above statement of corporate purpose with this statement from the Roundtable in January 2017:

> "America's business leaders congratulate Speaker of the House Paul Ryan and his team on their success in today's leadership elections . . . With positive action by the House and Senate and the energy of the new Trump Administration, the United States can finally accelerate the growth that our workers, families and businesses seek. Business leaders are eager to work with Congress and a President Trump to turn opportunities into reality — one in which all Americans share in the nation's success."[87]

This is but one of many very conservative public statements made by the Roundtable over decades. Yet, they agree with Senator Warren's definition of corporate purpose.

These two positions of the Business Roundtable are consistent. Its member CEOs and other executives do not want more government regulation. They firmly believe that the private sector can solve social problems. They want to earn profits but reject the shareholder primacy norm and have pledged to consider the public impact of corporate conduct.

These executives don't always practice what they preach. But they insist that corporations should make profits *and* contribute to overall social welfare. Capitalism, they believe, is a win-win proposition for a free country.

### *B. The Agency Problem*

Shareholder primacy theory is premised on a cynical assumption about the character of corporate managers that is not normally associated with believers in free enterprise.

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[86] *Id*.

[87] *Business Roundtable Statement on House Republican Leadership Elections*, BUS. ROUNDTABLE (Jan. 2017), https://www.businessroundtable.org/archive/media/news-releases/business-roundtable-statement-house-republican-leadership-elections. [https://perma.cc/Z2EU-C5W5].

This assumption is that corporate managers are Holmesian "bad men"[88] who need to be told to focus on only one fiduciary obligation: to maximize profits. The law must tell managers to consider only shareholders' interests, and judges must enforce that law if necessary. Managers are simply hired agents for shareholders, and very likely to be bad agents if allowed to consider business priorities other than profits.[89]

First, who says officers and directors are selfish people who won't manage corporations to earn profits for shareholders and also advance the public benefit? Pro-business conservatives are likely to find that argument unappealing.

Second, shareholder primacy doesn't stop managers' self-dealing when it does occur. Self-dealing managers can simply claim that whatever they are doing is in the interests of shareholders. Without the shareholder primacy norm, traditional corporate law described in Part II of this Article protects shareholders against self-dealing officers and directors.[90] Corporate law is by no means perfect in solving agency problems in corporations, but it's hard to see what a robust application of shareholder primacy theory does to give shareholders more protection against managers. Judicial enforcement of shareholder primacy theory also would undermine the business judgment rule,[91] subjecting corporate managers to second guessing by courts—an invitation to the very type of judicial activism and government intrusion into business affairs that conservatives reject.

Furthermore, the shareholder primacy norm may encourage self-serving conduct by managers. Managers who embrace this ideological obsession with maximizing profits are likely to see themselves as individual profit maximizers too. The more the shareholder primacy norm is talked about, the more selfishly managers may behave. Saying that the only purpose of a corporation is making money sets in motion a self-selection process that attracts managers who are likely to put their own economic interests first and take advantage of others, including shareholders. Vocal articulation of this ideology of profit maximization also makes it easy for the political left to demonize corporate managers. This is hardly a win for private enterprise.

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[88] Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (postulating that we should understand the law by viewing it not from the vantage point of a good man driven by the "vaguer sanctions of conscience," but from the vantage point of the "bad man," who "cares only for the material consequences which such knowledge enables him to predict").

[89] EASTERBROOK & FISCHEL, *supra* note 77.

[90] *See e.g.* AM. BAR. ASS'N, MODEL BUS. CORP. ACT §§ 8.30 (stating standards of conduct for directors), 8.31 (stating standards of liability for directors), 8.42 (stating standards of conduct for officers) (2023); 8 DEL. C. § 144 (stating standards for interested directors).

[91] *See* Part II of this Article discussing the business judgment rule.

### *C. The Litigation Problem*

Business conservatives, including the members of the U.S. Chamber of Commerce, have long opposed lawsuits against corporations, particularly class action litigation and shareholder litigation.[92]

The shareholder primacy norm thus far has resided mostly in academic literature, not in corporate caselaw, and judges have made very few exceptions to the business judgment rule discussed in Part II of this Article. Some dicta in Delaware's *E-Bay* case, discussed in Part II, is concerning, however. Courts that enforce a shareholder primacy norm invite shareholder lawsuits. Even if courts defer to directors and officers in deciding how to make profits, those who do not swear allegiance to profit maximization will be vulnerable to litigation. Directors and officers who say that patriotic or religious values, or not abandoning operations in a country such as Israel in a time of war, are factors important in their business decision will be among the first to get sued if shareholders claim profits are adversely impacted. The traditional business judgment rule protects against these lawsuits; strict application of the shareholder primacy theory invites them.

An even bigger litigation problem arises if some corporate managers go overboard in pursuit of profits, cutting corners on product safety or defrauding customers. Shareholder primacy advocates don't explicitly endorse illegal conduct, but single-minded pursuit of profits is bound to make it happen. Then come the billion-dollar class action lawsuits that industry loathes.

The advantage here lies with lawyers. In recent years, donations to Democrats by lawyers have exceeded donations to Republicans by about three or four times.[93] Whether single-minded pursuit of profits and the litigation that often comes with it is good for business is a more difficult question.

### *D. Collective Action Problems: Preventing Financial Meltdown, Putting America First and Private Sector Solutions to Climate Change*

Shareholder primacy theory can box corporate managers into collective action problems if each individual company pursues business decisions that, in the long run, harm an entire industry. In the end,

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[92] *See Chamber Litigation Center*, U.S. CHAMBER OF COM. (Nov. 1, 2023), https://www.chamberlitigation.com [https://perma.cc/Q6V7-LG9N] (dedicating an entire division to fighting litigation against corporations).

[93] *See Summary: Top Contributors, 2021-2022*, OPEN SECRETS (Mar. 20, 2023), https://www.opensecrets.org/industries/indus.php?ind=k01# (approximating that $240 million was given by lawyers to Democrats compared to about $60 million to Republicans in the 2020 election cycle).

shareholders lose too. Government regulators also may step in when private actors can't solve industry-wide problems because of selfish profit maximizing by individual companies.

For example, Wall Street banks marketing risky financial instruments wreak havoc on the financial services sector. Still, if other banks are doing it, profit maximizing directors and officers find it hard to resist. They market risky products aggressively, reaping the profits, hoping they can hedge against systemic financial failure. Some banks did just that in the years prior to the 2008 financial collapse.[94] Without the government bailout of 2008, these banks, too, probably would have failed.[95] The financial tsunami unleashed by "profit maximizing" banking was set to destroy everything in its path.[96]

Some proponents of shareholder primacy theory refer to corporate social responsibility as "socialism."[97] But the government bailouts after the 2008 financial crisis[98] were a form of socialism. The ideology of profit maximization, when taken to extremes, can encourage antisocial conduct so severe that the government is needed to bail out businesses and their shareholders. The bailouts infuriated not just liberals (the Occupy Wall Street movement) but conservatives, fueling what became the Tea Party movement.[99]

Another example is cheap imports. An entire industry may maximize profits by importing parts, for example microchips, from a foreign exporter because it's cheaper than buying from American suppliers. This gives the exporting country leverage in a trade war or diplomatic breach with the United States. Everyone in the industry might be better off if all companies bought at least some of their parts from American suppliers, but no single company is willing to suffer the competitive disadvantage of buying American when others buy cheaper parts abroad. In this situation, nobody is willing to put "America First."

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[94] HILL & PAINTER, *supra* note 82, at 4. This example was discussed in one of the "hypotheticals" at the beginning of Part II of this Article.

[95] *Id*.

[96] *Id*.

[97] Rock, *supra* note 81, at 22 (quoting Professor Ed Rock, a strong proponent of shareholder primacy theory, not only strongly criticizing Senator Warren's Accountable Capitalism Act but also comparing Wall Street lawyer Martin Lipton to Vladimir Lenin); Friedman, *supra* note 76, at 33 (quoting Milton Friedman, who equates departure from the shareholder primacy norm with "socialism").

[98] *See* HILL & PAINTER, *supra* note 82, at 4 (discussing the massive bailouts after the 2008 financial crisis as well as distorted incentives for investment bankers and excessively risky conduct in the years leading up to the crisis).

[99] *See Occupy Wall Street, Tea Party Movements Both Born of Bank Bailouts*, FOX BUS. NEWS (Jan. 14, 2015, 4:39 AM), https://www.foxbusiness.com/markets/occupy-wall-street-tea-party-movements-both-born-of-bank-bailouts. [https://perma.cc/J9V7-V6SH].

This is a first mover problem. Which company will act first to protect the entire industry and the American economy from overreliance on imports and supply interruptions that could ensue? The manager freed from the shareholder primacy norm might buy some parts from American suppliers, despite the higher costs and immediate impact on profitability.

Directors and officers stretch credulity if they argue that they have a legal duty to buy from the cheapest supplier to maximize profits (they don't under the corporate law discussed in Part II of this article). But the "shareholder primacy" theory gives them an excuse to say just that. And it's wrong.

Similarly, for climate change, the central focus of the anti-ESG resolution vetoed by President Biden in March 2023. For now, conservative politicians seem wedded to fossil fuels, but voter sentiment is changing.

According to a 2023 CBS News poll, two thirds of American voters feel something needs to be done about climate change.[100] Doing something about climate change is a concern also of a younger generation of conservatives, including Evangelical Christians.[101] Economists often refer to collective action problems as "the tragedy of the commons," an analogy to farmers who allow livestock to destroy common grazing areas through overuse because they won't coordinate to limit depletion of this resource.[102] Globally, that is exactly what is happening with climate change.

Addressing climate change with government regulation is a tough sell to conservatives, but solutions grounded in private enterprise are increasingly attractive. Corporations can invest in new technologies for clean energy or buy inputs from suppliers that invest in clean technology. This requires corporations to take that first step even if there is a short-term negative impact on profits. That is still a lot better of a solution than waiting for government regulation to solve a problem that many conservatives don't believe the government can solve.

Shareholder primacy theory suggests that corporate directors and officers should wait to see what the law requires, or what other companies do, with an eye exclusively on profits. As discussed in Part II of this article, corporate law does not impose such constraints. And most business leaders don't want to concede that government regulation is the only solution.

Many corporate managers want to confront climate change, heeding the dire warnings a few years ago from the Chairman of the Bank of England about the devasting impact on the economy.[103] Some institutional investors are

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[100] Jennifer De Pinto, *Climate Change needs to be addressed…and soon, most Americans say*, CBS NEWS (Apr. 21, 2023), https://www.cbsnews.com/news/climate-change-needs-to-be-addressed-poll-2023-04-21/.

