THE VIRTUOUS CORPORATION: ON CORPORATE SOCIAL MOTIVATION AND LAW

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Above and beyond their traditional financial roles, contemporary corporations increasingly assume a normative role, promoting social agendas. The myriad normative roles assumed by the corporation, from profit-centered corporate goodness to environmental and human rights corporate agendas and to corporate philanthropy, comprise an emerging corporate social identity. This article asks what induces corporations to pursue social agendas and provides an initial taxonomy for corporate social motivation showing that the incentives to pursue normative corporate conduct are often rooted in the business purpose itself. Central policy challenges are discussed, outlining the promise and the peril of emerging corporate social identities.

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INTRODUCTION

Above and beyond their traditional financial roles, contemporary corporations are increasingly assuming a normative role, promoting social agendas well beyond their organizational boundaries. According to 2015 sustainability reports, the normative outreach of contemporary S&P 500 corporations is growing with exuberance, notwithstanding their ultimate commitment to shareholder value. Among other social causes, American corporations now tackle chronic malnutrition and hunger, fight disease pandemics, mitigate gender inequality, and promote human rights.[1]

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1. *See, e.g.*, Rita Vilkė et al., *Gender and Corporate Social Responsibility: Big Wins for Gender and Society?*, 156 PROCEDIA - SOCIAL AND BEHAVIORAL SCIENCES 198, 198-202 (2014) (discussing the rise of corporate action in addressing gender issues); Alistair Barr, *Google's "Don't Be Evil" Becomes Alphabet's "Do The Right Thing"*, WALL ST. J.: DIGITS (Oct. 2, 2015), http://blogs.wsj.com/digits/2015/10/02/as-google-becomes-alphabet-dont-be-evil-vanishes/ [https://perma.cc/MFD3-FX7E] (discussing Alphabet Inc.'s motto "Do the Right Thing" and its corporate ancestor "Don't be Evil"); Deepa Seetharaman & Anupreeta Das, *Mark Zuckerberg and Priscilla Chan to Give 99% of Facebook Shares to Charity*, WALL ST. J. (Dec. 2, 2015), http://www.wsj.com/articles/mark-zuckerberg-priscilla-chan-to-give-99-of-facebook-stock-to-philanthropy-1449005878 [https://perma.cc/3Z4X-B6UP] (discussing Mark Zuckerberg and Priscila Chan's recent pledge to create a new "foundation that would initially focus on 'personalized learning, curing disease, connecting people and building strong communities'" with 99% of their Facebook shares); Rachel Soares et al., *Gender and Corporate Social Responsibility: It's a Matter of Sustainability*, CATALYST, 2011, 1-3 (exploring the connection between corporations' treatment of gender issues and sustainability); *Citizensship 2014 Performance Summary*, DISNEY 4-7, https://ditm-twdc-us.storage.googleapis.com/FY14-Performance-Summary.pdf [https://perma.cc/Q9WE-KPWU] (last visited Feb. 7, 2017) (summarizing Disney's efforts to have a positive corporate impact); *Community: Creating Pathways to Opportunity*, STARBUCKS,

Promotion of social agendas by corporations is one of the greatest controversies of corporate law.[2] This paper exclusively focuses on a narrower mission: to suggest an initial taxonomy of incentives underlying corporate social agendas. Incentive analyses for corporate social agendas may shed light on the potential merit, and possible risks, of corporate social identities, to be further explored in future works.

Social values are embedded in every corporate decision. Corporations have always generated norms within their organizational boundaries, and social values are embedded in every corporate decision, from employment policies to customer service and business development.[3] Yet, the social agendas assumed by contemporary corporations are open, dynamic, and diverse, stretching far beyond the corporate organizational boundaries and aiming to influence society as a whole.[4] The myriad normative roles

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http://www.starbucks.com/responsibility/community [https://perma.cc/WYF2-UN8Y] (last visited Jan. 26, 2017) (discussing Starbucks' declaration of corporate conscience); *Foundation and Corporate Responsibility*, BRISTOL-MYERS SQUIBB, CORPORATE RESPONSIBILITY REPORT 1 (2014), http://www.bms.com/Documents/foundation/BMS-Corporate-Responsibility-Report.pdf [https://perma.cc/D2RC-579F] (outlining Bristol-Myers Squibb's 2014 corporate social responsibility report and its mission to fight disease); *Ikea FY15 Group Sustainability Report*, IKEA 22-48, http://www.ikea.com/ms/en_US/img/ad_content/2015_IKEA_sustainability_report.pdf [https://perma.cc/5A6R-YPVQ] (last visited Feb. 7, 2017) (outlining Ikea's environmental sustainability efforts).

2. *See, e.g.,* Christopher Geczy et al., *Institutional Investing When Shareholders Are Not Supreme*, 5 HARV. BUS. L. REV. 73, 75-78 (2015) (analyzing the relationship between high fiduciary duty institutions and benefit corporations). *See generally* Leo E. Strine, Jr., *The Dangers of Denial: The Need for A Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761 (2015) (examining a pragmatic view of the effects of Delaware corporate law on corporate responsibility).

3. *See* Mark DeWolfe Howe, *The Supreme Court, 1952 Term*, 67 HARV. L. REV. 91, 91 (1953) (arguing that "government must recognize that it is not the sole possessor of sovereignty, and that private groups within the community are entitled to lead their own free lives and exercise within the area of their competence an authority so effective as to justify labeling it a sovereign authority."). Consider the norm-generating role taken by corporations in employee training. The organization is a sphere of law and sovereignty, and institutional boundaries are used to define the breadth of corporate authority. *See generally* Shlomit Azgad-Tromer, *The Case for Consumer-Oriented Corporate Governance, Accountability and Disclosure,* 17 U. PA. J. BUS. L. 227 (2015) (discussing the need for corporate disclosure standards for businesses offering products or services to the public to enhance corporate informational accountability).

4. *See* Fabrizio Cafaggi & Katharina Pistor, *Regulatory Capabilities: A Normative Framework for Assessing the Distributional Effects of Regulation* (Columbia Law Sch. Pub. Law and Legal Theory Working Grp., Working Paper No. 13-354, July 5, 2013), http://ssrn.com/abstract=2290218 (providing a theoretical discussion of self-determined norms and regulatory capability); *see also* Azgad-Tromer, *supra* note 3 (discussing further examples of these agendas); Howe, *supra* note 3 (providing examples of corporate social

assumed by the corporation, from profit-centered corporate goodness to environmental and human rights corporate agendas and to corporate philanthropy, comprise an emerging corporate social identity. The article critically explores the strategic incentives underlying corporate social identities, showing that the social engagement of corporations is often rooted in the business purpose itself,[5] and serving to satisfy the normative taste of various stakeholder constituencies, such as responsible investors,[6] engaged employees,[7] virtuous managers,[8] and conscious consumers.[9] A strategic analysis of incentives for corporate social motivation may serve to create a better architecture of corporate law, focusing on variances of corporate behavior that are less likely to be voluntarily addressed.

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agendas);.

5. For a survey of strategic value of corporate social responsibility, *see generally* Michael E. Porter & Mark R. Kramer, *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, HARV. BUS. REV., Dec. 2006, at 1 [hereinafter *Strategy*] (examining how businesses can be financially successful and socially responsible); Michel E. Porter & Mark R. Kramer, *The Competitive Advantage of Corporate Philanthropy*, HARV. BUS. REV., Dec. 2002, at 1 [hereinafter *Advantage*] (describing the add-value of corporate social responsibility).

6. Anna Prior, *Investors Follow Their Conscience,* WALL ST. J. (July 17, 2015), http://www.wsj.com/articles/investors-follow-their-conscience-1437154588 [https://perma.cc/3KRX-DHCF].

7. *See generally* Christopher Marquis et al., Note, *Corporate Social Responsibility and Employee Engagement*, HARV. BUS. SCH. ORGANIZATIONAL BEHAVIOR UNIT CASE NO. 410-138 (2010), http://ssrn.com/abstract=2038012 [https://perma.cc/SH5D-3ND5] (analyzing the link between CSR and employee engagement); Caroline Flammer & Jiao Luo, Corporate Social Responsibility as an Employee Governance Tool: Evidence from a Quasi-Experiment (Nov. 2015) (unpublished manuscript), http://ssrn.com/abstract=2380336 [https://perma.cc/6WFN-B9QP] (examining whether companies employ corporate social responsibility to improve employee engagement and to mitigate adverse workplace behavior).

8. *See, e.g.*, Ronald W. Masulis & Syed Walid Reza, *Agency Problems of Corporate Philanthropy* 1 (ECGI, Finance Working Paper No. 370, 2014), http://ssrn.com/abstract=2234221 [https://perma.cc/W5K4-X8J5] (stating that corporate giving can reflect a CEO's preferences).

