

GOVERNMENT FAILURE AND CORPORATE REFORM

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ANEIL KOVVALI*

Abstract: Corporate law has been racked by a decades-long debate. Shareholder primacy theorists suggest that corporate leaders should focus exclusively on maximizing financial returns to shareholders, while stakeholder governance theorists suggest that corporate leaders should consider a broader range of concerns such as impacts on workers and the environment. Though the battle has been fought intensely on many fronts for years, there is one area of apparent agreement. Most commentators view stakeholder governance as a kind of second-best regulation. Ideally, the government would tend to worker and environmental concerns through real regulations, imposing financial penalties on corporations that behave in socially destructive ways. Corporate leaders could then focus on financial returns, given the knowledge that bad behavior would not be profitable. It is only when the government fails in its basic task by refusing to issue or enforce necessary regulations that it becomes necessary for corporations to balance different concerns internally.

But although it seems to be a point of broad agreement, the idea that stakeholder governance is a response to government failure is incomplete. This Article unpacks that claim and reveals its shortcomings. It is far from obvious whether the government's refusal to regulate in a space is a failure or simply a result of the democratic process given widespread disagreement. And even an "ideal" government would face limitations in its ability to drive good outcomes. Statutes and regulations are inherently limited tools, and there are many areas such as speech and dignity interests where the government cannot interfere or provide an adequate solution. Understanding these shortcomings deepens the analysis of the relationship between corporate governance and the political process and reveals fresh insights about the debate between shareholder primacy and stakeholder governance.

INTRODUCTION

The shareholder primacy approach to corporate law suggests that the purpose of a corporation is to deliver financial returns to its shareholders.¹ Alt-

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¹ For noteworthy statements that shareholder primacy is descriptively accurate as a statement of existing law and normatively desirable as a tool for enhancing social wealth, see FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 35–39 (1991); Hen-

though it remains dominant, shareholder primacy is increasingly being challenged by the insurgent stakeholder governance approach to corporate law, which suggests that corporate leaders should consider a broader range of interests.² Instead of seeking only to deliver financial returns to shareholders, managers should also consider the environment, workers, and other social concerns.

Shareholder primacy assumes that the government will force shareholders to internalize the consequences of bad corporate behavior. If a corporation is forced to bear the cost of misconduct—if, for example, it will be fined for polluting a river, and the expected fine matches the expected social cost of the pollution—managers focused on financial returns to shareholders will avoid that misconduct.³

Most commentators also believe that stakeholder governance assumes that the government is failing to address externalities.⁴ On this account, stakeholder

ry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 441–42 (2001); Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sep. 13, 1970), <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html> [perma.cc/3D4M-TSYE].

² For noteworthy critiques of shareholder primacy and articulations of an alternative stakeholder governance perspective, see generally GRANT M. HAYDEN & MATTHEW T. BODIE, *RECONSTRUCTING THE CORPORATION* (2023); LYNN A. STOUT, *THE SHAREHOLDER VALUE MYTH* (2013); MARTIN LIPTON, *THE NEW PARADIGM* (2017), <https://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.25960.16.pdf> [perma.cc/9UDK-ADZ6]; *Business Roundtable Redefines the 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> [perma.cc/VEM8-3D4M].

³ See, e.g., STEPHEN M. BAINBRIDGE, *CORPORATION LAW AND ECONOMICS* 425 (2002) (“Corporate conduct doubtless generates negative externalities. In appropriate cases, such externalities should be constrained through general welfare legislation, tort litigation, and other forms of regulation.” (footnote omitted)); EASTERBROOK & FISCHER, *supra* note 1, at 37, 39 (noting that “[w]hen costs fall on third parties—pollution is the common example—firms do injury because harm does not come back to them as private cost,” and suggesting that society should respond “by imposing monetary penalties”); JOHN ARMOUR, LUCA ENRIQUES ET AL., *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 23 (3d ed. 2017) (describing the broadly shared assumption “that any externalities that the corporation generates are best addressed by regulatory constraints from other areas of law” than corporate law).