[101] Silk, *supra* note 17.

[102] *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244 (1968).

[103] *See, e.g.,* Mark Carney, *Breaking the Tragedy of the Horizon – climate change and financial stability*, Speech at Lloyd's of London (Sept. 29, 2015),

using the shareholder proxy[104] to motivate companies to do just that. Business can help solve climate change, and perhaps government can have less of a role, but only if corporate managers don't obsess over short-term profits so much that they lose sight of the long-term problem.

*E. The Avoision Problem*

In 1979, Arthur Seldon, Alfred Roman Ilersic, and Barry Bracewell-Milnes from the London School of Economics published a seminal collection of essays titled Tax Avoision: The Economic, Legal and Moral Inter-Relationship Between Avoidance and Evasion.[105] These authors coined the phrase "avoision," a blend of law avoidance and evasion, for operating at the margins of the law. Avoidance is the legal, if unethical, circumvention of the law; for example, a corporation's board of directors approving a reverse merger into a smaller corporation in a different jurisdiction simply to enjoy that jurisdiction's lower corporate tax rates. Evasion is illegal maneuvering around the law, such as lying to tax authorities about one's place of residence to pay lower tax. Avoision falls somewhere in between—for example, structuring a transaction to appear one way (lower tax) when its economic reality is another way (higher tax). Avoision might or might not be legal and can easily cross the line into illegal evasion, such as when taxpayers lie about the essential facts of a transaction.[106]

Seldon et. al's argument to excuse avoision had a nihilistic component: tax law was presumed to have no moral basis. The government's actions, such as setting tax rates too high and imposing unfair retroactive taxes on completed transactions, were presumed to be oppressive. Their book explains:

> The distinction between legal 'avoidance' of tax and illegal 'evasion' has been blurred in recent years by governments that have retrospectively converted avoidance into evasion, in order to punish legal behaviour to which they object. This practice emphasises that tax law has nothing necessarily to do

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https://www.bis.org/review/r151009a.pdf [https://stanford.box.com/s/1o5skbmms1pghmcjzvbutgq1lva45q67].

[104] *See generally* Jessica Camille Aguirre, *The Little Hedge Fund Taking Down Big Oil*, N.Y. TIMES (June 23, 2021), https://www.nytimes.com/2021/06/23/magazine/exxon-mobil-engine-no-1-board.html [https://perma.cc/QQ6E-775C]
(describing a time in 2021 when an activist hedge fund spearheaded a successful proxy fight to elect three dissident directors of ExxonMobil to combat climate change by shifting toward cleaner energy).

[105] ARTHUR SELDON ET AL, TAX AVOISION (1979).

[106] *See* 18 U.S.C. 1001 (criminal statute prohibiting false statements to federal officers including the I.R.S.).

> with morals, for moral standards could not apply retrospectively.[107]

If lawmakers allow "the government itself to override the law, it is hypocrisy to object when citizens evade taxes," the essay concludes. What is the answer to this problem? "Tax avoision," a term defined as "tax minimisation with elements of both avoidance and evasion practiced by the taxpayer who has difficulty in equating the legal with the moral and the illegal with the immoral."[108]

In other words, business interests shouldn't just use political mechanisms to change the law. They are also presumably justified in doing whatever they can to get around the law, exploiting as much as possible the sometimes-ambiguous distinction between law avoidance, which is presumably legal, and law evasion, which is illegal. Or so the avoision theory goes.

Seldon et. al.'s book makes transparent the link between some versions of free market economics on the one hand, including the shareholder primacy norm, and the ideology of law avoision on the other. The approach is not just to change the law but to avoid and evade it until it can be changed because the law is itself wrong and should not apply to you. This is not just a strategy for business success; it is a normative judgment of right and wrong—a form of ethics avoision.[109]

Never mind that this approach to law – the assumption that law has nothing to do with morals – is anathema to conservatives who believe in natural law and integrating morals into law.[110] This avoision language is an open invitation to law breaking to the extent law breakers can get away with it.

This term "avoision" became so popular in the United States that it was featured on *The Simpsons*.[111] Some U.S. academics also picked up on the phrase.[112] Combining the ideology of law avoision with the ideology of corporate profit maximization is an invitation to corporate conduct at the outer margins of the law.

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[107] SELDON ET. AL., *supra* note 105, at 28.
[108] *Id.* at 29.
[109] Richard W. Painter, *How Trump's Philosophy of Law "Avoision" is Remaking the Political Right*, NEWSWEEK (Aug. 5, 2020), https://www.newsweek.com/how-trumps-philosophy-law-avoision-remaking-political-right-opinion-1523113.
[110] For discussion of natural law in corporate law, *see, e.g.,* Robert G. Kennedy, *Business and the Common Good in the Catholic Social Tradition*, 4 VILL. J.L. & INVESTMENT. MGMT. 29 (2002).
[111] ThingsICantFindOtherwise, *I Don't Say Evasion, I Say Avoision (The Simpsons)*, YOUTUBE (Jan. 30, 2016), https://www.youtube.com/watch?v=wpEaFmK3lrY.
[112] *See* LEO KATZ, ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW (1996), (discussing law avoision in various contexts).

Two distinct pressures confront the corporate manager and pull in opposite directions. First, the law is not always clear and there will always be a temptation to operate at the margins of the law, sometimes crossing the line into noncompliance. On the other hand, there are often good reasons for corporate managers not only to comply with the law but to expansively interpret the requirements of the law, reducing litigation risk and putting the corporation in a better competitive position if the law becomes stricter in the future. This second impulse may be weaker, however, if the benefits of such strict law compliance are too speculative and too far in the future to demonstrably benefit today's shareholders.

When defenders of strict law compliance feel the need to frame their argument only in terms of shareholder wealth maximization, they can be at a disadvantage vis a vis others in an organization who want to skirt close to the line. In deliberation over corporate conduct, the ideology of shareholder primacy tilts the scales in favor of amoral practitioners of law avoision. Managers who embrace moral principles of right and wrong are on the defensive, constantly fighting against those who think that shareholder primacy requires them to do whatever they can get away with to make more money.

Rarely would officers and directors argue that shareholder primacy requires them to break the law, but in the gray area between legal and illegal, they can argue that it is ethically right to focus on profit maximization and to avoid overly cautious interpretations of the law. They can argue that their fiduciary duty is to resolve most doubts in favor of the legality of a profitable business plan and then claim that their hands were tied when they erroneously cross the line into illegal behavior or fail to stop subordinates who are engaged in illegal behavior.

Law avoision should worry conservatives. One of the most politically explosive categories of law avoision in the United States is hiring illegal immigrants or subcontracting to businesses that hire illegal immigrants.[113] Other profit maximizing corporations circumvent export control laws or sanctions on hostile powers. [114] Some corporations violate the Foreign

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[113] *See* Travis Putnam Hill, *Big Employers No Strangers to Benefits of Cheap, Illegal Labor,* TEXAS TRIBUNE (Dec. 19, 2016), https://www.texastribune.org/2016/12/19/big-name-businesses-exploit-immigrant-labor/ [https://perma.cc/953G-CCQ8] (stating that "It's that 'don't ask, don't tell' system that allows employers to benefit from cheap immigrant labor. The same shadows under which undocumented immigrants are hired can also obscure the further exploitation they often endure.").

[114] *See Deputy Attorney General Lisa Monaco Delivers Remarks at American Bar Association National Institute on White Collar Crime*, DEPARTMENT OF JUSTICE (Mar. 2, 2023), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-remarks-american-bar-association-national [https://perma.cc/JRJ2-D93P] (announcing increased funding of DOJ corporate criminal investigations of sanctions evasion and export control violations in the National Security Division). *See also* Shahir Shahidsaless, *US*

Corrupt Practices Act by hiring offspring of high-ranking Chinese Communist Party members.[115] United Technologies violated laws restricting transfer of military technology to China, apparently helping China build a new attack helicopter.[116] American workers, American intellectual property, and national security are put at risk when corporate managers and their lawyers maximize profits by finding clever ways to get around the law.
Not to mention the litigation problem already discussed in an earlier subsection of this Article. Profit maximizing managers who practice law avoision sometimes, perhaps often, get sued by regulators, customers, counterparties, or somebody else. The profits of law avoision may end up going to lawyers, not shareholders.

*F. The Portfolio Problem*

Most Americans are beneficiaries of pension plans and retirement accounts managed by institutional investors whose fiduciary duty is to plan beneficiaries.[117] In two respects, this fiduciary duty weighs against a shareholder primacy model.[118] First, some beneficiaries may have social objectives in addition to maximizing the value of their portfolios. Second, the value of an entire portfolio can be diminished by corporate conduct that increases profits of one company at the expense of other investments in the portfolio.

Institutional investors catering to beneficiaries on the left of the political spectrum have made these points for a long time. Union pension

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*Treasury Identifies Channel Iran has used to Circumvent Sanctions*, ATLANTIC COUNCIL (Nov. 14, 2018), https://www.atlanticcouncil.org/blogs/iransource/us-treasury-identifies-channels-iran-has-used-to-circumvent-sanctions/ [https://perma.cc/H6LG-CGEW].

[115] *See* Emily Flitter, *Credit Suisse Fined $77 Million in Corruption Inquiry*, N.Y. TIMES (July 5, 2018), https://www.nytimes.com/2018/07/05/business/credit-suisse-china-bribery.html [https://perma.cc/Q9S4-3W5C] (Credit Suisse "hired the relatives of influential Chinese officials in order to win business for the bank in the country…. the latest Wall Street firm to run afoul of the anti-bribery law through its Chinese hiring practices.").

[116] *See, e.g. United Technologies subsidiary pleads guilty to criminal charges for helping China develop new attack helicopter*, U.S. IMMIGR. & CUSTOMS ENF'T (June 28, 2012), https://www.ice.gov/news/releases/united-technologies-subsidiary-pleads-guilty-criminal-charges-helping-china-develop ("Pratt & Whitney Canada Corp. (PWC), a Canadian subsidiary of the Connecticut-based defense contractor United Technologies Corporation (UTC), today pleaded guilty to violating the Arms Export Control Act and making false statements in connection with its illegal export to China of U.S.-origin military software used in the development of China's first modern military attack helicopter, the Z-10.").

[117] *See generally* Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, 90 U. OF COLO. L. REV, 731 (2019).