9. C.B. Bhattacharya, Diogo Hildebrand & Sen Sankar, *Corporate Social Responsibility: A Corporate Marketing Perspective*, 45 EUR. J. MKTG. 1353, 1353-1364 (2011); C.B. Bhattacharya, N. Craig Smith & David Vogel, *Integrating Social Responsibility and Marketing Strategy: An Introduction*, 47 CAL. MGMT. REV. 6, 6-7 (2004); Amihai Glazer et al., *Firms' Ethics, Consumer Boycotts, and Signalling,* 26 EUR. J. POL. ECON. 340, 340-350 (2010); Jill Gabrielle Klein et al., *Why We Boycott: Consumer Motivation for Boycott Participation*, 68 J. MKTG. 92, 92-109 (2004); Jeff Fromm, *10 Things Millennial CEOs will Reimagine in America*, FORBES (Apr. 8, 2014), http://www.forbes.com/sites/onmarketing/2014/04/08/10-things-millennial-ceos-will-reimagine-in-america/ [https://perma.cc/ED6C-3BTX] (stating that "[m]illennials expect brands to give back, be authentic and transparent").

Contemporary corporations celebrate their organizational conscience[10] and actively promote social values in their normal business practice. The business of corporate America is not simply business, it is virtuous business. "If you want me to do things only for ROI [Return on Investment] reasons," advised Apple's CEO Tim Cook in defense of Apple's environmental values, "you should get out of this stock."[11] This dash for virtue is induced and reported through sustainability reporting, thereby creating a transparent environment for non-financial corporate performance.[12] Sustainability reporting encourages management to set goals, measure performance, and manage organizational change in a variety of social and moral issues.[13] G4 standards issued by the Global Reporting Initiative (GRI) set a format of recommended disclosures on stakeholder engagement, ethics and integrity, environmental and social management approaches, labor practices, decent work conditions, product responsibility, human rights and more.[14] By 2017, it is highly customary for public corporations to disclose sustainability information;[15] more than 6,000 companies are now issuing sustainability reports,[16] with 499 of the S&P

10. For example, *see Community: Creating Pathways to Opportunity*, STARBUCKS, http://www.starbucks.com/responsibility/community [https://perma.cc/N924-DUZ2] (last visited Jan. 27, 2017) (showing an example of a company publicly declaring corporate responsibility).

11. Geczy et al., *supra* note 2, at 75; Leif Johnson, *Angry Tim Cook Tells Climate Change Skeptic to Get Out of Apple Stock*, WEST MICH. DESIGN AND TECH. SOLUTIONS (Mar. 3, 2014), http://www.wmtds.com/angry-tim-cook-tells-climate-change-skeptic-to-get-out-of-apple-stock-2/ [https://perma.cc/J7CT-XUX5].

12. Mandating the disclosure of non-financial information about corporate performance in environmental, social and governance issues has become, by 2016, widespread, including countries such as the U.K., Denmark, South Africa, China, Malaysia, Brazil, Hong Kong, and India. A recently published study suggests that mandatory sustainability disclosures are associated with increases in firm valuations, as reflected in Tobin's Q. *See* Ioannis Ioannou & George Serafeim, *The Consequences of Mandatory Corporate Sustainability Reporting: Evidence from Four Countries 2-3* (Harvard Business School, Research Working Paper No. 11-100, 2014), http://ssrn.com/abstract=1799589 [https://perma.cc/HC79-25U5] (describing the countries that require non-financial corporate reports).

13. *See* GLOBAL REPORTING INITIATIVE, *Preface to* G4 SUSTAINABILITY REPORTING GUIDELINES (2015), https://www.globalreporting.org/resourcelibrary/GRIG4-Part1-Reporting-Principles-and-Standard-Disclosures.pdf [https://perma.cc/6NW2-FJJW] (issuing guidelines to encourage corporate management to adopt sustainable initiatives).

14. GLOBAL REPORTING INITIATIVE, G4 SUSTAINABILITY REPORTING GUIDELINES 9, 20, 25, 43 (2015).

15. Shlomit Azgad-Tromer, *Corporations and the 99%: Team Production Revisited,* 21 FORDHAM J. CORP. & FIN. L. 163, 164, 194 (2016).

16. *Id*. at 194 (citing *Integrated Financial and Sustainability Reporting in the United States*, INVESTOR RESPONSIBILITY RESEARCH INSTITUTE (2013), http://irrcinstitute.org/pdf/FINAL_Integrated_Financial_Sustain_Reporting_April_2013.pdf

500 companies having made a sustainability disclosure or linked financial performance with a sustainability initiative.[17]

Corporations often adhere to the G4 format in reporting about their social impact and sustainability, but sometimes they report in their own format, deciding for themselves what matters in the sphere of their social doing and what activities should be classified as socially responsible.[18] Nestle's voluntary disclosure of November 2015, which reveals the fact that slavery and forced labor are present in its seafood supply chain, is a good example. Nestle has voluntarily committed to employ protective measures in its global operations and to impose stricter standards on its suppliers.[19] Kering is another good example: in May 2015, it published an open-sourced environmental profit and loss account, voluntarily measuring its environmental footprint in its own operations and across its supply chains, and valuing it in monetary terms.[20]

Further social fuel is added to the corporate arena through alternative purpose firms, such as the benefit corporation, which are officially committed to social goals, despite potential conflicts with profit maximization.[21] Finally, corporations promote normative agendas through philanthropy; according to statistics released by the Committee Encouraging Corporate Philanthropy's (CECP) 2015 *Giving in Numbers* report, median total giving as a percentage of pre-tax profit was one percent, both in 2012 and in 2014.[22]

) [https://perma.cc/C22A-WTVD].

17. *Id*.

18. *See Ikea FY15 Group Sustainability Report*, *supra* note 1 (making it a business priority to have a positive impact on the planet).

19. Martha Mendoza, *Nestlé Confirms Labor Abuse Among its Thai Seafood Suppliers*, THE SEATTLE TIMES (Nov. 28, 2015), http://www.seattletimes.com/business/nestle-confirms-labor-abuse-among-its-thai-seafood-suppliers-2/ [https://perma.cc/J62W-BFDU]; *Nestlé Admits to Forced Labour in its Seafood Supply Chain in Thailand*, THE GUARDIAN (Nov. 24, 2015), https://www.theguardian.com/global-development/2015/nov/24/nestle-admits-forced-labour-in-seafood-supply-chain [https://perma.cc/6Z9M-9R62].

20. Kering is a corporate group in apparel and accessories markets, where it develops and maintains luxury sport and lifestyle brands. Kering is present in more than 120 countries and generated revenues of €10 billion in 2014 with more than 37,000 employees at year end. The Kering stock is listed on Euronext Paris. *See generally Environmental Profit & Loss (E P&L),* KERING (2013), http://www.kering.com/sites/default/files/document/kering_epl_methodology_and_2013_group_results_0.pdf [https://perma.cc/5FGH-PPQF].

21. Alicia E. Plerhoples, *Delaware Public Benefit Corporations 90 Days Out: Who's Opting In?*, 14 U.C. DAVIS BUS. L.J. 247, 247-280 (2014); Hans Rawhouser, Michael E.Cummings & Andrew Crane, *Benefit Corporation Legislation and the Emergence of a Social Hybrid Category*, 57 CAL. MGMT. REV. 13, 13-35 (2015).

22. CECP, Coalition Encouraging Corporate Philanthropy, is a coalition of CEOs "united in the belief that societal improvement is an essential measure of business

Part I of this article provides an initial taxonomy of incentives for corporate social motivation. Corporations are induced to normative social conduct by the strategic demand of their stakeholder constituencies.[23] Management's ideology and social values, often labeled in the literature as agency costs,[24] induce corporations to social conduct in compliance with management's values. Impact and responsible investors demand social performance and create incentives for normative corporate conduct.[25] Employees are better engaged, easier to recruit and have lower turnover and higher productivity when working for normative corporate employers.[26] Normative corporate conduct may also increase revenue, as consumers are more loyal to virtuous brands.[27] Finally, corporations may

performance" and whose mission is to "create a better world through business". *Giving in Numbers Report*, CECP 10 (2015), http://cecp.co/measurement/benchmarking-reports/giving-in-numbers.html [https://perma.cc/J33Q-67CF].

23. For a survey of strategic values of corporate social responsibility, *see generally* Porter & Kramer, *Strategy*, *supra* note 5, at 78; *see also,* Michel E. Porter & Mark R. Kramer, *Creating Shared Value,* HARV. BUS. REV., Jan.-Feb. 2011, at 89; Michael E. Porter & Mark R. Kramer, *The Competitive Advantage of Corporate Philanthropy,* HARV. BUS. REV., Dec. 2002, at 56.

24. Howe, *supra* note 3; Azgad-Tromer, *supra* note 3; *see also* Part II A *infra* (discussing the central policy challenges regarding corporate responsibility under soft corporate governance). For a different view, *see* Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 560, 565 (2016) (describing management private values as idiosyncratic visions).