⁴ See, e.g., STEPHEN M. BAINBRIDGE, *THE PROFIT MOTIVE: DEFENDING SHAREHOLDER VALUE MAXIMIZATION* 94 (2023) (“The polarization of national politics and resulting political gridlock have encouraged activists to turn to corporations to effect social change they are unable to obtain politically.”); ROBERT CHARLES CLARK, *CORPORATE LAW* 691 (1986) (“Perhaps the main reason for high idealism is ‘government failure.’ . . . In view of these failures, it seems prudent to encourage private enterprise, perhaps only on an experimental basis, to participate actively in the definition and execution of public policies.”); MATTEO GATTI, *CORPORATE POWER AND THE POLITICS OF CHANGE* 11–12 (2025) (describing a phenomenon of “government substitution” in which “[c]orporations step in to provide resources, services, or protections, in other words, perform quasi-governmental roles when the actual government cannot (because of its dysfunction) or does not want to (because of its political credo) perform such functions”); Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORN. L. REV. 91, 173–74 (2020) (identifying and critiquing the view that “the prospects of overcoming political gridlock and obtaining stakeholder-protecting laws, regula-

tion, and policies are dim”); Jennifer S. Fan, *Woke Capital: The Role of Corporations in Social Movements*, 9 HARV. BUS. L. REV. 441, 452 (2019) (“[G]overnment is increasingly gridlocked, mired in partisan politics, and in some ways hampered by their constituencies and the desire to be re-elected. . . . As a result of this absence of leadership, corporations have stepped into the void to address social issues and, in turn, have both voluntarily and forcibly participated in social movements.” (footnote omitted)); Matteo Gatti, *Corporate Governing: Understanding Corporations as Agents of Socioeconomic Change*, 50 J. CORP. L. 149, 154 (2024) [hereinafter Gatti, *Corporate Governing*] (discussing the concept of “government substitution” further and providing examples); Matteo Gatti & Chrystin Ondersma, *Stakeholder Syndrome: Does Stakeholderism Derail Effective Protections for Weaker Constituencies?*, 100 N.C. L. REV. 167, 170 (2021) (critiquing the stakeholderism arguments based on “the view that direct regulation is not feasible in the current environment and that stakeholderism will successfully lead to incremental change as well as create an environment more conducive to passage of direct regulation”); Zohar Goshen, Assaf Hamdani & Alex Raskolnikov, *Poor ESG: Regressive Effects of Climate Stewardship*, 51 BYU L. REV. 1039, 1042 (2026) (“Today, many view ESG [environmental, social, and governance] as a market-based solution to a public policy failure. Where Congress failed, ESG will succeed.” (footnote omitted)); Ann M. Lipton, *Reviving Reliance*, 86 FORDHAM L. REV. 91, 126 (2017) (“In recent years, there has been a particular disenchantment with direct government regulation as a mechanism for curbing corporate externalities. . . . As a result, some reformers have sought to curb corporate externalities by manipulating the balance of power within the corporate form itself.”); Dorothy S. Lund, *Toward a Dynamic View of Corporate Purpose*, 109 MINN. L. REV. 2089, 2099 (2025) [hereinafter Lund, *Corporate Purpose*] (“[A]rguments for stakeholderism won the day when proponents could point to evidence of rampant corporate externalities and the government’s inability to address them. . . .”); Dorothy S. Lund, *Asset Managers as Regulators*, 171 U. PA. L. REV. 77, 77 (2022) [hereinafter Lund, *Asset Managers as Regulators*] (“And in this moment of dissatisfaction with government, powerful asset managers have stepped in to serve as regulators of last resort, adopting rules that bind corporate America on issues of great social importance, including climate change and workplace diversity.”); Jonathan R. Macey, *ESG Investing: Why Here? Why Now?*, 19 BERKELEY BUS. L.J. 258, 262 (2022) (“ESG investing and governance can be explained . . . as a response to the failure of government. People are turning to corporations for solutions to problems that are in the proper domain of government because government has failed.”); Saura Masconale & Simone M. Sepe, *Citizen Corp.—Corporate Activism and Democracy*, 100 WASH. U. L. REV. 257, 262 n.16 (2022) (“[U]nder classic CSR accounts, corporations would operate in substitution for government, contributing means to implement aims that are supported by broad consensus”); Mariana Pargendler, *The Corporate Governance Obsession*, 42 J. CORP. L. 359, 365, 393–94 (2016) (observing that corporate “governance may partly substitute for government, at least in the level of discourse” on both social and traditional corporate issues); Edward B. Rock, *For Whom Is the Corporation Managed in 2020? The Debate Over Corporate Purpose*, 76 BUS. LAW. 363, 367 (2021) (“[T]he political polarization of our electoral politics has resulted in legislative deadlock. Many have ceased to believe in the possibility of legislation to address societal issues such as climate change, redistribution, stagnant wages The combination of frustration with legislative inaction and fear of radical future regulation has brought forth a plethora of ideas that can be implemented through private sector initiatives.”); Mark J. Roe, *Why Shareholder-Driven Corporate Social Responsibility Failed*, 176 U. PA. L. REV. (forthcoming 2026) (manuscript at 2–3, 9 & n.16), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6329838 [perma.cc/G7CW-92KR] (describing “the widely articulated foundation for shareholder-induced CSR—that it is needed to resolve the social challenges of our time because dysfunctional government cannot” and collecting examples of statements to that effect); Alex Edmans, *What Social Responsibilities Should Companies Have? A New Approach*, WALL ST. J. (Oct. 1, 2023), <https://www.wsj.com/business/c-suite/social-responsibility-companies-96b0786c> [perma.cc/7BDG-SBZJ] (identifying four necessary conditions that are required for stakeholderism or ESG arguments to work, one of which is “that governments fail to solve the externality created by companies—even if voters, in aggregate, would like it to do so”); Tim Wu, *The Goals of the Corporation and the Limits of the Law*, CLS BLUE SKY BLOG (Sep. 3, 2019), <https://clsbluesky.law.columbia.edu/2019/09/03/the-goals-of-the-corporation-and-the-limits-of-the-law/> [perma.