[118] A substantial body of empirical studies have examined the changing role of institutional investors in promoting corporate social responsibility. *See, e.g.*, Alexander Dyck et al., *Do Institutional Investors Drive Corporate Social Responsibility? International Evidence*, 131 J. FIN. ECON. 693 (2017).

funds avoid investing in companies that pay substandard wages,[119] and church pension funds avoid weapons manufacturers.[120] Universities are under consistent pressure from students, staff, and alumni to invest endowments consistent with values of many members of their community.[121] Politically conservative investors and representatives in Congress also focus on values-based investing, even if they emphasize a different set of values. For example, pressure is mounting on pension fund managers to avoid investments in many Chinese companies.[122] Institutional investors increasingly realize that their investment decisions sometimes should be driven by factors other than expected return.

Sometimes, institutional investors use their shareholder proxy to support resolutions recommending change to socially harmful corporate conduct.[123] In 2021, the SEC released new guidance for institutional investors on disclosures to their own shareholders about votes on corporate governance proposals.[124]

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[119] *See* Tessa M. Hebb and Larry Beeferman, *U.S. Pension Funds' Labour Friendly Investments*, INDUSTRY STUDIES CONFERENCE (Apr. 22, 2008) (discussing U.S. pension fund investments).

[120] For example, the Episcopal Church's portfolio restrictions bar investments in weapons manufacturers. EPISCOPAL CHURCH EXEC. COUNCIL CORP. SOC. RESP. COMM., COMPANIES SUBJECT TO NO-BUY PORTFOLIO RESTRICTIONS 1 (Feb. 2020).

[121] *See generally* Susan N. Gary, *Values and Value: University Endowments, Fiduciary Duties, and ESG Investing*, 42 J. OF COLLEGE & U. L. 247 (2016) (discussing increasing pressure on university endowments to consider ESG factors in investing).

[122] *See, e.g.*, *Murphy Panetta Lead Bipartisan Letter to Safeguard U.S. Retirement Savings from Chinese Companies*, Off. of Congressman Greg Murphy (May 25, 2022), https://gregmurphy.house.gov/media/press-releases/murphy-panetta-lead-bipartisan-letter-safeguard-us-retirement-savings-chinese (stating that "Rep. Greg Murphy, M.D.'s (NC-03) and Rep. Jimmy Panetta (CA-20) sent a bipartisan letter to Acting Federal Retirement Thrift Investment Board (FRTIB) Chairman David Jones expressing concern regarding a recent FRTIB decision which could expose U.S. federal employee and service member retirement savings to Chinese companies. U.S. Senator Marco Rubio led an identical Senate version of the letter with Senators Rick Scott, Tom Cotton, Josh Hawley, Roger Marshall, M.D., and Rob Portman."). *See also Colleagues Urge President Biden to Protect Federal Retirement Dollars from Dangerous Chinese Companies*, Off. of Senator Marco Rubio (May 24, 2022), https://www.rubio.senate.gov/public/index.cfm/ press-releases?ID=FE4C4D79-7C47-497 C-B162-D86E58F25F99 (discussing political opposition to some Chinese investments).

[123] *See generally Record Breaking Year for Environmental, Social, and Sustainable Governance Shareholder Resolutions*, AS YOU SOW (June 24, 2021) (discussing climate change shareholder proposals); Jackie Cook and Lauren Solberg, *Hints of Sea Change in Big Fund Company ESG Proxy Votes*, MORNINGSTAR (May 12, 2021) (discussing increase in shareholder support for ESG resolutions).

[124] SECURITIES AND EXCHANGE COMMISSION, ENHANCED REPORTING OF PROXY VOTES BY REGISTERED MANAGEMENT INVESTMENT COMPANIES; REPORTING OF EXECUTIVE COMPENSATION VOTES BY INSTITUTIONAL INVESTMENT MANAGERS, 17 CFR Parts 232, 240, 249, 270, and 274 [Release Nos. 34-93169; IC-34389; File No. S7-11-21] RIN 3235-AK67 (Sept. 29, 2021), https://www.sec.gov/rules/proposed/2021/34-93169.pdf.

Institutional investors also care about the total value of their entire portfolios (portfolio primacy) more than the stock price of individual companies inside their portfolios (shareholder primacy). Shareholder wealth maximization by a single company thus is harmful to institutional investors if it diminishes the value of other assets in their portfolios.[125]

For example, institutional investors holding a diverse array of financial stocks probably will not want banks to earn profits by marketing products that risk destabilizing the entire financial sector. If portfolios are weighted heavily toward U.S. stocks (most Americans' pension plans and retirement accounts are), these funds will care about overall growth in the U.S. economy and disfavor corporate conduct, such as overreliance on imports, that undermines the competitive position of the United States.

There are limits to portfolio primacy,[126] particularly when it is difficult for portfolio managers to assess the impact of profit maximizing conduct in a single company on an entire portfolio. Nonetheless, there are some areas such as climate change where institutional investors are deeply concerned about the impact of destructive corporate conduct on the entire economy and the value of assets in their portfolios.[127]

There is nothing "liberal" or "conservative" about maximizing the value of institutional investor portfolios, not just the stock price of each individual company inside those portfolios. People of all political views have retirement accounts. Fund managers can and should be concerned with how underlying companies' profit making affects the value of the entire portfolio.

### *G. The Finance Problem -- Overleverage and Excessive Risk in Capital Markets*

Credit markets can all too easily become a financial playground where reckless profit maximizing lenders meet reckless profit maximizing borrowers. Market discipline is supposed to prevent chaos by regularly and sufficiently imposing financial penalties on lenders and borrowers alike when they make poor decisions. It doesn't always work out that way.

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[125] Madison Condon, *Externalities and the Common Owner*, 95 WASH. U. L. REV. 1, 1 (2020) ("Due to the embrace of modern portfolio theory, most of the stock market is controlled by institutional investors holding broadly diversified economy-mirroring portfolios…. [D]iversified investors should rationally be motivated to internalize intra-portfolio negative externalities.").

[126] *See generally* Roberto Tallarita, *The Limits of Portfolio Primacy*, 76 VAND. L. REV. 511 (2021) (discussing reasons institutional investors sometimes do not fully consider the broader social and economic impact of climate change on investments, including the fact that the stock market may undervalue the benefits of climate change mitigation, and some institutional investors such as index funds invest in subsets of the economy that lean toward fossil fuels rather than a portfolio representative of the entire economy).

[127] Condon, *supra* note 125.

Some borrowers increase profits per share by raising most of their capital through loans, junk bonds, collateralized debt obligations, or other instruments. Financial institutions can make profits by borrowing money short term and lending it out long term (maturity mismatch), but this strategy can implode if interest rates suddenly rise, which is what happened with Silicon Valley Bank in 2022 and 2023.[128] This is one of many ways in which relentless pursuit of profits can induce overleveraged balance sheets which in turn increase the risk of collapse.

We might assume that credit markets are smart enough to restrict lending to overleveraged companies. Yet, inefficient credit markets have been around a long time, from the late 19th Century and early 20th Century when Louis Brandeis wrote his 1914 book *Other People's Money and How the Bankers Use It*,[129] to the financial crisis of the early 1930's,[130] and then the financial crisis of 2008.[131] These crises have exposed agency problems at multiple levels in financial institutions extending credit as well as trading markets for debt securities. The pursuit of maximum shareholder profits as a sole objective can mean too much lending and too much borrowing, sometimes with catastrophic impacts on the economy.

Disclosure of risk exposure to investors is another area where single minded profit-maximizing encourages law avoision.[132] Executive compensation is often tied to stock price, including management stock options, and to keep the stock price high, at least temporarily, management may conceal risky strategies, including overleverage.[133]

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**128** *Letters: Silicon Valley Bank and Collective Amnesia About Interest-Rate Risks*, WALL ST. J. (Mar. 27, 2023), https://www.wsj.com/articles/silicon-valley-bank-and-collective-amnesia-about-interest-rate-risks-collapse-c7205a56.

129 LOUIS BRANDEIS, OTHER PEOPLE'S MONEY--AND HOW THE BANKERS USE IT (1916).

130 *See generally* Barry Eichengreen & Kris James Mitchener, *The Great Depression as a Credit Boom Gone Wrong*, BANK FOR INTERNATIONAL SETTLEMENTS – MONETARY AND ECONOMIC DEPARTMENT, Working Paper No. 137 (September 2003) (using quantitative measures of the credit boom phenomenon to explain credit expansion of the 1920s and the depression of the 1930s, examining the property market, consumer durables industries, and technology sectors, as well as the financial sector where intermediaries competed aggressively in providing credit).

131 *See* Atif R. Mian & Amir Sufi, The Consequences of Mortgage Credit Expansion: Evidence from the U.S. Mortgage Default Crisis 1 (2008) (on file with author) (discussing the 2008 financial crash).

132 *See generally* discussion of law avoision *supra* pp. 39-42.

133 Chris S. Armstrong, Allison Nicoletti, & Frank Zhou, *Executive stock options and systemic risk* 1 (Jacobs Levy Equity Mgmt. Center for Quantitative Fin. Rsch. Paper, Sept. 1, 2021), https://ssrn.com/abstract=1072304 (finding that the sensitivity of executives' equity portfolio value to their firms' stock return volatility, encourages systemically risky policies, "including maintaining lower common equity Tier 1 capital ratios, relying on more run-prone debt financing, and making more procyclical investments" and suggesting that "executives' incentive-compensation contracts promote systemic risk-taking through banks' lending, investing, and financing practices.").

There is nothing that believers in free enterprise gain from having an overleveraged economy vulnerable to periodic collapse, not to mention the political chaos that follows.

*H. The Political Problem*

Corporations do not exist in a vacuum. Booms and busts, job losses from plant closings, jobs moving overseas, and other "externalities" of corporate conduct eventually alter, and potentially destabilize, the political system. Corporations need to be mindful of their political environment.

Corporate conduct causing unemployment has the most immediate political consequence. The 2008 financial collapse triggered enormous hostility to corporations on the left.[134] In the aftermath of the Great Recession, right leaning populist attacks were directed at bailouts of Wall Street banks and the Federal Reserve.[135] In the 2016 presidential election, candidate Donald Trump also focused his attacks on profit-maximizing corporations sending jobs overseas.[136]

In times of severe economic difficulties, competing visions of economic organization reemerge in political discourse. These include socialism, regulated capitalism coupled with progressive taxation, communitarian concepts of public-private partnership, and authoritarian government control of business combined with protectionism and economic nationalism. Many of these alternatives are unappealing to political conservatives, particularly those committed to free enterprise. The executives of the Business Roundtable[137] and institutional investor portfolio managers[138] want a seat at the table where political decisions are made about the future of private enterprise. The shareholder primacy norm is not the way to get there.