25. *See* Part II B *infra* (discussing how corporate shareholders can influence companies to adopt high publicity social mindfulness campaigns). Virtue and goodness have also been suggested to enhance shareholder financial value. *See also generally* Philipp Krüger, *Corporate Goodness and Shareholder Wealth,* J. FIN. ECON. (forthcoming) (discussing the positive shareholder reaction to deliberate corporate social responsibility aimed at improving investor relations). Impact investments aim at making a beneficial social or environmental impact alongside a financial return. *See* Jacob Gray et al., *Great Expectations: Mission Preservation and Financial Performance in Impact Investing*, WHARTON UNIV. OF PENNSYLVANIA: SOCIAL IMPACT INITIATIVE 3-4 (2015), *https://socialimpact.wharton.upenn.edu/wp-content/uploads/2016/09/Great-Expectations-Mission-Preservation-and-Financial-Performance-in-Impact-Investing.pdf* [https://perma.cc/3MS5-2JU3] (examining to what extent these two objectives can coexist).

26. BRADLEY K. GOOGINS, PHILIP H. MIRVIS & STEVEN A. ROCHLIN, BEYOND GOOD COMPANY: NEXT GENERATION CORPORATE CITIZENSHIP 149 (2007); Marquis et al., *supra* note 7; John Charlton, *Blue-Chip Companies Seek Non-Cash Rewards*, PERSONNEL TODAY (Nov. 5, 2009), http://www.personneltoday.com/hr/blue-chip-companies-seek-non-cash-rewards/ [https://perma.cc/7U4S-DQ5N] (cited in Marquis et al., *supra* note 7).

27. C.B. BHATTACHARYA ET AL., LEVERAGING CORPORATE RESPONSIBILITY: THE STAKEHOLDER ROUTE TO MAXIMIZING BUSINESS AND SOCIAL VALUE (2011); C.B. Bhattacharya & Sankar Sen, *Doing Better at Doing Good: When, Why, and How Consumers Respond to Corporate Social Initiatives,* 47 CAL. MGMT. REV. 9, 9-24 (2004). For analysis of customer values of corporate social responsibility, see John Peloza & Jingzhi Shang, The Conference Board Governance Center, *What Business Leaders Should Know: Investing in*

engage in corporate virtue as a political strategy in order to avoid regulation by signaling compliance with social norms, or as a manipulation tactic aimed at achieving a desired regulatory result.[28]

Part II of this article provides a roadmap for the central policy challenges to the emergence of corporate social identities.[29] Contemporary corporations have become norm-generating agents, creating non-binding rules for social activity and normative impact.[30] The corporation's norm-generating role is a decentered process, where stakeholders participate in a dynamic and systemic integration of values into a voluntary,[31] self-determined corporate social identity.[32] The resulting reflexive network of corporate social identities is proliferated by soft global standardization, setting normative and reporting guidelines for corporate social conduct such as the Global Reporting Initiative (GRI), the Sustainable Accounting Standards Board (SASB), the UN Global Conduct Principles, the OECD Guidelines for Multinational Enterprises, and ISO 26000.[33] The rise of corporate social motivation suggests a shift from substantive corporate law towards a decentered and reflexive network of diverse corporate social

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CSR to Enhance Customer Value, 3 DIR. NOTES SERIES 1-8 (Feb. 2011) (discussing what customers most value with corporate social responsibility and how it affects profit).

28. David P. Baron, *Private Politics, Corporate Social Responsibility, and Integrated Strategy,* 10 J. ECON. & MGMT. STRATEGY 7, 7-45 (2001); Roland Bénabou & Jean Tirole, *Individual and Corporate Social Responsibility*, 77 ECONOMICA 1, 2 (2010).

29. *See generally* Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice,* 61 STAN. L. REV. 571, 579 (2008) (explaining that the term "soft law" usually refers to "a rule issued by a lawmaking authority that does not comply with . . . formalities . . . that are necessary for the rule to be legally binding").

30. *See* Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT'L L.J. 229, 231 (2015) (discussing this phenomenon in an international context).

31. *See generally* Strine, *supra* note 2 (explaining that the protection of non-investor constituencies within corporation law itself is not currently available under Delaware law, with the one exception of the benefit corporation, while other constituencies are protected through externality regulations).

32. *See generally* Cafaggi & Pistor, *supra* note 4 (discussing the theory of self-determined norms and regulatory capabilities).

33. *See* GLOBAL REPORTING INITIATIVE, *supra* note 14; *Guidelines for Multinational Enterprises*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD) (2011), http://www.oecd.org/corporate/mne/ [https://perma.cc/DB6D-JPZQ]; *ISO 26000 – Social Responsibility*, INTERNATIONAL ORGANIZATION FOR STANDARDIZATION (2014), http://www.iso.org/iso/home/standards/iso26000.htm [https://perma.cc/7L7M-G3XD]; SUSTAINABILITY ACCOUNTING STANDARDS BOARD (SASB), http://www.sasb.org/ [https://perma.cc/RAE8-FHJL]; *The Ten Principles of the UN Global Compact*, UNITED NATIONS, https://www.unglobalcompact.org/what-is-gc/mission/principles [https://perma.cc/QTC4-HZ6S] (last visited Jan. 29, 2017) (all setting forth their standards, as non-governmental organizations, for sustainable best practices for multi-national corporations).

identities, governed by soft global standardization.[34]

The normative quest makes corporate performance vague and subject to manipulation.[35] Law can be specific, whereas morality is ultimately vague, leaving room for self-interested interpretation.[36] The rise of corporate social identities is thus the rise of what Katharina Pistor calls "Corporate Legal Particularism," a self-contained legal order that serves particular interests.[37] Corporate social identities do not necessarily align with social normative preferences. In particular, distributional preferences of corporate leadership do not necessarily align with those channeled through the tax system according to social interest,[38] as demonstrated by the Corporate Social Responsibility (CSR) Tax straddle. Indeed, social norms and corporate social identities may serve as normative substitutes. The rise of corporate social identities may thus pose a challenge to the democratic ideal.

I. STRATEGIC ANALYSIS OF CORPORATE SOCIAL MOTIVATION

Why do corporations engage in social causes? What drives corporate normative social conduct? This part of the article provides a taxonomy of corporate incentives to engage in normative agendas, suggesting that corporate social identities emerge to cater the demand for social agendas introduced by corporate stakeholder constituencies: investors, employees, and consumers, as well as by the management's private values and idiosyncratic visions.[39] Finally, normative corporate social conduct may serve as a political strategy promoting the corporation's core business missions.

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34. *See, e.g.*, *id*.

35. *See* Steven Davidoff Solomon, *Idealism That May Leave Shareholders Wishing for Pragmatism,* N.Y. TIMES: DEALBOOK (Oct. 13, 2015), http://www.nytimes.com/2015/10/14/business/dealbook/laureate-education-for-profit-school-public-benefit.html [https://perma.cc/UKR3-94YA] (discussing the vague corporate goals of some public benefit corporations and the questions this raises from shareholders).

36. *See* Steven Shavell, *Law Versus Morality as Regulators of Conduct*, 4 AM. L. & ECON. REV. 227, 242-43 (2002) (describing how the flexibility of soft corporate governance often makes corporate social conduct disappointing, due to different conceptions of good by various parties).

37. Katharina Pistor, Corporate Legal Particularism (June 17, 2016) (unpublished paper for "Forms of Pluralism and Democratic Constitutionalism" conference in Paris) (on file with author).

38. Bhattacharya, Smith, & Vogel, *supra* note 9; Bhattacharya, Hildebrand, & Sankar, *supra* note 9; Glazer et al., *supra* note 9; Klein et al., *supra* note 9.

39. *Why is a Benefit Corp Right for Me?*, BENEFIT CORPORATION, http://benefitcorp.net/businesses/why-become-benefit-corp [https://perma.cc/89SD-WDXR] (last visited Jan. 29, 2017) (listing reasons to incorporate as a benefit corporation).

A. *Management Values: Idiosyncratic Visions and Agency Costs*

When corporations engage in social values, managerial leadership gets the privilege of directing corporate social contribution towards its own normative goals and visions.[40] Managers and controlling shareholders have the prerogative to pursue their subjective values and normative preferences as part of their idiosyncratic visions for the corporation.[41] Idiosyncratic visions do not have to concern an innovation or invention: as long as the corporate leadership, management, controlling shareholders or entrepreneurs have a plan they subjectively believe would lead the corporation to merit, they have an idiosyncratic vision for corporate leadership. The identity of the beneficiaries of corporate social agendas may naturally be affected by management's private interests and values, as embedded in the corporate leadership.

Several researchers argue that corporate social conduct is a manifestation of managerial agency problems inside the firm, enhancing management's value at the expense of shareholders.[42] Researchers found empirical support for three key indicators of an agency motive for corporate social conduct.[43] First, increasing insider ownership decreases measures of firm goodness.[44] Firms with moderate levels of insider ownership cut goodness by more than firms with low levels (where the tax cut has no effect) and high levels (where agency is less of an issue).[45] Second, improved governance reduces corporate goodness. A regression discontinuity design of close votes around the fifty percent cut-off finds that passage of shareholder governance proposals leads to slower growth in goodness.[46] Third, the use of corporate jets is correlated with corporate

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40. *See generally* Donald V. Moser & Patrick R. Martin, *A Broader Perspective on Corporate Social Responsibility Research in Accounting*, 87 ACCT. REV. 797, 797-806 (2012) (discussing new research methods for corporate social responsibility).