governance is merely a kind of second-best regulation. Ideally, the government would force corporations to bear the cost of their misconduct through real regulations. But because the government has failed to issue or enforce the necessary regulations, there is room for private actors to improve outcomes by considering social interests directly. This reasoning leads to some of the core claims of stakeholder governance: that the government has failed to take adequate action to address climate change, therefore businesses should consider climate change's impacts when making decisions;⁵ or that the government has

cc/MBL4-Y785] (“[O]ne reason there is so much mounting pressure for corporations to take action today is that government has failed to act in many areas that people care about, often by overwhelming margins.”); cf. Claire A. Hill, *Good Faith and Law's Penumbra*, 27 THEORETICAL INQUIRIES IN L. 153, 154–55 (2026) (proposing an expansive, but still shareholder-centric understanding of *Caremark* duties based on a recognition that “[w]ell-resourced, sophisticated corporate actors can design around legal prohibitions, exploit gaps between legal form and legal purpose, and outpace regulatory capacity in ways that make the gaps between law’s purposes and law’s reach structural rather than incidental”). Similar arguments have appeared in writing addressed to popular audiences. See Jeff D. Colgan, *Exxon Mobil's Pioneer Acquisition Is a Direct Threat to Democracy*, N.Y. TIMES (Oct. 18, 2023), <https://www.nytimes.com/2023/10/18/opinion/exxon-pioneer-climate-change.html> [perma.cc/6QAP-RYF9] (criticizing Exxon’s proposed acquisition of Pioneer because it “seems to be a huge bet to take advantage of [the government’s] expected failure” to meet its obligations under the Paris climate agreement, and a “commitment to contribute to the failure”).