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[134] *See* Cara Buckley and Colin Moynihan, *Occupy Wall Street Protest Reaches a Crossroads*, N.Y. TIMES (Nov. 4, 2011), https://www.nytimes.com/2011/11/06/ny region/occupy-wall-street-protest-reaches-a-crossroads.html [https://perma.cc/N5A5-KACE] (discussing change of the Occupy Wall Street movement from an on-the-ground protest in Manhattan to a broader political movement).

[135] Sewell Chan, *From Tea Party Advocates, Anger at the Federal Reserve,* N.Y. TIMES (October 10, 2010), https://www.nytimes.com/2010/10/11/us/politics/11fed.html [https://perma.cc/YF49-RPZD] (discussing how the Tea Party and other right wing political movements "have made the Fed a target of their ire, linking it to their criticisms of President Obama's stimulus effort and the Wall Street bailouts begun under President George W. Bush.").

[136] *See, e.g.*, Nelson D. Schwartz, *Trump Leans on Carrier to Keep 2,000 U.S. Jobs From Moving to Mexico*, N.Y. TIMES (Nov. 25, 2016), https://www.nytimes.com/2016/11/25/business/international/trump-leans-on-carrier-to-keep-2000-us-jobs-from-moving-to-mexico.html [https://perma.cc/AMF2-TQ2Z].

[137] *See* BUS. ROUNDTABLE, *supra* note 87.

[138] *See* text accompanying notes 117-127 supra (discussing institutional investor, portfolio primacy, ethical investing, and other considerations).

Corporate managers and investors surely will defend the market economy and corporate profitability as consistent with the public welfare, but the rhetoric of Milton Friedman's shareholder primacy norm whereby corporate managers focus only on profits is unappealing, and even more so when the hegemony of a free-market economy is at risk.

Furthermore, corporations operating on a global scale are affected by political change everywhere. Concerns about economic inequality[139] dominate political discourse in many countries, and this may be impacted by the wages corporations pay in those countries, among other factors. At some point concepts of fairness impact the way decision makers in the political and business arenas approach problems, not only in private bargaining,[140] but in the political system's interactions with corporations.[141]

Geo-political instability[142] is a danger to capitalism.[143] If excessive profit making and corporate scandal lead to economic crisis, countries that

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[139] AMARTYA SEN, ON ECONOMIC INEQUALITY (1973) (presenting the conceptual framework and practical problems in measurement of economic inequality from the vantage point of philosophical assumptions, economic theory, and statistics).

[140] *See*, *e.g.*, Matthew Rabin, *Incorporating Fairness into Game Theory and Economics*, 83 AM. ECON. REV. 1281 (1993).

[141] The worst fear in this respect is that the economic problems and political stability that plagued Europe in the early and mid-twentieth century could be reemerging in Europe, the United States, and other parts of the industrialized world a hundred years later. *See* Manuel Funke, *How is Politics Affected by Financial Crises?*, WORLD ECON. F. (Nov. 24, 2015) (citing Alan de Bromhead, Barry Eichengreen & Kevin O'Rourke, *Right-Wing Political Extremism in the Great Depression,* VOXEU (Feb. 27, 2012), https://voxeu.org/article/right-wing-political-extremism-great-depression [https://perma.cc/8G43-B93P]), https://www.weforum.org/agenda/2015/11/how-is-politics-affected-by-financial-crises/ [https://perma.cc/9NPC-AXYR]; Manuel Funke, Moritz Schularick & Christoph Trebesch, *Going to Extremes: Politics after Financial Crises, 1870-2014* (Ctr. Econ. Pol'y Rsch., Discussion Paper No. 10884, 2015), https://cepr.org/active/publications/discussion_papers/dp.php?dpno=10884 [https://perma.cc/2R38-ASDK].

[142] Connections between economic inequality and political instability have been written about extensively. Many publications have looked at this phenomenon in the developing world but recent focus also has been on developed countries. *See*, *e.g.*, Pablo Duarte & Gunther Schnabl, *Monetary Policy, Inequality and Political Instability* (CESifo, Working Paper No. 6734, 2017), https://ssrn.com/abstract=3100010 (using concepts of justice by Hayek, Rawls and Buchanan to argue that "growing political dissatisfaction in industrialized countries is rooted in the asymmetric pattern in monetary policies since the 1980s for two reasons. First, the structurally declining interest rates and the unconventional monetary policy measures have granted privileges to specific groups. Second, the increasingly expansionary monetary policies have negative growth effects, which reduce the scope for compensation of the ones excluded from the privileges. The result is the fading acceptance of the economic order and growing political instability.").

[143] *See generally* THE ECONOMIST, ECONOMIST IMPACT REPORT: BUSINESS IN AN ERA OF HEIGHTENED GEOPOLITICAL INSTABILITY 17 (2021) (a survey of 300 senior executives in the United States, United Kingdom, France, Germany, China and India concerning corporate response to geopolitical instability reporting that "most [70.3%] of responding firms have a clear sense of purpose that goes beyond maximizing profits for shareholders"),

embrace democracy and free market capitalism may find it hard to compete with countries that embrace political and economic authoritarianism of the extreme left or the extreme right. For some corporate managers, investors, and voters, the lure of authoritarianism may be appealing, even if the long-term consequences are devastating.

The message is more general: corporate profit-maximizing and stock prices can diverge from overall social welfare for a time, but that time is not indefinite. The outside world eventually comes knocking on the C Suite door. Some corporations respond to this political problem with political spending, hoping for favorable regulation. From the Clinton era to today, Wall Street has often backed politicians who are liberal on social issues, but moderate and pro-business on economic issues.[144] Corporate PAC spending and dark money electioneering communications fueled by the Supreme Court's decision in *Citizens United v. FEC*[145] mean there's big money at stake. Candidates from both political parties benefit from these expenditures but conservatives might complain that, on the Democratic side of the ledger, there is a "left wing protection racket" in which liberal politicians conscript big business to bankroll their battles with social conservatives in exchange for minimal economic regulation. Middle-class social conservatives' cries against "wokeness" on Wall Street have become a staple of Republican politics in recent years.[146]

Corporations unwilling to temper their thirst for profits can only do so much to stave off their unpopularity and the risk of government regulation and taxation. A free-market economy may only be sustainable if corporations are believed to make a reasonable effort to serve the public good. The shareholder primacy norm instead puts more pressure on managers to make profits and more pressure on governments to use regulation, taxation, and other measures to control presumptively "greedy" corporations. Such is not the political environment that most corporate managers, or most political conservatives, want to live in.

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https://impact.economist.com/perspectives/sites/default/files/ei_norsk_hydro_briefing_report_business_in_an_era_of_heightened_geopolitical_instability.pdf.

[144] *See* Grace Dean, *Wall Street spent a record $2.9 billion on political contributions and lobbying in 2019 and 2020, a new study shows. Here's who spent, and received, the most cash.*, BUS. INSIDER (Apr. 16, 2021), https://www.businessinsider.com/wall-street-political-contributions-lobbying-election-trump-biden-president-2021-4 [https://perma.cc/4ERX-4AZJ] (reporting that Wall Street firms spent 2.5 times as much supporting Biden as they did on Trump, and split their contributions roughly evenly between the two parties in Congressional elections).

[145] 558 U.S. 310 (2010).

[146] *See* Zachary Warmbrodt and Sam Sutton, *GOP Plans to Punish Woke Wall Street*, POLITICO (Nov. 17, 2022), https://www.politico.com/news/2022/11/17/republicans-congress-wall-street-00065688. [https://perma.cc/7L39-LXFR]

## V. A CONSERVATIVE AGENDA FOR ACCOUNTABLE CAPITALISM

### *A. Protecting the "Values" Based Corporation*

#### 1. Hobby Lobby – What's the Point?

Consider the Supreme Court's holding in *Burwell v. Hobby Lobby Stores*.[147] The Department of Health and Human Services (DHS) sued to require Hobby Lobby to provide contraception in its health insurance as required by DHS regulations under the Affordable Care Act. Hobby Lobby said contraception was against its religious beliefs and claimed exemption under the free exercise clause of the First Amendment and the Religious Freedom Restoration Act of 1993 (RFRA). The Court held that the Affordable Care Act regulatory exemption for non-profit religious organizations should also apply to for-profit corporations such as Hobby Lobby.

Hobby Lobby is a privately owned corporation, controlled by the Green family. As the Court observed:

> Hobby Lobby's statement of purpose commits the Greens to '[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles.' Each family member has signed a pledge to run the businesses in accordance with the family's religious beliefs and to use the family assets to support Christian ministries. In accordance with those commitments, Hobby Lobby and Mardel stores close on Sundays, even though the Greens calculate that they lose millions in sales annually by doing so. The businesses refuse to engage in profitable transactions that facilitate or promote alcohol use; they contribute profits to Christian missionaries and ministries; and they buy hundreds of full-page newspaper ads inviting people to 'know Jesus as Lord and Savior.'[148]

The Court held that Congress intended for RFRA to apply to for-profit corporations as well as nonprofits. The Court expressly rejected the government's argument that for-profit corporations should be treated differently because their only purpose is to make money:

> Some lower court judges have suggested that RFRA does not protect for-profit corporations because the purpose of such corporations is simply to make money. This argument flies in the face of modern corporate law. … While it is certainly true that a central objective of for-profit corporations is to make

[147] 573 U.S. 682 (2014).
[148] *Id.* at 703 (citations and quotations omitted).

> 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. Many examples come readily to mind. So long as its owners agree, a for-profit corporation may take costly pollution-control and energy-conservation measures that go beyond what the law requires. A for-profit corporation that operates facilities in other countries may exceed the requirements of local law regarding working conditions and benefits. If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well.[149]

The Supreme Court majority in this case thus expressly repudiated the shareholder primacy theory. The Court's understanding of corporate purpose draws on the traditional understanding of corporate law discussed in Part II of this Article: A corporation may pursue objectives other than profits. The Court's characterization of corporate purpose is dicta, however, and is not binding. If courts in Delaware or some other state decide to tell corporations to focus only on profits, absent a federal law such as the Accountable Capitalism Act, they are free to do so.

Hobby Lobby, as the Court noted, was privately held. There were no complaining minority shareholders who disagreed with the corporate policy. Nonetheless, if Hobby Lobby had minority shareholders who disagreed with the birth control policy (perhaps a future Green family descendant), they could claim that Hobby Lobby was impermissibly hurting its profits by flouting the federal birth control mandate. Indeed, a strong case can be made that Hobby Lobby's policy reduced profits by requiring Hobby Lobby to offer higher pay to attract employees. Hobby Lobby profits are also adversely impacted if there are more consumers who don't shop at Hobby Lobby because they disapprove of the policy than consumers who support it. The policy, and the emphasis on Christian purpose overall, could make it difficult for Hobby Lobby to expand into parts of the country that are disapproving of its conservative brand of Christianity. The policy could even trigger consumer boycotts.