41. *See* Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 560, 565-66 (2016) (describing controlling shareholders as entrepreneurs instead of the prevailing view that they act to the detriment of minority shareholders).

42. *See* Krüger, *supra* note 25, at 5-6 (discussing the effects of corporate social responsibility on the stock market). *See also* Bénabou & Tirole, *supra* note 28, at 1-19 (providing a commentary on agency issues relating to CSR); Ing-Haw Cheng, Harrison Hong & Kelly Shue, *Do Managers Do Good with Other People's Money?* 1-2 (Fama-Miller Working Paper, 2014), http://ssrn.com/abstract=1962120 [https://perma.cc/QH6D-CGCA] (discussing similar agency motives relating to corporate social responsibility).

43. *Id*.

44. Cheng, Hong & Shue, *supra* note 42, at 2-4.

45. *Id*.

46. *Id*.

goodness.[47] Other research indicates that as giving increases, shareholders reduce their valuation of cash holdings, suggesting corporate giving is a manifestation of agency conflicts that reduce firm value.[48] Further, dividend increases are also associated with reduced corporate giving.[49] Corporate giving is typically associated with CEO charity preferences, indicating that firm donations advance CEO interests and studies suggest that the misuse of corporate resources reduces firm value.[50]

B. *Impact and Responsible Investments*

"Investors follow their conscience," says a *Wall Street Journal* headline from July 2015,[51] referring to moral trends of investments, actively seeking to boost investors' portfolios with virtuous corporations. This "can encompass everything from boosting worker retention through fair pay and good working conditions to preserving natural resources and having a minimal impact on the environment."[52] Indeed, investors pay increasing attention to non-financial social corporate performance and sustainability matters.[53] Asset managers seeking to promote moral values are now so common that research firms dedicated to social and moral assessment provide resources for "environmental, social and governance (ESG) research."[54] According to the research firm Morningstar, as of 30

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47. *Id.*

48. *See generally* Ronald W. Masulis & Syed Walid Reza, *Agency Problems of Corporate Philanthropy*, REV. FIN. STUD. 4, (forthcoming) (European Corporate Governance Institute, Working Paper No. 370, 2014) (finding that corporate giving decreases firm value).

49. *Id.*

50. *Id.* at 2.

51. Prior, *supra* note 6.

52. *Id.*

53. *See generally* Sarah Dadush, *Regulating Social Finance: Can Social Stock Exchanges Meet the Challenge?*, 37 U. PA. J. INT'L. L. 139, 139-230 (2015) (discussing the merits of investing in enterprises that cater to poor and underserved populations); CENTER FOR POLITICAL ACCOUNTABILITY & ZICKLIN CENTER FOR BUSINESS ETHICS AT THE WHARTON SCHOOL OF THE UNIVERSITY OF PENNSYLVANIA, THE 2015 CPA-ZICKLIN INDEX OF CORPORATE POLITICAL DISCLOSURE AND ACCOUNTABILITY 8 (2015) (finding that increasingly large numbers of corporations have chosen to disclose their political spending for the sake of ethical transparency); GOVERNANCE & ACCOUNTABILITY INSTITUTE, INC., SUSTAINABILITY — WHAT MATTERS? 3 (2014) (stating similar findings); KPMG LLP, CURRENTS OF CHANGE: THE KPMG SURVEY OF CORPORATE RESPONSIBILITY REPORTING 2015 28-30 (2015) (showing that an increasingly large portion of companies are choosing to engage in corporate responsibility reporting).

54. *About Us*, EIRIS, http://www.eiris.org/about-us/ [https://perma.cc/7VDB-M6W3] (last visited Jan. 30, 2017) (identifying itself as a "leading global provider of environmental, social and governance (ESG) research, empowering responsible investors with independent

June 2015, investors have poured nearly $8.2 billion into socially minded stock and bond funds since 2013.[55] Total assets in such funds have grown roughly 59% over the past five years, to $72.6 billion, while assets in all mutual funds have risen 52% to $12.5 trillion.[56] Here is an illustration of assets flowing to mutual funds with a socially responsible mandate in recent years:

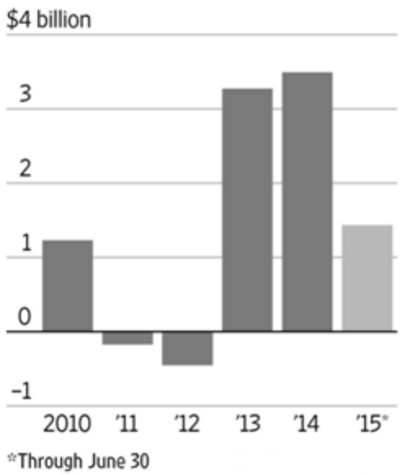

ILLUSTRATION 1 :ASSETS FLOWING INTO MUTUAL FUNDS WITH A SOCIALLY RESPONSIBLE MANDATE[57]

Socially responsible investments are generally motivated by normative considerations, yet some empirical evidence suggests that they have supplemental economic merit.[58] To list a few examples: a higher CSR score is on average associated with lower idiosyncratic risk,[59] a lower probability of financial distress,[60] lower cost of capital,[61] more positive sell-

analysis and the tools to incorporate this information into investment decisions").

55. *Id*.

56. *Id*.

57. Prior, *supra* note 6.

58. *See generally* Azgad-Tromer, *supra* note 15 (providing an analysis of institutional investors as agents of the general public and the costs accompanying this agency).

59. Darren D. Lee & Robert W. Faff, *Corporate Sustainability Performance and Idiosyncratic Risk: A Global Perspective,* 44 FIN. REV. 213, 225 (2009).

60. Allen Goss, *Corporate Social Responsibility and Financial Distress*, PROCEEDINGS OF THE ADMIN. SCIENCE ASS'N OF CANADA 1 (2009).

61. Dan S. Dhaliwal et al., *Voluntary Nonfinancial Disclosure and the Cost of Equity Capital: The Initiation of Corporate Social Responsibility Reporting*, 86 ACCT. REV. 59, 60 (2011); Sadok El Ghoul et al., *Does Corporate Social Responsibility Affect The Cost of*

side analysts' recommendations,[62] and higher abnormal returns and long-term post-acquisition returns.[63] Ferrell, Liang, and Renneboog find that corporate social responsibility is associated with managerial pay-for-performance and maximization of firm value.[64] Eccles, Ioannou, and Serafeim show that companies voluntarily adopting environmental and social policies, outperform their counterparts over the long term, in terms of both stock market and accounting performance.[65] The outperformance is stronger in sectors where the customers are retail consumers.[66] Cheng, Ioannou, and Serafeim show that firms with better corporate social responsibility performance face significantly lower capital constraints.[67]

Other scholars have shown that socially responsible firms are likely to deliver more transparent and reliable financial information to investors, as compared to firms that do not meet the same social criteria and are less likely to manage earnings through discretionary accruals, to manipulate real operating activities, and to be the subject of SEC investigations.[68] Raj Sisodia, David Wolfe, and Jagdish Sheth have selected firms on the basis of their humanistic profiles, including their sense of purpose; how well they are loved by customers, team members, suppliers, and communities; and their culture and their leadership. They find that those humanistic firms outperformed their market on a nearly nine-to-one ratio over a period of ten years.[69] Further research by Sisodia et al. reveals that the same companies

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Capital?, 35 J. BANK. AND FIN. 2388, 2389 (2011); Allen Goss & Gordon S. Roberts, *The Impact of Corporate Social Responsibility on the Cost of Bank Loans*, 35 J. BANK. & FIN. 1794, 1795 (2011).

62. Robert G. Eccles, George Serafeim & Michael P. Krzus, *Market Interest in Nonfinancial Information*, 23 J. APPLIED CORP. FIN. 113, 127 (2011); *see also* Ioannis Ioannou & George Serafeim, *The Impact of Corporate Social Responsibility on Investment Recommendations*, 1 ACAD. OF MGMT. ANN. MEETING PROC. 1, 1-6 (2010) (finding that positive corporate governance and environmental ratings impacted analysis).

63. Xin Deng, Jun-koo Kang & Buen Sin Low, *Corporate Social Responsibility and Stakeholder Value Maximization: Evidence from Mergers*, 110 J. FIN. ECON. 87, 89 (2013).

64. Higher CSR is closely related to tighter cash, a proxy for better-disciplined managerial practice, and higher pay-for-performance sensitivity. Allen Ferrell et al., *Socially Responsible Firms* 3-4, 31 (European Corporate Governance Institute, Working Paper No. 432/2014, 2016).

65. Robert G. Eccles, Ioannis Ioannou & George Serafeim, *The Impact of Corporate Sustainability on Organizational Processes and Performance,* 60 MGMT. SCI. 2835, 2835-2836 (2014).