A closely related argument suggests that stakeholder governance is flawed because the problems it seeks to address should be addressed through other areas of law. See, e.g., BAINBRIDGE, *supra*, at 86 (“In appropriate cases, such externalities should be constrained through general welfare legislation, tort litigation, and other forms of regulation.”); Bebchuk & Tallarita, *supra*, at 169–70 (cataloguing labor, antitrust, and environmental measures as alternatives to stakeholder governance); Gatti & Ondersma, *supra*, at 191–209 (proposing labor and antitrust reforms as an alternative to addressing labor market problems through corporate governance). Some accounts have similarly suggested that corporate governance reforms are offered strategically to forestall superior substantive regulation. See Pargendler, *supra*, at 376–77, 382–83, 385, 387–88 (describing reforms corporations make to compromise in place of legislation); Urška Velikonja, *The Political Economy of Board Independence*, 92 N.C. L. REV. 855, 893–94 (2014) (“A strategy that . . . reduce[s] the perceived need for reform or to substitute [it] . . . is thus valuable”). Another related argument suggests that stakeholder governance is inappropriate because it usurps the decision-making role of government. See, e.g., MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 134 (40th anniversary ed. 2002) (“Is it tolerable that these public functions of taxation, expenditure, and control be exercised by the people who happen at the moment to be in charge of particular enterprises, chosen for those posts by strictly private groups?”); VIVEK RAMASWAMY, *Woke, Inc.: Inside Corporate America's Social Justice Scam* 18 (2021) (describing stakeholder governance as a “new model of capitalism” that “demands a dangerous expansion of corporate power that threatens to subvert American democracy”). In effect, these arguments suggest that the absence of government failure (or prospect of future government success) disproves stakeholder governance, a proposition that logically equates to the idea that the stakeholder governance approach to corporate law depends on governmental failure.

⁵ See, e.g., Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1, 73 (2020) (offering a theory in which “private investors respond to the *absence* of government regulation” of carbon emissions “rather than its presence”); Rock, *supra* note 4, at 368 (“If the legislature will not enact reasonable environmental regulation to control carbon, and we face imminent and irreversible environmental degradation, perhaps corporate law and governance should do more to control climate change . . . by treating it as an additional risk factor that boards should consider, or as a direct object.”).

failed to adopt tax or spending policies that would adequately address inequality, therefore businesses should consciously seek to address it when making decisions.⁶ This type of reasoning inverts the usual formula. Instead of identifying a market failure and using that failure as a justification for government action, the approach seeks to identify government failures and uses those failures as a justification for action by market participants.

Varied groups of commentators have invoked this government failure rationale for stakeholder governance, including shareholder primacy theorists defending their position,⁷ shareholder primacy theorists describing stakeholder governance,⁸ and theorists sympathetic to stakeholder governance defending their position.⁹ The return of Donald Trump to the presidency has amplified these arguments as commentators criticize his administration's deregulatory philosophy.¹⁰ But despite the variety of commentators who have invoked the concept and the frequency with which it is raised, its basic logic has not been subjected to sustained scrutiny.

This Article fills that gap by evaluating the government failure rationale for corporate reform. The analysis supports three basic claims. First, it is generally far from clear that government inaction on an issue represents a governmental *failure*.¹¹ Government inaction may simply reflect the unpopularity or contentiousness of a particular position. It is possible to identify systemic blind spots in the political process, which can be quite significant. For example, the courts

⁶ See, e.g., Rock, *supra* note 4, at 368 (“If the tax system will not take even small steps toward redistribution of wealth in response to rising inequality, an increase that threatens social cohesion and possibly even democratic governance, perhaps corporate law and governance should do more to reduce inequality.”).

⁷ E.g., Bebchuk & Tallarita, *supra* note 4, at 173–74; Gatti & Ondersma, *supra* note 4, at 170.

⁸ E.g., Rock, *supra* note 4, at 368.