The profit maximization issue was not before the Supreme Court in Hobby Lobby. Even though the Court observed that state corporate law allows a corporation to pursue any lawful purpose, including a religious

[149] 573 U.S. 628 at 710-12.

purpose as well as a profit-making purpose,[150] a state court applying a shareholder primacy norm could disagree.

If Hobby Lobby had been incorporated in Delaware instead of in Oklahoma, and if a Delaware Court were to apply an expansive reading of the E-Bay holding in a minority shareholder suit,[151] the controlling shareholders could have a problem. A broad interpretation of the language in eBay would suggest that minority shareholders should have an opportunity to prove that Hobby Lobby's "Christian values" business model harms shareholder profits. Many corporations in the United States, large and small, incorporate in Delaware,[152] so this question is not insignificant.

Furthermore, judges applying a shareholder primacy rule might give more leeway for arguments that progressive policies such as climate change initiatives, diversity initiatives, and charitable contributions don't hurt profits and less leeway to companies such as Hobby Lobby with a religious or moral rationale for controversial policies. In more liberal states, at least, judicial rulings applying a shareholder primacy norm probably would not favor conservatives, particularly religious conservatives.

Some conservatives might be content to defer to state law, warning corporations such as Hobby Lobby not to incorporate in a state where courts insist on corporate worship of the almighty dollar. Other conservatives will object. Why should corporations with a religious or philosophical purpose as well as a profit-making purpose be discriminated against and required to give up the benefits of incorporation in Delaware or anywhere else? Strict enforcement of a shareholder primacy norm would tell corporations with a public benefit purpose that they are not welcome to incorporate in the jurisdiction unless they choose a B Corporation model. For many corporations, the B Corporation is not an acceptable alternative because it stigmatizes the corporation with profit-seeking investors and could raise the cost of capital. Such a two-tier state corporate law – separating corporations

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[150] The Court also noted that state corporate law clearly allows corporate directors to pursue a religious as well as a profit-making purpose. "In any event, the objectives that may properly be pursued by the companies in these cases are governed by the laws of the States in which they were incorporated—Pennsylvania and Oklahoma—and the laws of those States permit for-profit corporations to pursue 'any lawful purpose' or 'act,' including the pursuit of profit in conformity with the owners' religious principles." 15 Pa. Cons. Stat. §1301 (2001) ("Corporations may be incorporated under this subpart for any lawful purpose or purposes"); Okla. Stat., Tit. 18, §§1002, 1005 (West 2012) ("[E]very corporation, whether profit or not for profit" may "be incorporated or organized . . . to conduct or promote any lawful business or purposes").

[151] *See* discussion of E-Bay in Part II supra.

[152] Charlotte Morabito, *Here's why more than 60% of Fortune 500 companies are incorporated in Delaware*, CNBC (March 13, 2023), https://www.cnbc.com/2023/03/13/why-more-than-60percent-of-fortune-500-companies-incorporated-in-delaware.html [https://perma.cc/M43D-347L].

that care only about profits from corporations that care about other values too – arguably is discriminatory and wrong.

None of this directly pertains to the issue the Court decided in *Hobby Lobby*. Religious conservatives who want to expand upon the *Hobby Lobby* line of cases, seeking religious exemptions from generally applicable laws, will have to challenge those laws in court as they did in *Hobby Lobby*. That is not a subject appropriately addressed in amendments to the Accountable Capitalism Act or in this Article. The point here is that political conservatives, particularly religious conservatives, should not want the shareholder primacy norm to become an indirect weapon to force corporations to back off from nonmonetary values in cases where a corporation has the choice to pursue those values.

Although the Accountable Capitalism Act speaks to "public benefit" not a religious purpose, under the Accountable Capitalism Act, directors and officers may consider religious as well as secular values in determining the public benefit. The Accountable Capitalism Act reaffirms the role of nonmonetary values-based norms in corporate governance and protects these norms against encroachment of the shareholder primacy norm. With that, proponents of faith-based corporate governance should be pleased.

### 2. Should Chick-Fil-A be Open on Sunday?

The restaurant chain Chick-Fil-A, incorporated in 1964 in Georgia, is closed on Sundays. The company's official statement of corporate purpose says that the business exists "to glorify God by being a faithful steward of all that is entrusted to us; and to have a positive influence on all who come in contact with Chick-fil-A."[153] Closing on Sunday supports this corporate purpose, although, like Wrigley's refusal to play night baseball, it may make the corporation much less money (Chick-Fil-A outlets at NFL football stadiums, for example, are almost never open).[154]

Dan Cathy and Bubba Cathy own a controlling interest in Chick-fil-A, founded by their father S. Truett Cathy in 1967 in Atlanta, Georgia. Dan was chairman and CEO, succeeded by his son Andrew Cathy. Bubba is executive vice president. Before his death in 2014, Truett Cathy asked his children to sign an agreement that Chick-fil-A would continue as a privately

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[153] *Company Profile, Information, Business Description, History, Background Information on Chick-fil-A Inc.*, REFERENCE FOR BUS., https://www.referenceforbusiness.com/history2/65/Chick-fil-A-Inc.html#ixzz7YSIhAAOh (last visited Dec. 9, 2023) [https://perma.cc/LVK5-XWSR].

[154] Sean Wagner-McGough, *The Falcons' billion-dollar stadium will have a Chick-fil-A that's almost never open*, CBS SPORTS (Aug. 16, 2017), https://www.cbssports.com/nfl/news/the-falcons-billion-dollar-stadium-will-have-a-chick-fil-a-thats-almost-never-open/ [https://perma.cc/RVX4-JD9T].

held company.[155] This substantially reduces but does not eliminate the possibility of a minority shareholder complaining that Sunday closings hurt profits.

For now, the choice of whether Chick-fil-A is open on Sunday is for controlling shareholders to make through the board of directors. But could a minority shareholder successfully sue to require the directors to put aside their religious values and earn profits from Sunday sales? Not if *Schlensky v. Wrigley* and similar caselaw are followed in Chick-fil-A's state of incorporation (Georgia). Chick-fil-A need not be open on Sundays any more than Wrigley needed to allow night baseball games.[156]

A shareholder primacy-oriented court, following an expansive interpretation of the language of the Delaware court in *E-Bay*, however, might subject Chick-Fil-A's Sunday closing policy to more rigorous review, requiring management to show a positive or at least neutral impact on firm profits. A state court might hold that it is improper to mix religious principles with the corporate purpose of a for-profit corporation. A state court might even view the Cathys as authoritarian, narrow-minded, and even bigoted and use the shareholder primacy norm to rein them in.

Keeping Chick-Fil-A's corporate charter in Georgia might stave off such a lawsuit, unless Georgia courts were to embrace the shareholder primacy theory. But if the shareholder primacy norm were to gain momentum elsewhere, particularly the influential state of Delaware, there is no telling for sure what a future Georgia court might do.

All of this poses difficult estate planning and business planning issues for the Cathys and similarly situated shareholders. With each generation, shares are likely to be more broadly dispersed within the family. Payment of estate taxes could require family members to sell additional shares to outsiders, increasing the chances of a shareholder derivative suit from someone hostile to Sunday closing hours.

Furthermore, restaurant chains sometimes separately incorporate stores in different states. Chick-Fil-A, for example, operates through some Delaware corporations.[157] Such a corporate structure, however, will be ill advised if the parent corporation does not own all the stock and Delaware courts are tempted to interfere with religiously motivated business decisions because of a judicially created shareholder primacy norm.

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[155] Andrea Norris, *Can You Buy Chick-fil-A Stock? What To Know*, GOBANKINGRATES (May 12, 2022), https://www.gobankingrates.com/investing/stocks/chick-fil-a-stock/ [https://perma.cc/VEU4-V9M4].

[156] *See* discussion of *Schlensky v. Wrigley* in text accompanying note 51 above.

[157] There are already some Chick-fil-A entities incorporated in Delaware, although it is not clear whether these entities are used to raise capital from minority shareholders. CHICK-FIL-A INC, https://delaware-company.com/co/chick-fil-a-inc-10 (last visited Dec. 9, 2023).

The "public benefit" purpose set forth in the Accountable Capitalism Act[158] resolves much of this uncertainty. Future generations of Cathys who own enough stock to elect the majority of Chick-Fil-A directors can pursue their founder's vision of the public benefit as part of the corporation's purpose. A secular rationale for Sunday closing of course exists as well – giving employees a common day of rest can have benefits for the workforce – but the Accountable Capitalism Act says nothing that precludes the religious rationale for Sabbath also being a public benefit.

Although liberals disagree with religious conservatives on some issues, there is room for common ground on other issues. The younger generation of Evangelical Christians is increasingly concerned about climate change, as is the Catholic Church.[159] The common ground for liberal and conservative managers with a moral conscience is that the corporate purpose cannot just be about making money.

*B. China*

As already discussed in this Article, conservatives in Congress are increasingly raising the alarm about American investments in China and American corporations' business relationships with Chinese companies. For U.S. corporations, investments in China, supply contracts with China, and joint ventures with Chinese companies can be enormously profitable. The potential downsides include U.S. national security concerns, unauthorized transfer of technology to China, human rights issues, fair competition with U.S. businesses, preserving American jobs, maintaining American access to strategically important minerals, and minimizing American dependence on imported Chinese microchips, pharmaceutical components, and other essentials. Conservatives also point out strong connections between Chinese businesses and the Communist Party, which is hostile to capitalism itself.
China related initiatives in Congress, many of which are from the Republican side, but some of which are bipartisan – are so numerous that only a few are summarized here.