66. *Id*. at 2838.

67. Beiting Cheng, Ioannis Ioannou & George Serafeim, *Corporate Social Responsibility and Access to Finance*, 35 STRATEGIC MGMT. J. 1, 1-23 (2014).

68. Yongtae Kim, Myung Seok Park & Benson Wier, *Is Earnings Quality Associated with Corporate Social Responsibility?,* 87 ACCT. REV. 761, 790 (2012).

69. RAJ SISODIA ET AL., FIRMS OF ENDEARMENT: HOW WORLD-CLASS COMPANIES PROFIT FROM PASSION AND PURPOSE 14 (Jeanne Glasser Levine et al. eds., 2nd ed. 2007).

outperform the S&P 500 by a factor of 10.5 over a period of fifteen years from 1996 to 2011.[70] Ethisphere has produced an annual list of the world's most ethical companies, assessed in terms of corporate citizenship and responsibility, corporate governance, innovation that contributes to well-being, industry leadership, executive leadership, regulatory and reputation track record, and internal systems of ethics or compliance programs.[71] The selected companies outperformed the S&P 500 "every year since the inception of the program in 2007, by an average of 7.3 percent annually."[72]

Charity is also associated with corporate performance. Lev, Petrovits, and Radhakrishnan find that charitable contributions are significantly associated with future revenue, a result particularly pronounced for firms that are highly sensitive to consumer perception, where individual retail consumers are the predominant customers.[73] As the following illustrations demonstrate, corporate social giving is correlated with better performance, higher growth rates, and increased revenue.

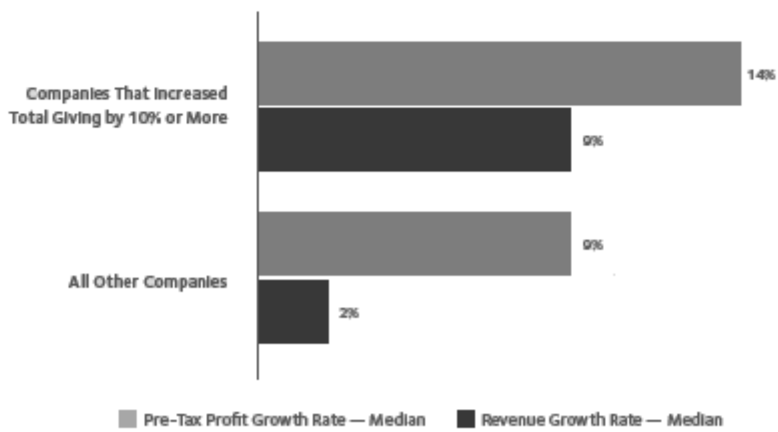

ILLUSTRATION 2: FINANCIAL PERFORMANCE AND CORPORATE GIVING[74]

70. JOHN MACKEY & RAJ SISODIA, CONSCIOUS CAPITALISM: LIBERATING THE HEROIC SPIRIT OF BUSINESS 101 (2014).

71. *Id*. at KINDLE location 4708.

72. *Id*.

73. Baruch Lev, Christine Petrovits & Suresh Radhakrishnan, *Is Doing Good Good for You? How Corporate Charitable Contributions Enhance Revenue Growth*, 31 STRATEGIC MGMT. J. 182, 182-184, 198 (2010).

74. *Giving in Numbers Report*, *supra* note 22, at 7.

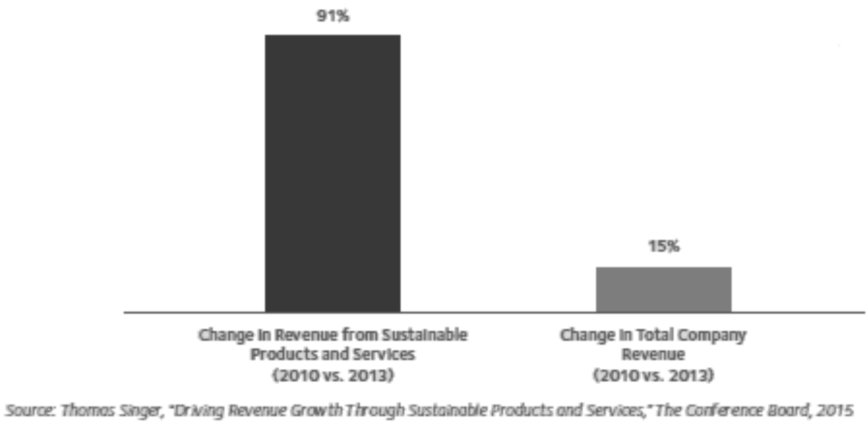

ILLUSTRATION 3: REVENUE FROM SUSTAINABLE PRODUCTS AND SERVICES [75]

C. *Employee Engagement*

Corporate social identities may give corporations leverage in connecting, recruiting, and motivating employees' performance.[76] Studies have shown that more than seventy percent of employed Americans deciding between two jobs offering the same location, job description, pay, and benefits would choose to work for a company that also supports charitable causes.[77] For high-value employees, cash is no longer king, and there are numerous other emotions corporations need to address in recruiting employees and engaging them in the corporate mission.[78] To connect and engage employees, companies need to engage their human identities and address their values.[79] Field studies show that employees involved in philanthropic initiatives showed a statistically significant increase in their sense of identification with their respective corporate employers, an increase also correlated with improved job performance.[80]

75. *Id*. at 8.

76. Marquis et al., *supra* note 7.

77. TERENCE LIM, MEASURING THE VALUE OF CORPORATE PHILANTHROPY: SOCIAL IMPACT, BUSINESS BENEFITS, AND INVESTOR RETURNS 31 (Committee Encouraging Corporation Philanthropy 2010).

78. Marquis et al., *supra* note 7, at 2 (citing John Charlton, *Blue-Chip Companies Seek Non-Cash Rewards*, PERSONNEL TODAY (Nov. 5, 2009), http://www.personneltoday.com/hr/blue-chip-companies-seek-non-cash-rewards/).

79. Googins, *supra* note 26, at 149.

80. David A. Jones, *Does Serving the Community Also Serve the Company? Using Organizational Identification and Social Exchange Theories to Understand Employee*

Employees with a positive view of their organization's corporate social responsibility commitment also rate senior management as having high integrity.[81] Ethisphere's selected companies have been found to enjoy lower team member turnover.[82]

Corporate social responsibility often engages employees as the beneficiaries of accountability, committing to "a great place to work," diversity, professional training and development, and wellness and benefits. Significantly, corporate social responsibility engages employees in contributing to other stakeholder constituencies: for example, better customer service, as well participation in the corporation's social agenda.[83] Because employees search for meaning and values, a framework for corporate social identity may be part of the moral "employee value proposition" retaining individuals to the corporation and urging them to stay longer and give their personal best.[84]

Engaging employees is a significant priority for corporations. Corporate America struggles with making its employees fully engaged and committed to its business, as the following illustration shows:

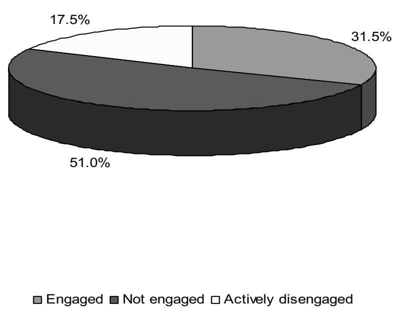

ILLUSTRATION 4: 2014 EMPLOYEE ENGAGEMENT IN THE U.S.[85]

Responses to a Volunteerism Programme, 83 J. OCCUPATIONAL & ORG. PSYCHOL. 857, 858-61 (2010).

81. Marquis et al., *supra* note 7, at 3.

82. MACKEY & SISODIA, *supra* note 70, at KINDLE location 4708.

83. *See, e.g.*, CAESARS ENTERTAINMENT, INSPIRING CITIZENSHIP: CORPORATE CITIZENSHIP REPORT 2014-2015 43, 76 (2014-2015) (referring to employee engagement both when employees are the beneficiaries and when other constituencies are the beneficiaries; for example, rewards for customer service, which benefit both customers and shareholders, and volunteering in the community, which benefits the public).

84. C.B. Bhattacharya, Sankar Sen & Daniel Korschun, *Using Corporate Social Responsibility to Win the War for Talent*, 49 MIT SLOAN MGMT. REV. 37, 37 (2008).

85. Amy Adkins, *Majority of U.S. Employees Not Engaged Despite Gains in 2014*, GALLUP (Jan. 28, 2015), http://www.gallup.com/poll/181289/majority-employees-not-

Corporate social identities are particularly appealing to the younger workforce of Generation Y.[86] Nearly seven of ten millennials say they are aware of their employer's commitment to social and environmental causes, and sixty-five percent say that their employer's social and environmental activities "make them feel loyal to the company."[87] A study at Stanford Business School suggests that corporate social responsibility can provide incentives that are potentially more alluring than monetary compensation: more than 90% of the MBAs in the study sample were willing to make a financial sacrifice and forgo financial benefits in order to work for a firm with a better reputation for corporate social responsibility and ethics.[88]

D. *Marketing and Customer Relations*

Corporations may engage in corporate social conduct as a signal for the company's virtuous social identity, aiming consumers to attribute virtue to their brands.[89] Bhattacharya and Sen refer to "consumer-company identification" (CCI) as an extension of social identity theory.[90] Consuming the moral brand of a virtuous corporation may contribute to

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engaged-despite-gains-2014.aspx [https://perma.cc/AD5U-N8ZU].