⁹ E.g., Fan, *supra* note 4, at 451–52; Wu, *supra* note 4.

¹⁰ See, e.g., Afra Afsharipour & Darren Rosenblum, *The Inclusion Imperative for Repairing Corporate Governance*, 81 BUS. LAW. 439, 442–44 (2026) (describing the second Trump Administration's attacks on diversity, equity, and inclusion initiatives and the continued need to integrate diverse perspectives in corporate governance); Donald Braman, Theresa Gabaldon & Cindy Cho, *Reconstituting Corporate Power & Accountability*, 104 TEX. L. REV. ONLINE 88, 91–92, 127–32 (2025), <https://texaslawreview.org/reconstituting-corporate-power-accountability/> [perma.cc/KBY8-37ZS] (describing the collapse in environmental regulation under the second Trump Administration, and calling for corporate governance changes); Lisa M. Fairfax & Veronica Root Martinez, *The Miscalculation of Corporate DEI Risk*, 174 U. PA. L. REV. (forthcoming 2026) (manuscript at 27–28), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6111506 [perma.cc/J8NR-4B65] (describing the second Trump Administration's attacks on diversity, equity, and inclusion efforts, and suggesting that corporations have miscalculated by surrendering too quickly); Caley Petrucci, *Corporate Goodwill*, 67 B.C. L. REV. 585, 599–601, 633–40 (2026) (describing the second Trump Administration's activities and proposing steps to have corporations recommit to stakeholders).

¹¹ See *infra* Part II.A. Although this Article focuses on the concept of “government failure” within the corporate law literature, confusion about the concept is pervasive in the regulatory and economics literatures as well. See Barak Orbach, *What Is Government Failure?*, 30 YALE J. ON REGUL. BULL. 44, 46 (2013) (observing that “government failure” and related terms lack a settled meaning and are used inconsistently across the literature).

have long recognized that the political process will not adequately protect “discrete and insular minorities,” and principled corporate stands on racism or immigration could improve the national conversation.¹² But using systemic blind spots as a justification for stakeholder governance requires nuanced analysis and likely will not support all stakeholder-oriented reforms.

Second, even an ideal government would have serious limitations, preserving a role for stakeholder governance. At least taking current constitutional doctrine as a given,¹³ the government could not operate a surveillance state capable of rooting out all opportunism or malign intentions,¹⁴ would struggle to experiment or impose different rules on different players,¹⁵ and could not trample on freedoms like speech rights.¹⁶ Even under an ideal system, there would thus be room for businesspeople to make voluntary choices that improve outcomes.

Finally, there are basic objectives beyond the reach of government. If workers are entitled to have a say in their workplace, that goal can only be met by giving them power within corporate governance.¹⁷ Similarly, if workers are entitled to be regarded as whole human beings worthy of dignity, as opposed to mere tools for generating profits, that goal can only be satisfied by altering the objectives of corporations so that they can have a goal other than profits.¹⁸ External governmental regulation cannot satisfy these entitlements. They can only be satisfied by reorienting corporate governance to empower and respect workers.

These points have broad implications. They challenge the shareholder primacy camp by offering new reasons for endorsing stakeholder governance, at least in specific and targeted contexts. And they challenge the stakeholder governance camp to develop a more nuanced account of purported government

¹² See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (noting that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities”); *infra* Part II.C.1.

¹³ Of course, regardless of whether the doctrine helps define an ideal state, it has the practical implication that ordinary political actors are disabled from issuing legislation or regulation on these matters. See Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCT. 247, 249 (2017) (“[I]n the United States there are some areas where the Supreme Court has made political intervention very difficult by, for example, ruling that individuals have a constitutional right to own a gun and that corporations have a constitutional right to support political campaigns. If political change is hard to achieve, action at the corporate level is a reasonable substitute.”); cf. Mariana Pargendler, *Veil Peeking: The Corporation as a Nexus for Regulation*, 169 U. PA. L. REV. 717, 774 (2021) (noting that “government-controlled corporations” have sometimes been used as a tool for “avoiding the more cumbersome legal regime applicable to the state”).