In 2022, Representative Greg Murphy (R-NC) wrote a letter calling on fifteen private colleges and universities with the largest endowments to divest their endowments of investments in Chinese entities that Murphy

[158] *See* the Accountable Capitalism Act, public benefit provision, text accompanying note 5 *supra*.
[159] *See* note 17 *supra*. *See generally Encyclical Letter, Laudato si'of the Holy Father Francis on Care for Our Common Home*, VATICAN (May 24, 2015), https://www.vati can.va /content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html.

deemed a threat to U.S. national security.[160] Murphy also released a discussion draft of the Protecting Endowments from Our Adversaries Act (PEOAA), which would discourage billion-dollar, tax-advantaged university endowments from investing in entities that pose an unacceptable national security risk.[161] Murphy noted that "Because of university endowments' educational mission and tax advantage status, they have a moral obligation not to invest in companies that are detrimental to the national security of the United States."[162]

In 2022, members of the U.S. Senate Intelligence Committee asked the Federal Trade Commission to investigate whether Chinese owned TikTok's data practices created privacy and security risks for American users. Senators Mark Warner (D-Va.) and Marco Rubio (R-Fla.) sent the letter,[163] citing a BuzzFeed News report [164] contradicting TikTok's 2021 testimony to the Committee about its data practices.[165] In addition, the senators' letter accused Tik Tok of misrepresenting its corporate structure, particularly its ties to another company with ties to the Chinese Communist Party (CCP).[166] In March of 2022, Senators Marco Rubio (R-FL), Rick Scott (R-FL), and Todd Young (R-IN) introduced the Crippling Unhinged Russian Belligerence and Chinese Involvement in Putin's Schemes (CURB CIPS)

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[160] *Murphy Calls on U.S. Universities to Purge Investments in Chinese Entities Deemed National Security Threats*, GOP WAYS & MEANS COMM. (Jun. 10, 2022), https://gop-waysandmeans.house.gov/murphy-calls-on-u-s-universities-to-purge-investments-in-chinese-entities-deemed-national-security-threats/.

[161] *Murphy Releases Discussion Draft of Protecting Endowments from Our Adversaries Act*, OFF. OF REP. GREG MURPHY (May 16, 2022), https://gregmurphy.house.gov/media /press-releases/murphy-releases-discussion-draft-protecting-endowments-our-adversaries-act-0.

[162] *Id.*

[163] *Letter from Senators Rubio and Warner to FEC Chair Lina Kahn*, OFF. OF SEN. RUBIO (Jul. 5, 2022), https://www.rubio.senate.gov/public/_cache/files/51f13c73-7526-4b9d-ad98-76622f521281/C269999AFEBC17C73024352CFB9CB5DD.a42795c63518b32671f9accf82b1e26a.khan-ssci-tiktok-letter.pdf.

[164] *Id.* (citing Emily Baker-White, *Leaked Audio from 80 Internal TikTok Meetings Shows that US User Data Has Been Repeatedly Accessed from China*, BUZZFEED NEWS (June 17, 2022), https://www.buzzfeednews.com/article/emilybakerwhite/tiktok-tapes-us-user-data-china-bytedance-access)).

[165] Diane Bartz and Sheila Dang, *TikTok Tells U.S. Lawmakers It Does Not Give Information to China's Government*, REUTERS (Oct. 26, 2021), https://www.reuters.com/technology /tiktok-tells-us-lawmakers-it-does-not-give-information-chinas- government-2021-10-26/.

[166] *Id*. at 1-2 ("Additionally, these recent reports suggest that TikTok has also misrepresented its corporate governance practices, including to Congressional committees such as ours. In October 2021, TikTok's head of public policy, Michael Beckerman, testified that TikTok has 'no affiliation' with another ByteDance subsidiary, Beijing-based ByteDance Technology, of which the CCP owns a partial stake. Meanwhile, as recently as March of this year, TikTok officials reiterated to our Committee representations they have previously made that all corporate governance decisions are wholly firewalled from their PRC-based parent, ByteDance. Yet according to a recent report from Buzzfeed News, TikTok's engineering teams ultimately report to ByteDance leadership in the PRC.").

Act.[167] This bill would sanction Chinese financial institutions that enter into transactions with Russian financial institutions using alternative financial transfer systems to the Society for Worldwide Interbank Financial Telecommunication (SWIFT) system from which Russian institutions were removed after Russia's invasion of Ukraine.

In April 2022, Senators Marco Rubio and Scott introduced the Transaction and Sourcing Knowledge (TASK) Act (S. 4095),[168] a bill that would direct the SEC "to require publicly traded companies to report on any aspect of their supply chain directly linked to products using forced labor from the Xinjiang Uyghur Autonomous Region, as well as any transactions with certain companies that pose national security risks." This bill is expressly directed at U.S. publicly traded companies doing business with Chinese entities, embodying the very type of ESG disclosure that is often advocated for by human rights organizations. Rubio and Scott's specific concerns may be selective – they focus on China and not on other countries using forced labor – but their solution to the problem, enhanced ESG disclosure in securities filings, is much the same.

SEC disclosures, however, only go so far if corporate managers believe they have a fiduciary duty to maximize profits no matter what the social cost. Disclosure seems pointless if officers and directors are not supposed to consider the social impact of their decisions. It is not difficult to imagine Senators Rubio and Scott, and their GOP colleagues, supporting legislation including a "public benefit" fiduciary standard for corporate transactions abroad if they knew it would help rein in problematic transactions with China.

Conservatives in Congress likely will continue to support regulation of corporate dealings in China. But regulation alone is not enough. As pointed out in Part IV of this article, profit-maximizing corporations are good at working their way around regulation – a practice known as law "avoision." A public benefit purpose at least puts a brake on the underlying ideology of avoision, which is that managers should do anything they can to make money. The Accountable Capitalism Act is a counterweight to profit-maximizing corporate managers selling short their own Country's interests to make money overseas. The Act alone will not solve these problems but will reinforce whatever prohibitory laws Congress enacts. The Act's fiduciary standard should encourage some corporate officers and directors to go beyond what the law requires.

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[167] Crippling Unhinged Russian Belligerence and Chinese Involvement in Putin's Schemes Act of 2022, S.3877, 117th Cong.

[168] Transaction and Sourcing Knowledge (TASK) Act, S. 4095, 117th Cong. (2022).

*C. Israel*

The October 7, 2023 surprise attack on Israel by Hamas brings Israel's vulnerability once again to the fore.

Profit-maximizing corporations need little incentive to do business with most developed countries**,** including Western Europe, Australia, and Japan. Israel – a small country strong on technological know-how but poor in natural resources and under constant military threat – may be an exception. In the 1970's, Arab countries tried to coerce U.S. corporations to boycott Israel, using their power in the oil industry to assure compliance. Fearing that profit-maximizing U.S. corporations would succumb to the Arab boycott of Israel, Congress responded with anti-boycott legislation.[169]

The effort to economically isolate Israel continues not just in the Middle East but on the left of the political spectrum at home – a movement known as Boycott, Divest and Sanction (BDS). Hostility to Israel on college campuses has intensified, which could hurt recruitment of new employees by companies with a presence in Israel. Supporters of BDS say that it is consistent with corporate social responsibility – an argument made in 2022 by Ben & Jerry's Ice Cream in suing its parent company Unilever to try to ban the sale of its ice cream in the occupied West Bank.[170] Supporters of Israel and opponents of BDS argue the opposite, saying that BDS is antisemitic in seeking to dismantle Israel as a Jewish state. Ironically, in February 2024, Unilever took a substantial hit to its sales in at least one country, Indonesia, because anti-Israel boycotters there believed Unilever was doing too much business in Israel.[171]

Federal anti-boycott legislation remains in place, and new anti-BDS legislation is being enacted in some states. Nonetheless, there are many ways around these laws, particularly if a company avoids Israel instead of overtly boycotting Israel. The profit maximization norm makes Israel avoidance – or avoision as discussed in Part IV of this Article – easier. Although a company participating in a high-profile boycott of Israel could harm stock price,[172]

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[169] 1977 amendments to the Export Administration Act of 1969 prohibited certain actions by U.S. individuals and corporations in furtherance of a foreign boycott not sanctioned by the U.S. government. These amendments were later incorporated into Section 8 of the Export Administration Act of 1979, Pub. L. 96-72.

[170] Dasha Afanasieva, *The Ben & Jerry's boycott of the West Bank apparently harmed the parent company's stock price. Lydia Moynihan, Activist investor says Ben & Jerry's Israel boycott is harming Unilever shares*, N.Y. POST (Nov. 11, 2021, 1:13PM), https://nypost.com/2021/11/11/investor-ben-jerrys-israel-boycott-is-harming-unilever-shares/ [https://perma.cc/4NKE-CC9K].

[171] Dasha Afanasieva , *Boycott over Gaza hits Unilever's Sales in Indonesia: Sales in Indonesia fell 15% on Middle-East related boycott*, BLOOMBERG (February 8, 2024), https://www.bloomberg.com/news/articles/2024-02-08/unilever-suffers-decline-in-indonesia-on-boycott-over-gaza [https://perma.cc/K2N4-W8PP].

[172] *See* Afanasieva, *The Ben & Jerry's boycott*, *supra* note 170.

avoiding controversy by quietly selling off or discontinuing business in Israel, may help stock price. With Israel's relatively small markets, profit maximizing companies may just choose to stay away.

The Accountable Capitalism Act does not take sides in this debate. But the Act does provide that "public benefit" is part of the corporate purpose that directors and officers must consider in addition to making profits. Because of the considerable economic power amassed against Israel – not only oil-producing nations but now also some pension funds, endowments, and others embracing the BDS movement – defenders of Israel should want corporate directors and officers to consider factors other than profits when deciding how to respond.

Shareholders also may not be told the truth about how decisions are made. For example, we may never learn the real reason General Mills closed its operations in the West Bank.[173] Such decisions are often made in secret in the boardroom. Pro-Israel officers and directors may have to threaten to resign their positions if confronted with economic arguments for avoiding business with Israel. However, they may not get others to agree with them, as pressure to maximize profits intensifies.

The "public benefit" provisions of the Accountable Capitalism Act could help pro-Israel directors and officers assert a broader corporate purpose when confronting colleagues, and perhaps shareholders, who insist that profits come first and that entanglement with Israel is bad for business. The Accountable Capitalism Act would point boardroom deliberation toward public benefit and give everyone in the discussion less room to hide behind the mantra of profit maximization.

### *D. Boycotts and Other Pressure Points on Profits*

Domestic economic boycotts – including entire states boycotting other states – are in the news. Politically conservative states are the target of many such boycotts, with economically powerful liberal states leading the charge. California, for example, passed and then later repealed a law prohibiting use of state funds for state employees' travel to states with laws that the California Attorney General determines as discriminatory toward LGBTQ+ persons.[174] The California AG's boycott list, before it was repealed, included 21 states. [175]

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[173] See Brooks Johnson, General Mills selling its stake in often-criticized Israel business, MINNEAPOLIS STAR-TRIB. (Jun. 2, 2022, 1:45 PM), https://www.startribune.com/general-mills-selling-its-stake-in-often-criticized-israel-business/600178653/.

[174] *See* CALIFORNIA GOV'T CODE § 11139.8(b).

[175] *See* Office of the California Attorney General, Prohibition on State-Funded and State-Sponsored Travel to States with Discriminatory Laws (Assembly Bill No. 1887), https://oag.ca.gov/ab1887.