86. Generation Y, also referred to as "Millennials," are individuals born between 1978-1998, who seek "more responsibility and advancement . . . and highly prioritize these qualities over job security." Marquis et al., *supra* note 7, at 4; *see Generation Y: Powerhouse of the Global Economy*, DELOITTE DEVELOPMENT LLC 4-11 (2009), http://www2.deloitte.com/content/dam/Deloitte/us/Documents/human-capital/us-consulting-hc-generationy-snapshot-041509.pdf [https://perma.cc/5DVU-5ART] (describing Generation Y traits and how employers can capitalize on those traits); *see also* KATHLEEN SHAPUTIS, THE CROWDED NEST SYNDROME: SURVIVING THE RETURN OF ADULT CHILDREN 99 (1st ed. 2004) (coining Generation Y as "Generation Peter Pan" for its "delaying rites of passage into adulthood" and refusal to grow up); *Millennials*, WIKIPEDIA https://en.wikipedia.org/wiki/Millennials#Traits [https://perma.cc/V3VU-QNAN] (last visited Jan. 30, 2017) (explaining various characteristics of the generation).

87. Marquis et al., *supra* note 7, at 4 (quoting CONE INC. & AMP AGENCY, THE 2006 CONE MILLENNIAL CAUSE STUDY).

88. Bill Snyder, *For MBA Grads, Corporate Responsibility Trumps Salary*, STANFORD BUSINESS: INSIGHTS (June 1, 2008), https://www.gsb.stanford.edu/insights/mba-grads-corporate-responsibility-trumps-salary [https://perma.cc/XBQ2-YNSG] (describing the findings in the Stanford Business School study); *see also* David B. Montgomery & Catherine A. Ramus, *Corporate Social Responsibility Reputation Effects on MBA Job Choice* 7 (Stanford Graduate School of Business, Working Paper No. 1805, 2003), http://www.gsb.stanford.edu/faculty-research/working-papers/corporate-social-responsibility-reputation-effects-mba-job-choice [https://perma.cc/DEH5-U79T].

89. John C. Turner & Katherine J. Reynolds, *The Story of Social Identity*, *in* REDISCOVERING SOCIAL IDENTITY 13-22 (Tom Postmes & Nyla R. Branscombe eds., 2010).

90. C.B. Bhattacharya & Sankar Sen, *Consumer-Company Identification: A Framework for Understanding Consumers' Relationships with Companies*, 67 J. MKTG. 76, 76, 86 (Apr. 2003).

consumers' self-esteem, attaching consumers to the firm and enhancing its brand value.[91] Corporate social conduct has the potential to create value for consumers, and it is the customer perception of this value that mediates the relationship between corporate social conduct and subsequent financial performance.[92] Ethisphere's list of most-ethical corporations has been found to enjoy better brand reputation and higher customer loyalty.[93] Cabral suggests there is a positive relationship between trust and the price customers are willing to pay for a product or service—the higher the trust, the more customers are willing to pay.[94] In addition, the more consistent the transactions that take place between a seller and a buyer, the harder it is to break any trust previously built between them (whether good or bad).[95] Cabral's theory suggests there is a negative relationship between reputation and the amount of money the corporation must invest in improving their reputation. As reputation increases, corporate leaders can invest incrementally less in building their reputation without hurting the progress they've made.[96] High trust and reputation can together help corporations earn higher profits.[97] A corporation can not only increase the price of its products and services, it can also decrease its expenses (the amount of money invested in reputation management).[98]

Consumers affect corporate morality with a stick, and not only a carrot. Firms deviating from accepted social and moral norms risk decline in sales due to consumer boycotts. To list just a few recent examples, Nestlé suffered a consumer boycott after selling inappropriate milk to pregnant mothers in developing countries;[99] Nike was boycotted over alleged sweatshop conditions at Asian suppliers;[100] Shell suffered a boycott

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91. BHATTACHARYA ET AL., *supra* note 27; Bhattacharya & Sen, *supra* note 27, at 15-17.

92. For analysis of customer values of Corporate Social Responsibility, see generally Peloza & Shang, *supra* note 27 (explaining the value that corporate social responsibility activities can create for customers and practical recommendations for creating corporate social responsibility programs).

93. MACKEY & SISODIA, *supra* note 70, at KINDLE location 4708.

94. Luís M B Cabral, The Economics of Trust and Reputation: A Primer 26 (June 2005) (unpublished manuscript), http://pages.stern.nyu.edu/~lcabral/reputation/Reputation_June05.pdf [https://perma.cc/DUF6-6FVC].

95. *Id*. at 7-8.

96. *Id*. at 20.

97. *Id*. at 14-19.

98. *Id*.

99. *See Nestlé-free Zone*, BABY MILK ACTION http://www.babymilkaction.org/nestlefree [https://perma.cc/JA23-CAGU] (last visited Jan. 30, 2017) (describing the details of the boycott of Nestle's baby food due to it breaching international marketing standards).

100. Simon Birch, *How Activism Forced Nike to Change Its Ethical Game*, THE GUARDIAN (July 6, 2012), https://www.theguardian.com/environment/green-living-

because of its plan to sink the Brent Spar oil platform at sea.[101] The more egregiously a consumer perceives the firm's behavior, the more likely she is to boycott.[102] Boycotts thus serve a mechanism by which consumers can hold firms accountable to perceived transgressions of corporate normativity.[103]

E. *Political Strategy*

Corporations do not act in a political vacuum. Corporate social conduct could be a means of placating regulators and public opinion to avoid strict supervision in the future, or of attempting to raise rivals' costs by encouraging environmental, labor, or safety regulations that will particularly handicap competitors.[104] Organizational resources devoted to corporate social conduct are aligned with the corporate business mission so as to create a positive, virtuous public image of the corporation and thereby leverage the corporation's agendas with regulators and public officials.[105]

II. CENTRAL POLICY CHALLENGES

This part of the article provides a roadmap for some of the central policy challenges of the emerging corporate social identities. Contemporary corporations have become norm-generating agents, creating non-binding rules for social activity and normative impact.[106] The rise of corporate social motivation suggests a shift from substantive corporate law towards a decentered and reflexive network of diverse corporate social identities, governed by soft global standardization.[107] The normative quest makes

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blog/2012/jul/06/activism-nike [http://perma.cc/6YC3-VZ2A].

101. Nathanel C. Nash, *Oil Companies Face Boycott Over Sinking of Rig*, N.Y. TIMES (June 17, 1995), http://www.nytimes.com/1995/06/17/world/oil-companies-face-boycott-over-sinking-of-rig.html [https://perma.cc/25PC-HH2Z].

102. Klein et al., *supra* note 9, at 93-96.

103. N. Craig Smith, *Corporate Social Responsibility: Whether or How?*, 45 CAL. MGMT. REV. 52, 60-61 (2003).

104. Baron, *supra* note 28, at 12-13.

105. Bénabou & Tirole, *supra* note 28, at 12.

106. Arato, *supra* note 30, at 231-232.

107. The term "soft law" usually refers to "a rule issued by a lawmaking authority that does not comply with . . . formalities . . . that are necessary for the rule to be legally binding." Gersen & Posner, *supra* note 29.

Examples include, but are not limited to, SASB, *supra* note 33; UNITED NATIONS, *supra* note 33 (offering a principled approach for corporate fundamental responsibilities in the areas of human rights, labor, environment, and anti-corruption); ISO, *supra* note 33; GLOBAL REPORTING INITIATIVE, G4 SUSTAINABILITY REPORTING GUIDELINES, REPORTING PRINCIPLES, AND STANDARD DISCLOSURES, *available at* https://www.globalreporting.org/

corporate performance vague and subject to manipulation.[108] Ultimately, we need to ask: whose values does the corporation pursue? Corporate social identities do not necessarily align with social normative preferences.[109] Social norms and corporate social identities may serve as normative substitutes.