¹⁴ See *infra* Part III.A.

¹⁵ See *infra* Part III.B.

¹⁶ See *infra* Part III.C.

¹⁷ See *infra* Part IV.A.

¹⁸ See *infra* Part IV.B.

failings and the proper relationship between government and business. Stakeholderism may be at its strongest when urging attention to racial equity, scrutiny of government contractors, attention to hate speech or misinformation in the media industry, or an active governance role for workers. But it may have previously undiagnosed weaknesses elsewhere.

The analysis also rehabilitates then critiques increasingly prominent arguments about “woke” corporations. Many prominent government officials have expressed concern that financial elites are making decisions on political matters without being subject to democratic accountability and restraint.¹⁹ The potential merit of this argument may have been obscured by the opportunism and incoherence of many of its key exponents. For example, Florida Governor Ron DeSantis feuded with Disney over the company’s criticism of state legislation forbidding classroom discussion of sexual orientation or gender identity.²⁰ The feud was plainly designed to advance DeSantis’s ambition to win the Republican nomination for the presidency, not to advance a coherent vision of corporate law: Florida law continues to expressly authorize the directors of companies incorporated in the state to consider employee and social interests when making decisions,²¹ and the feud’s substance and timing matched DeSantis’s campaign rhetoric about fighting socially conscious corporate elites.²² But although DeSantis’s particular position may be conceptually weak and politically opportunistic, there is a broadly shared and potentially valid concern that financial elites are going around the government and undermining democracy when they press corporations to adopt their preferred set of positions on environmental and social matters.²³ The argument deserves to be stated as persuasively as possible and evaluated on its real merit.

¹⁹ See Stavros Gadinis & Christopher Havasy, *The Quest for Legitimacy: A Public Law Blueprint for Corporate Governance*, 57 U.C. DAVIS L. REV. 1581, 1613–16 (2024) (collecting examples).

²⁰ Gatti, *Corporate Governing*, *supra* note 4, at 151–52; Manuel Roig-Franzia, *Ron DeSantis’s Scorn-Filled Book Sets the Tone for a Potential Campaign*, WASH. POST (Feb. 27, 2023), <https://www.washingtonpost.com/books/2023/02/27/ron-desantis-courage-be-free/> [perma.cc/ZP5N-HKJC]

²¹ FLA. STAT. § 607.0830(6) (2025) (“[A] director may consider such factors as the director deems relevant, including . . . the social, economic, legal, or other effects of any action on the employees, suppliers, customers of the corporation or its subsidiaries, the communities and society in which the corporation or its subsidiaries operate, and the economy of the state and the nation.”); *see also* Bebchuk & Tallarita, *supra* note 4, at 117 (classifying Florida’s corporate statute as identifying employees, customers, suppliers, local community, the economy, and a catch-all as stakeholders).

²² *See* Ron DeSantis, *Why I Stood Up to Disney*, WALL ST. J. (Feb. 28, 2023), <https://www.wsj.com/articles/why-i-stood-up-to-disney-florida-woke-corporatism-seaworld-universal-esg-parents-choice-education-defa2506> [perma.cc/3FRZ-37FL] (explaining DeSantis’s reasoning in stripping Disney’s “self-governing status” from its Florida property).

²³ *See, e.g.*, MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE 26 (1994) (arguing that “American public opinion, which mistrusted private large accumulations of power” has historically played an important role in public policy weakening financial institutions and empowering corporate managers at individual firms); Lund, *Asset Managers as Regulators*, *supra* note 4, at 89 (“[A]llowing three for-profit asset managers that lack

More fundamentally, the analysis invites a deeper conversation between scholarship in corporate law and scholarship in other fields. As corporate law debates turn to stakeholderism, environmental damage, and social concerns, corporate law scholars have increasingly made claims about the political process and bodies of public law.²⁴ Despite their significance to the corporate law literature, these claims are often underdeveloped and are rarely subjected to serious scrutiny. If corporate law scholarship is to explore questions about the relationship between corporations and society, corporate law scholars must do more to unpack and critically examine the deep logic of their ideas about politics. This Article begins that conversation and invites further scholarship.