Corporations also can be enlisted in this effort to exert economic pressure on states with laws that people in other states don't agree with. The pressure point is obvious – target the profits of large corporations that refuse to participate in the boycott. Corporations that care only about profits are an easy mark.

For example, a corporation might be deciding between opening a new plant and creating 2000 new jobs in California or in Tennessee. Economic considerations weigh in favor of Tennessee, but when a nationwide boycott of corporations opening new facilities in Tennessee is threated by political activists boycotting Tennessee over its abortion laws, the economic calculus shifts in favor of California. Some directors and officers may think this is coercion and refuse to consider the impact of a boycott on profits. Others might insist that all factors impacting profits, including the boycott, must be considered. This consideration tips the scale in favor of California.

Conservatives and liberals often disagree about the difference between good boycotts and bad boycotts. But some conservatives and liberals may agree that how a business responds to a boycott is a moral issue, not a decision that should be dictated by profits. Directors and officers should not participate in a boycott they think is morally wrong simply because of economic pressure from boycott organizers or their supporters.

The alternative "amoral" approach is for the profit-maximizing corporation to only focus on profits. Whichever side, boycott opponents or boycott proponents, has the most economic clout wins. The corporation goes along with that position not because it is morally right but because it makes the most money.

Conservatives have a lot to lose if this fundamentally moral decision – how to respond to a politically motivated boycott – boils down to profits. The aftermath of the reversal of *Roe v. Wade* could bring further boycotts of entire states or regions of the Country. Some states with the most restrictive abortion laws are among the poorest states in the nation where multinational corporations may earn relatively little profits. But, having invested in those communities and made promises to the people there, perhaps they should remain anyway.

Consider also boycotts used to enlist corporate employers against their own employees for exercising First Amendment rights. An employee who, in a personal capacity, expresses political or religious views on a controversial social issue can cost an employer profits, particularly if social media boycott organizers target the employer. Directors and officers may fire or punish the employee to protect profits. Corporate officers and directors who believe an employee's statement merits free speech protection may want to stand up for the employee's free speech, regardless of impact on profits. But does the shareholder primacy norm allow this? Apparently not.

Turning from the First to the Second Amendment, some large retailers discontinue gun sales because of social and economic pressure. Gun control advocates may argue that this is an example of corporate social responsibility, putting people before profits. But for many stores, it is likely about profits. Gun sales are a small percentage of profits for large retailers, and if guns on the floor discourage shoppers from entering the store, profits decline. Conservatives, however, presumably would want corporate directors and officers who believe in gun rights not to cave into economic pressure to discontinue gun sales. Conservatives also would not want shareholder derivative suits against retail chains claiming that gun sales undermine profits. Gun control advocates are on the opposite side of the debate but likely agree with their opponents on one thing: the decision about whether to sell guns should turn on the corporation's vision of its responsibility to the public, not solely on profits.

*E. Amendments to the Accountable Capitalism Act (not inconsistent with its purpose or current language) that would broaden support from Conservatives.*

Very few changes would have to be made to the Accountable Capitalism Act to address the specific concerns discussed in this Part. Indeed, all the concerns discussed in this Article could be considered by corporate officers and directors, and balanced against profit-making objectives, under the broad language of the Accountable Capitalism Act as presently drafted. Nonetheless, the bill could be amended to sharpen its focus on issues of concern to conservatives, including the national security of the United States and its allies, protecting American jobs, furthering American economic growth, not hindering economic growth in any of the fifty states (an implicit repudiation of boycotts of any of the states), and furthering the independence of the United States in raw materials, defense production, lifesaving drugs and other areas. The bill also could mention that a public benefit is not achieved by expanding the military capacity of countries hostile to the United States, hostile to allies of the United States, or that have threatened the independence of democratic governments. There would be no specific formula for directors and officers to apply in considering these factors and weighing them against other factors or against profit maximization goals.[176]

The only requirement would be that these factors be considered by officers and directors in making their decisions.

Enumerating the specific interests to be considered by directors and officers, the Accountable Capitalism Act thus could be amended to provide that

[176] *See generally* discussion in Section I, *supra*.

directors and officers in carrying out the public benefit (added language in *italics*):

(i) shall consider the effects of any action or inaction on— (I) the shareholders of the United States corporation; (II) *the interest of the United States in keeping high paying jobs in the United States*, and the employees and workforce of— (aa) the United States corporation; (bb) the subsidiaries of the United States corporation; and (cc) the suppliers of the United States corporation; (III) the interests of customers and subsidiaries of the United States corporation as beneficiaries of the general public benefit purpose of the United States corporation; (IV) community and societal factors, including those of each community in which offices or facilities of the United States corporation, subsidiaries of the United States corporation, or suppliers of the United States corporation are located, *including human rights and religious and personal freedom of persons living in nondemocratic countries*; (V) the local and global environment; *(VI) the national security of the United States and its allies, including the danger of contributing to military or technological advancement of countries that threaten democratic governments or that are actual or potential adversaries of the United States or its allies, (VII) the competitiveness of the United States, economic growth of the United States and impact on economic growth in all of the fifty states, the territories and the District of Columbia*, and (VIIII) the short-term and long-term interests of the United States corporation, including— (aa) benefits that may accrue to the United States corporation from the long-term plans of the United States corporation; and (bb) the possibility that those interests may be best served by the continued independence of the United States corporation; and (VII) the ability of the United States corporation to accomplish the general public benefit purpose of the United States corporation;

the officers and Directors also:

(ii) may consider— (I) other relevant factors *including environmental, social and governance principles, and/or philosophical, moral, ethical, or religious principles stated in the articles of incorporation or bylaws of the corporation, or deemed relevant by its directors, officers, or shareholders*; or (II) the interests of any other group that

> are identified in the articles of incorporation in the State in which the United States corporation is incorporated, if applicable; and
>
> (iii) shall not be required to give priority to a particular interest or factor described in clause (i) or (ii) over any other interest or factor.[177]

Note that the unitalicized language above is already in Senator Warren's Accountable Capitalism Act. Subsection (ii) thus already provides that the directors and officers "may consider other relevant factors; or the interests of any other group that are identified in the articles of incorporation…." This would presumably include a religious group of which the controlling shareholders are a part, although the proposed amended language in italics makes this point even more explicit.

The Accountable Capitalism Act, as amended, also could include a separate provision stating that the officers and directors of a corporation or other limited liability entity organized in any state or territory of the United States, but not large enough to be a United States corporation, *may* consider any of the factors in either paragraphs (i) or (ii) above in the course of managing the business, notwithstanding any provision of state corporate or fiduciary duty law or judicial interpretation of fiduciary duty or corporate law in the state where the business is organized. The Accountable Capitalism Act, as amended, also probably should include a provision explicitly stating that its provisions do not affect the legal obligations of a business under other state law or federal law. Conflict between a corporation's stated purpose and generally applicable law, including *Hobby Lobby* type cases, nondiscrimination laws, labor laws, anti-boycott laws, and other mandates, are to be resolved in separate statutes and caselaw, not in the Accountable Capitalism Act.

The current version of the Accountable Capitalism Act itself creates some litigation risk because it allows shareholders to sue officers and directors who breach their fiduciary duty to fulfill the "public benefit" purpose. However, as discussed in Part I of this Article, the Act expressly defers to officers' and directors' determination about how to balance competing considerations, including profits. This means that most suits would fail unless directors and officers demonstrably refused to consider the public benefit factors set forth in the Act. Directors and officers who openly acknowledge that their only consideration is pursuit of profits might be vulnerable to suit, but otherwise, the traditional business judgment rule would be preserved.

If this relatively benign private right of action alienates conservatives in Congress who otherwise would support the Accountable Capitalism Act,

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[177] *Id.* § 5(c)(1)-(2).

the bill's sponsors might drop it to bolster bipartisan support. The principal objective of the Accountable Capitalism Act is not to foster shareholder litigation but to repudiate the shareholder primacy norm and steer boardroom deliberations toward a broader public vision of corporate purpose. The protection the Act provides against shareholder primacy-based lawsuits would remain intact, meaning the Act should be appealing to business conservatives who are opposed to shareholder litigation and judicial activism in corporate law.

## VI. FEDERALISM AND THE FEDERAL CORPORATE PURPOSE STATUTE

Some political conservatives will hesitate about the Accountable Capitalism Act because they are reluctant to impose a federal overlay on affairs traditionally regulated by the states.

It is important to recognize, however, that state corporate law, unlike most other state law, is not just about regulating economic activity within a single state. For decades, a disproportionate number of American corporations have incorporated in President Biden's home state of Delaware without doing substantial business in Delaware.[178] Delaware makes money from corporate franchise taxes, and Delaware corporate lawyers profit from advice and litigation over conduct having little impact on residents of Delaware. Although corporations "choose" Delaware, and they can incorporate in other states, Delaware exporting its corporate law nationwide is hardly the traditional model of federalism that conservatives prefer to federal regulation.

Conservatives should not be happy with Delaware, a liberal-leaning state, appearing to embrace the amoral shareholder primacy theory. Passages of the *E-Bay* holding suggest that Delaware could abandon traditional values in corporate law that broadly define corporate purpose in cases such as *Schlensky v. Wrigley*, the same traditional concept of corporate purpose embraced by the conservative majority of the U.S. Supreme Court in *Hobby Lobby*. Delaware, if its courts broadly extend *E-Bay's* reasoning beyond the unique facts of that case, could replace the business judgment rule with judicial activism where courts evaluate business decisions based solely on their impact on shareholders. Application of a strict shareholder primacy rule to business decisions involving China would be particularly offensive for conservatives. If Delaware ventures further into shareholder primacy jurisprudence and the judicial meddling that comes with it, the days of conservatives cheering for corporate law federalism and the "genius" of

[178] *See generally* Peter Molk, *Delaware's Dominance and the Future of Organizational Law*, 55 GA. L. REV. (2021) (discussing Delaware's enduring attraction as a state of incorporation for corporations headquartered and doing most of their business elsewhere).

American corporate law (much of it Delaware corporate law),[179] should be over.

The corporate purpose and fiduciary duty provisions of the Accountable Capitalism Act would not curtail the discretion that directors and officers have under the business judgment rule other than telling them to consider interests other than shareholders when making decisions. Such would be far preferable to Delaware judges telling directors and officers that they must maximize profits and perhaps even how to do so.

The Accountable Capitalism Act does differ from most state corporation laws because it says that directors and officers *must* consider non-shareholder interests in addition to shareholder profits. But the bill does not tell corporations how to do this, or how much to weigh non-shareholder interests. The enforcement provisions of the bill also are weak because the bill does not provide a yardstick for courts to apply if shareholders allege that duties to non-shareholder constituencies have not been complied with. As discussed above, if these shareholder private right of action provisions of the Act are unacceptable for conservatives in Congress, the private right of action provision can be dropped from the bill when amendments are made. It is unlikely to have much substantive bite anyway.