A. *Soft Corporate Governance*

The quest for virtue shifts corporations from passive to active roles, where corporations become a norm-generating authority defining their social identities and functions through a local organizational process.[110] The resulting reflexive network of corporate social identities is proliferated by soft global standardization, setting normative and reporting guidelines for corporate social conduct, such as the Global Reporting Initiative (GRI), SASB, the UN Global Conduct Principles, the OECD Guidelines for Multinational Enterprises, and ISO 26000.[111]

While traditional corporate governance creates mandatory incentives and deals with the mitigation of agency costs with a mission to enhance shareholder value,[112] contemporary corporations adopt a soft, aspirational, and voluntary norm-generating process to identify and promote their corporate social identities.[113] From the traditional financial realm of corporations, contemporary corporations proceed to diverse social, environmental, and economic agendas,[114] reaching far beyond the

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resourcelibrary/GRIG4-Part1-Reporting-Principles-and-Standard-Disclosures.pdf [https://perma.cc/959Q-TSXC]. The Global Reporting Initiative sets a list of standards for corporate self-assessment and reporting, including gender equality and human rights. GLOBAL REPORTING INITIATIVE, *supra* note 14; *see also* OECD, *supra* note 33, (providing similar guidelines).

108. Solomon, *supra* note 35.

109. For articles analyzing this, see generally Bhattacharya, Smith, & Vogel, *supra* note 9; Bhattacharya, Hildebrand, & Sankar, *supra* note 9; Glazer et al., *supra* note 9; Klein et al., *supra* note 9.

110. *See* Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought,* 89 MINN. L. REV. 342, 393 (2004) (discussing the shift to a governance model and the effect that it has on the legal regime).

111. Geczy et al., *supra* note 2, at 79.

112. Henry Hansmann & Reinier Kraakman, *What is Corporate Law?*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 1-19 (Reinier R. Kraakman et al. eds., 2004).

113. *See* GLOBAL REPORTING INITIATIVE, *supra* note 14 (explaining that stakeholder dialogue is the recommended process for identification of material issues for disclosure under the G4).

114. For examples of corporate disclosures of activities and agendas in environmental, social, and economic realms *see supra* note 1 (showing various American companies that

organizational boundaries and often aiming for global social impact.[115]

The term "soft" corporate governance thus seeks to describe the emerging rules of conduct established and enforced within the corporate realm in the absence of directives of hard-binding mandatory corporate law.[116] Contemporary corporate governance is soft because its norm-generating authority is the corporation itself, induced by non-binding global standardization.[117] Jerry Mashaw defines soft law as consisting of "social accountability regimes" that are "continuously revisable."[118] In contemporary corporate governance, corporations voluntarily assume social accountability in a continuously revisable process aiming to define their social identities, and to promote their social agendas and regimes of voluntary normativity, proliferating their financial purposes and notwithstanding them.

As the corporate social identity is unique to each and every corporation, the process of defining agendas for corporate social conduct and clarifying corporate social motivation is internal at the local corporate level.[119] The corporation defines for itself its social agendas, sets its normative involvement, and chooses its beneficiaries.[120] Far from the top-down hierarchy of traditional corporate governance, contemporary corporations assume an internal decision-making process, to define the material contents of the corporation's non-financial performance.[121] The corporation's norm generating role is a decentered process, where stakeholders participate in a dynamic and systemic integration of values into a voluntary, self-determined corporate social identity.[122]

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are taking active roles in their communities).

115. *See generally* Part II *infra* (providing a discussion of corporate social motivation beyond organizational boundaries and describing the policy issues relating to corporations' new role in social responsibility).

116. Lobel, *supra* note 110, at 388.

117. *See generally* Gersen & Posner, *supra* note 29 (discussing the importance of soft law, specifically congressional law).

118. Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, *in* PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 115-156 (Michael W. Dowdle ed., 2006).

119. Liad Ortar, *From Flexibility to Specificity: Practical Lessons from Comparing Materiality in Sustainability Reports of the World's Largest Financial Institutions*, 1 INT'L J. CORP. STRATEGY & SOC. RESP. 44, 51 (2016).

120. *See generally* Cafaggi & Pistor, *supra* note 4 (outlining a theoretical discussion of regulatory capabilities).

121. *See generally* Stephen Kim Park & Gerlinde Berger-Walliser, *A Firm-Driven Approach to Global Governance and Sustainability*, 52 AM. BUS. L.J. 255 (2015) (discussing this contemporary process).

122. GRI, for example, recommends a stakeholder dialogue to determine the relative materiality of specific sustainability issues. *See* Ursa Golob & Klement Podnar, *Critical*

The self-determined vision of corporate goodness is thus the result of a local decision making process of the corporation, induced and proliferated by soft global standardization.[123] Corporations do not define their social identities in a vacuum: normative agendas for corporations are suggested and promoted by several global initiatives, including the UN Global Conduct Principles,[124] the OECD Guidelines for Multinational Enterprises,[125] and ISO 26000.[126] Visions of corporate normativity are then disclosed under global standards for corporate social transparency, such as the Global Reporting Initiative (GRI)[127] and SASB.[128] The outcome is a social network of corporate visions of goodness, where corporations are further influenced to virtuous social conduct by corporate peers and by industry standards.[129]

Points of CSR-Related Stakeholder Dialogue in Practice, 23 BUS. ETHICS: A EUR. REV. 248, 248-257 (July 2014) (advising that in the dialogue of stakeholders, representatives should state their views and participate in developing an organizational understanding of a corporate social purpose and agenda).

123. *See generally* Daniel Halberstam, *Local, Global and Plural Constitutionalism: Europe Meets the World, in* THE WORLDS OF EUROPEAN CONSTITUTIONALISM, (Gráinne De Búrca & J.H.H. Weiler eds., 2012) (discussing the advantages of walking the middle road between globalism and localism).

124. *See* UNITED NATIONS, *supra* note 33 (outlining that "[t]he UN Global Compact's Ten Principles are derived from: the Universal Declaration of Human Rights, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption").

125. *See* OECD, *supra* note 33 (highlighting that OECD guidelines are divided by industry sectors).

126. *See* INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, *supra* note 33 (providing another method by which normative agendas might be defined).

127. *See* GLOBAL REPORTING INITIATIVE, *supra* note 14 (outlining current sustainability reporting guidelines).

128. *See* SASB, *supra* note 33 (laying out US sustainability disclosure standards).

129. *See generally* NOAH E. FRIEDKIN, A STRUCTURAL THEORY OF SOCIAL INFLUENCE (Mark Granovetter ed., 1998) (focusing on the process of social influence, and on how this process, when it is played out in a network of interpersonal influence, may result in interpersonal agreements among actors who are located in different parts of a complexly differentiated organization. This theory may be applied to the network of different corporations in the corporate race to virtue and social identity).

	CORPORATE GOVERNANCE	
	TRADITIONAL	SOFT
NATURE	Centered Substantive Centralized Command-and Control	Decentered Reflexive Flexible Contextualized
CONTENT	Financial	Social, Environmental, Economic
NORM GENERATING AUTHORITY	State	Corporation, induced by Global soft standardization
INSTITUTIONAL ORGANIZATION	Top-down Hierarchy	Stakeholder Dialogue Informal Corporate Decision Making Process
MOTIVATOR FOR PRIVATE ACTION	Liability	Reputation Public Image Stakeholder Relations
OUTREACH	Within Organizational Boundaries	Beyond Organizational Boundaries
POWER	Hard Coercive Mandatory	Soft Aspirational Voluntary
CONCEPTUAL FRAMEWORK	Mitigate Agency Costs	Promote Corporate Social Identity

TABLE 1: FROM TRADITIONAL TO SOFT CORPORATE GOVERNANCE

B. *Corporate Social Motivation and Law*

Understanding the strategic incentives for corporate social motivation may serve to create a better architecture of corporate law, focusing on variances of corporate conduct that are less likely to be addressed and are significantly valuable for social welfare, as demonstrated by illustration 5 below.[130] The illustration offers a metric for the evaluation of corporate social conduct.[131] When a corporation engages in peripheral social activity (as demonstrated by sections A and D), assessment of its corporate social profile in light of the general value for social welfare is required. Examples for such activities are meager budgets dedicated for social activities with a high publicity profile, but low social impact. Finally, when a corporation has sufficient strategic incentives to voluntarily engage in social conduct that has significant social value, as demonstrated by section B in illustration 5, the corporation fulfills a vision for social corporate leadership, supplementing or substituting public governance.[132]

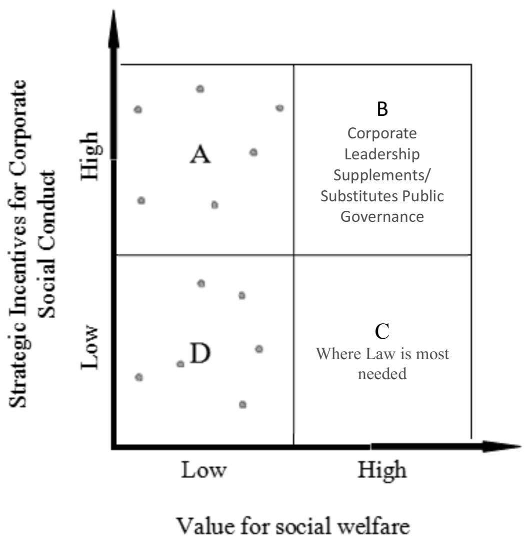

ILLUSTRATION 5: THE METRICS OF CORPORATE VIRTUE

130. Consider negative externalities as an example for section C. While the corporation has meager incentives for virtuous conduct, society attributes considerable value to the issue at hand and carries its full costs when corporate virtue fails to materialize.