Under the Accountable Capitalism Act, the business judgment rule thus remains intact. The main requirement under federal law is that corporations be candid with shareholders about internal decision making by officers and directors. A lack of candor to shareholders can lead to liability under the federal securities laws,[180] and the lack of candor to regulators can lead to prosecution under the false statements statute.[181] But these federal laws have existed for decades and remain unchanged by the Accountable Capitalism Act.

A diluted federal corporate purpose statute would be permissive rather than mandatory. Such a bill could resemble the Accountable Capitalism Act with the corporate purpose provisions remaining the same, but the fiduciary duty provisions would say that directors and officers *may* consider non-shareholder interests but are not required to do so. Such a permissive statute mirrors the business judgment rule of traditional corporate law. To safeguard against further encroachment of shareholder primacy theory in corporate law (the broad application of *E-Bay* type reasoning), the permissive federal corporate purpose statute would explicitly preempt state corporate law that restricts the discretion of corporate officers and directors to consider non-shareholder interests.

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[179] *See* ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW (1994).
[180] *See* Securities Exchange Act of 1934, Pub. L. 73-291, § 10(b); 17 C.F.R. 240.10b-5 (SEC Rule 10b-5).
[181] 18 U.S.C.1001 (criminal penalties for making false statements to federal regulators).

Even if not as strongly worded as the Accountable Capitalism Act, a permissive corporate purpose bill if passed by Congress would still accomplish some of the objectives discussed in this Article for several reasons. First, it would avoid encroachment of shareholder primary theory in state corporate law. Second, it would send a message to corporate directors, officers, investors, analysts, and others that profit maximization is not the only objective of a corporation. Economic pressures on mangers to focus only on profits will remain, but, at least, the expressive effect of federal law will point in the other direction.

Yet another option is a statute that uses the mandatory fiduciary duties in the Accountable Capitalism Act as a benchmark and then requires companies choosing a shareholder primacy theory instead to disclose that fact and explain the reasons why. Such "comply or explain" rules are a common regulatory approach in the U.K., Germany, and other jurisdictions that set standards that companies either comply with or provide an explanation for non-compliance.[182] A few corporations might choose to opt out of aspects of public benefit in unique circumstances. For example, a corporation with many of its shareholders or employees outside the United States might opt out of some of the "America First" language that this Article suggests. However, if the words of the Business Roundtable about the public benefit purpose of corporations[183] are a good indicator of management opinion, few corporations would opt out of public benefit altogether.

Congress also may want to "grandfather in" some existing state corporate law or exempt from federal preemption specific transactions where shareholders arguably should be afforded primacy. These transactions include, for example, the sale of a company, mergers, tender offers, takeover defenses, and change in control transactions, in which existing state corporate law sometimes imposes upon directors and officers special duties to shareholders.[184] On the other hand, non-shareholder interests also can be

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[182] *See* Jain MacNeil & Irene-Marie Esser, *The Emergence of 'Comply or Explain' as a Global Model for Corporate Governance Codes*, 33 EUR. BUS. L. REV. 1 (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3775736 [https://stanford.box.com/s/bkkkr54xqet7lk8dbugfa2lwtvdh01gl] (analyzing different explanations for the diffusion of "comply or explain" codes around the world). This more flexible approach has been contrasted with the rigid rules prevalent in U.S. regulations such as the Sarbanes-Oxley Act of 2002. *See* George Hadjikyprianou, *The Principle of 'Comply or Explain' Underpinning the UK Corporate Governance Regulation: Is There a Need for a Change?*, 7 CORP. GOV. L. J. (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract _id=2690687 [https://Stanford.box.com/s/xxzmnr78q5e64cobo1bqqqv3ioizhxpx] (discussing criticisms of the "comply or explain" approach, which may not always achieve its stated objectives, and how regulatory interventions can mitigate these shortcomings while preserving the flexibility of the comply or explain regimes).

[183] *See* BUS. ROUNDTABLE, *supra* note 85.

[184] *See* the brief discussion of Delaware's approach to "business judgment" in corporate takeovers in Part II of this Article.

particularly important in these contexts, particularly if a transaction results in job loss or the departure of valuable technology or other resources from the Country. Conservatives in Congress are very likely to be concerned about mergers involving Chinese companies and, perhaps, also companies from certain countries in the Middle East. This is not an article on corporate mergers and acquisitions law, and it will not explore this topic further. Congress may want to give change-in-control transactions more specific treatment than the general principles set forth in the Accountable Capitalism Act.

Perhaps the strongest objection to a federal corporate purpose statute is that it would represent another step toward federal corporate law. However, it would not be the first step in this direction. The Sarbanes-Oxley Act of 2002 (SOX), signed by President Bush, already intruded in very specific ways into the internal affairs of publicly traded companies,[185] and the Dodd-Frank Act of 2010 imposed additional federal requirements, particularly in the financial services area.[186] The old paradigm, in which state corporate law governed fiduciary duties and internal affairs while federal securities law only required disclosure, has long since passed.[187] Corporate governance now blends the fiduciary and other requirements of state corporate law with the requirements of federal law, particularly for publicly traded companies. The Accountable Capitalism Act would represent another step in this direction but be far less intrusive than either SOX or Dodd-Frank.

While the Accountable Capitalism Act provides that the federal charter exists side by side with the charter from the corporation's state of organization, some conservative might worry about the federal charter provision and the possibility that future federal corporate law could expand to preempt most state corporate law. Corporate managers might worry that federal corporate law would intrude further into matters such as election and removal of directors and compensation of directors and officers. If this provision of the Accountable Capitalism Act cannot pass in Congress, a streamlined bill might dispense with the federal charter, as well as the federal Office of United States Corporations in the Commerce Department, and simply mandate that large corporations engaged in interstate commerce have a corporate purpose beyond shareholder primacy and fiduciary duties of directors, in language like that in Senator Warren's bill.

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[185] Lisa M. Fairfax, *Sarbanes-Oxley, Corporate Federalism, and the Declining Significance of Federal Reforms on State Director Independence Standards*, 31 OHIO N.U. L. REV. 381 (2005).

[186] *See* Marc I Steinberg, *The Federalization of Corporate Governance—An Evolving Process*, 50 Loy. U. Chi. L. J. 539 (2019) (discussing additional federalization of corporate fiduciary duty law after the Dodd-Frank Act of 2010).

[187] *Id.*

Proposals for federal corporate charters have been made for decades going back to former SEC Chairman William Cary's proposal of a federal corporate law as an alternative to what he perceived to be a race to the bottom in fiduciary duties of directors with Delaware having the most lenient corporate law in the Country.[188] Predictably, there has been pushback against the idea of a federal corporate charter.[189] Regardless of which side is right in this debate, the federal corporate charter is not necessary to achieve the purpose of the Accountable Capitalism Act.

The main point of this Article is that political conservatives are concerned about corporate profit-maximizing at the expense of other values. A federal mandate that requires directors and officers to consider those other values, in addition to profit-making goals, could earn broad political support, particularly if values important to conservatives are among those specifically referenced in a law such as the Accountable Capitalism Act.

## CONCLUSION

The fundamental premise of Senator Warren's Accountable Capitalism Act – that corporations must be accountable to the public benefit –has support in both political parties. Republican voters are alienated by corporations that ignore the public benefit as are Democrats and independents, even if there are different visions of what the public benefit is. Restraining the economic and military power of China, defending Israel, protecting religious liberty, and resisting organized boycotts of "red states" or of politically conservative businesses are at least as important to conservatives as corporate profits. The younger generation of conservatives is increasingly concerned about climate change. Moral values are important to many conservatives, and the nihilistic pursuit of profits as an end is contrary to their professed values.

Both liberals and conservatives are angry at the perceived reckless conduct of profit-maximizing corporations. The problem can be resolved in one of two ways. First, liberals and conservatives can use whatever political power they amass in elections and judicial appointments to force corporations to adhere to their respective visions of the public benefit. This could result in a winner-take-all scenario if one party or the other gains and maintains control over all three branches of the federal government. The more likely result is a divergent patchwork of corporate conduct regulations in states with very different visions of the public benefit. The fiduciary duties of directors could be very different for corporations doing business in Alabama than in

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[188] *See* William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L. J. 663 (1974).

[189] *See* Frank H. Easterbrook, The Race for the Bottom in Corporate Governance 95 VA. L. REV. 685 (2009).

California, and the law of the state of incorporation, whether Delaware or elsewhere, could become increasingly irrelevant as states seek to regulate corporations doing business within their borders.

The second alternative is for Congress to give corporate managers a chance to include the public benefit in their corporate purpose and then voluntarily take concrete steps to advance the public benefit. The Accountable Capitalism Act or similar legislation would counterbalance the intense profit maximization pressure managers feel from some investors, analysts, academics, the media, and, perhaps, even judges threatening corporations with the rhetoric of the shareholder primacy norm.

This second alternative – allowing and encouraging corporate managers to address problems on their own without government interference – should be more palatable for conservatives. If this effort fails, it is already clear that politicians of both political parties are ready to confront corporations whose conduct conflicts with their political agenda, wielding the club of regulation, taxation, or whatever else is needed to bring corporations to heel.

How much a corporate accountability law will change corporate conduct is speculative and will turn, in part, on the strength of the language in the version of the bill that is enacted. A bill acceptable to conservatives will leave the balancing of profits and other priorities to the discretion of corporate officers and directors and not allow judges to determine if directors and officers have adequately considered the public benefit. Such a law, through exercise of federal preemption power, however, will prevent state courts in Delaware or other jurisdictions from interfering in corporate governance under the rubric of the shareholder primacy norm. Expansion of the *E-Bay* doctrine in Delaware or other states will be averted.

The intention of such a law is that corporate conduct will adjust so that additional government regulation can be avoided. The existing business judgment rule in corporate law should remain largely intact with the proposed new federal law giving directors and officers a "nudge"[190] toward the public benefit and away from profit maximization. For anyone who favors free markets and less regulation, that should be a good thing.

To preserve traditional understandings of corporate purpose, Congress should pass the Accountable Capitalism Act or a similar bill. Conservatives in Congress should not oppose it, but instead propose amendments to make sure their priorities are included in the public benefit that the bill makes a core part of corporate purpose.

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[190] *See generally* RICHARD THALER & CASS SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2009) (analyzing ways in which regulatory regimes can incentivize socially beneficial conduct without mandating it).