131. Consider each dot as an instance of corporate social conduct. This schematic table should be applied at the specific corporate level, as every corporation would have a different profile of social activity and impact.

132. George Serafeim, *The Role of the Corporation in Society: An Alternative View and Opportunities for Future Research* (Harvard Business School, Working Paper No. 14-110, 2014).

C. *Distributional Consequences: Corporate Legal Particularism and the CSR Tax Straddle*

When corporations engage in social agendas, their leadership–including controlling shareholders and managers–acquires the prerogative to sit behind the corporate social wheel.[133] Legal rules can specify the desired contents, scope, and beneficiaries for corporate social conduct at a highly detailed level.[134] By contrast, corporate social identities cannot be too detailed and nuanced: because it is incentivized by various stakeholders, and highly dependent on public opinion, corporate social identities must be easy for the general public to note and identify, and must be kept simple,[135] leaving the management room for interpretation. The potential for such self-interested interpretation by managers defeats the purpose of curbing private advantage.[136] Law can be specific, whereas morality is ultimately vague.[137]

The vagueness of virtue allows for self-interested interpretation. Because moral rules are so elusive, the interpretation given to them may differ among various constituencies and may lead to aversion. Lack of specific legal standards can be misused. Consider for example the recent scandal of Volkswagen in late 2015: from the top of the list of car firms in the Dow Jones Sustainability Index, it was caught using sophisticated software to avoid compliance with environmental regulation.[138] Indeed, morality is often disappointing. "If I had a yaller dog that didn't know no more than a person's conscience does, I would pison him" declares Huckleberry Finn towards the end of his journey down the Mississippi,[139]

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133. *See* Part II A *supra* (providing an analysis and review of empirical evidence of agency costs in corporate social responsibility).

134. Shavell, *supra* note 36, at 233-34.

135. *Id*. at 234.

136. *Id*.

137. *Id*.

138. *See generally* Enrique Dans, *Volkswagen and the Failure of Corporate Social Responsibility*, FORBES (Sept. 27, 2015), http://www.forbes.com/forbes/welcome/?toURL=http://www.forbes.com/sites/enriquedans/2015/09/27/volkswagen-and-the-failure-of-corporate-social-responsibility/&refURL=https://www.google.com/&referrer=https://www.google.com/ [https://perma.cc/SM5G-QTZW] (discussing the Volkswagen emission regulation scandal).

139. MARK TWAIN, THE ADVENTURES OF HUCKLEBERRY FINN 161-162, 175 (Dover Publications, Inc. 1994) (stating that Huck's conscience tells him that "the right thing and the clean thing"' is to return his friend Jim to his legal owner, Miss Watson, and that otherwise he will be doomed to hell. His inner voice, on the other hand, reminds him that Jim is his best friend, and it is better to be in hell with friends than to be saved from it with Miss Watson. Huck decides to be true to himself, and follow his inner self- voice. "All right, then, I'll go to hell," he states: "I would take up wickedness again.").

having realized that human conscience can sometimes justify the cruelty and injustice of slavery. Virtuous corporations require delegation of authority to determine the normative contents of compliance and such delegation can be misinterpreted and misused.[140]

Indeed, the nature and content of corporate social identities is decided and framed by the corporation for itself. When corporations pursue values, an immediate and pertinent concern is whose values are pursued and in service of what interests. Katharina Pistor warns of "corporate legal particularism," referring to a self-contained legal order that serves special interests.[141] Like beauty, normative agendas are ultimately in the eye of the beholder. Attitudes on what is socially responsible are "rather unscientific . . . and based on little information . . . framing is bound to distort assessments: the choice of presenting a firm's rationale for locating a plant in a low-labour-cost country as 'helping a poor country to develop' or 'minimizing labour cost' is obviously not neutral."[142] Thus, reports of corporate social responsibility vary in content, and they frequently refer to the corporation's core business. For example, the training and development of employees is often considered a manifestation of corporate social responsibility and included in social responsibility reports, despite its obvious contribution to the core business mission of the corporation.[143] Corporate social identities may differ from each other quite extensively, and there may be fundamental disagreements within a corporation about what is the morally right way to behave.

Corporate social identities create a distributional tension, because the social priorities of the corporation may differ from those of the public. As the CSR tax straddle demonstrates, corporations may choose to engage in voluntary corporate social conduct while making strenuous efforts to minimize and even avoid paying tax.[144] Consider for example Pfizer, "embracing . . . responsibility to society . . . helping the world's poor gain access to its products," and "strengthen[ing] and improv[ing] health-care

140. *See generally* Shavell, supra note 36; Solomon, *supra* note 35 (both discussing law and morality).

141. Pistor, *supra* note 37.

142. Bénabou & Tirole, *supra* note 28, at 15 (discussing socially responsible behavior as a means to further societal goals); *id*. at 19.

143. *See, e.g.*, *CSR Report 2016*, SONY 122-135 (2016), http://www.sony.net/SonyInfo/csr_report/ [https://perma.cc/2REP-3G4Z] (describing Sony's recruiting and training of employees as corporate social responsibility).

144. *See generally Social Saints, Fiscal Fiends*, THE ECONOMIST: SCHUMPETER BLOG (Jan. 2, 2016), http://www.economist.com/news/business-and-finance/21684770-social-saints-fiscal-fiends-opinions-vary-whether-firms-can-be-socially-responsible [https://perma.cc/9HXN-Q5BQ] (commenting on the tension between a corporation's goal to seek lower taxes and be socially responsible).

systems,"[145] while planning to shift its tax domicile from America to Ireland, where corporate income taxes are considerably lower.[146] Another example is Etsy, a handmade good marketplace that went public in the U.S. in 2015 as a certified B Corporation and simultaneously reorganized its Irish subsidiary in a way that conceals its tax-cutting arrangements from public view.[147] Recent empirical research finds evidence that corporate social responsibility is negatively related to five-year cash-effective tax rates and positively related to tax lobbying expenditures, suggesting that, on average, corporate social responsibility and tax payments act as normative substitutes.[148] Companies pursue their own values in their self-determined normative social identities where the corporation has a self-determined authority to specify the beneficiaries, the methods of engagement, and the amount of resources devoted to its self-determined social causes. Corporate social identities may thus pose a normative substitute for the tax system for social redistribution, and may challenge the democratic ideal.

CONCLUSION

With the popularity of Benefit Corporations and the rising trend of corporate social initiatives by traditional C Corporations, the vision of corporations actively generating their own norms of social conduct in pursuit of their self-determined set of values is emerging as a prominent model of corporate social conduct. This article analyzed the emerging trend of "Corporate Social Identities," arguing that incentives for corporate social motivation are often rooted in the business purpose itself. Corporations are induced to normative social conduct by their stakeholder constituencies: investors follow their conscience in responsible investments; employees are better engaged, more productive and are easier to recruit by ethical corporate employers; and consumers attribute virtue to

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145. *Id.*; *see also Corporate Responsibility: Bridging the Gap to Access for Patients in Need*, PFIZER, http://www.pfizer.com/responsibility [https://perma.cc/DJW3-979R] (last visited Jan. 30, 2017) (discussing Pfizer's corporate social responsibility).

146. *See generally* Liz Hoffman, Richard Rubin & Jonathan D. Rockoff, *Taxes Drive Potential Merger of Pfizer, Allergan*, WALL ST. J. (Oct. 29, 2015), http://www.wsj.com/articles/allergan-confirms-pfizer-talks-1446126062?mg=id-wsj [https://perma.cc/JT7M-WL3J] (discussing Pfizer's potential merger for tax purposes).

147. Jesse Drucker & Alex Barinka, *Etsy's B Corp Status Challenged by Tax Group Over Irish Haven*, BLOOMBERG TECH. (Sept. 1, 2015), http://www.bloomberg.com/news/articles/2015-09-01/etsy-s-b-corp-status-challenged-by-tax-group-over-irish-haven [https://perma.cc/2X9H-UKS7].

148. Angela K. Davis et al., *Do Socially Responsible Firms Pay More Taxes?,* 91 ACCOUNTING REV. 47 (2016).

moral brands, and might sanction the transgression of social norms by consumer boycotts. Management's private values induce the corporation to social engagement. In addition, corporate social activity may serve a political strategy, manipulating desired regulation or lack thereof. Understanding the strategic incentives for corporate social motivation may serve to create a better architecture of corporate law. When the strategic incentives for corporate social conduct are high, and the social value of corporate social conduct significant, the corporation may fulfill the vision for social leadership supplementing or substituting public governance. Law is most needed when the incentives for corporate social conduct are insufficient, but the social value significant.

In particular, the analysis of corporate social motivation may lead to full modeling of corporate social engagement, subject to empirical evaluation. Future attention should be paid to how global and domestic mechanisms may play a role in creating incentives diverting corporate social motivation towards fulfilling significant social value in alignment with social interests.