The Article proceeds as follows. Part I lays out the basics of the shareholder primacy and stakeholder governance schools and explores how they relate to claims about government capacity. Part II discusses the difficulty of diagnosing a government failure but highlights areas where longstanding beliefs about the political process make a diagnosis plausible. Part III shows that even an ideal state would leave room for corporate consideration of non-shareholder interests. Part IV identifies goals that are fundamentally beyond the reach of government and that can only be satisfied through some version of stakeholder governance. A brief conclusion follows.

I. THE CORPORATE PURPOSE DEBATE

Businesses affect and are affected by many groups, including shareholders, workers, creditors, customers, and suppliers, and the people who live in areas where the businesses operate. The standard shareholder primacy account of corporate law suggests that shareholders are special.²⁵ Shareholders inter-

electoral accountability to set regulatory policies for the United States economy is dangerous for our democracy”); Bernie Sanders (@BernieSanders), X, *This is what oligarchy is about. Today just 3 Wall Street firms . . . manage \$20.7 trillion in assets. These 3 firms are major shareholders in 95% of S&P 500 companies. Democracy will not survive with this concentration of economic & political power.* (Dec. 29, 2023, at 8:39 ET), twitter.com/BernieSanders/status/1740835054434369758 [perma.cc/CDS2-59Y3].

²⁴ See, e.g., Bebchuk & Tallarita, *supra* note 4, at 174 (basing analysis “on the premise that the possibility of stakeholder-protecting reforms is not completely blocked”); Anil Kovvali, *Stark Choices for Corporate Reform*, 123 COLUM. L. REV. 693, 694–95, 695 n.1 (2023) (noting that a large number of corporate law commentators have claimed that stakeholder governance could make regulation less likely without subjecting the claim to serious scrutiny); Lund, *Asset Managers as Regulators*, *supra* note 4, at 89 (“Perhaps most important, there is the risk that the provision of private regulation will take pressure off of the government to respond to these important issues.”); cf. HAYDEN & BODIE, *supra* note 2, at 103 (suggesting that corporate law theorists have advanced a superficially plausible but ultimately inaccurate argument based on a key result from social choice theory).

²⁵ See, e.g., EASTERBROOK & FISCHEL, *supra* note 1, at 67–68 (“[Corporate v]otes could be held by shareholders, bondholders, managers, or other employees in any combination. . . . Yet voting rights are universally held by shareholders, to the exclusion of [others]”); Emilie Aguirre, Julie Yen & Julie Battilana, *An Organizational Theory of Corporate Law*, 50 J. CORP. L. 567, 579 (2025) (describing the neoclassical view that “shareholders are special because they are residual claimants to the firm

nalize the marginal costs and benefits of corporate activity because they are the last in line to be paid. Before it can deliver profits to shareholders, the corporation must either comply with any applicable regulations or pay fines, sell products to willing buyers at an attractive price, and pay off creditors, workers, suppliers, and tax authorities. Because shareholders are only paid the residual—the amount that remains after regulatory and contractual obligations are satisfied—they have a unique incentive to maximize the total value of the enterprise.²⁶ As a result, it makes sense for corporate managers to use any residual authority—any decisions they are free to make given regulatory and contractual restraints—for the exclusive financial benefit of shareholders.²⁷ If they do, they will create value for everyone.

On this account, external government action is not necessary to protect some groups from corporate action. At least on the assumption that a company operates in competitive markets, workers, creditors, customers, and suppliers ought to be able to protect themselves by striking favorable deals with the company.²⁸ By contrast, shareholders would struggle to write an explicit contract that fully protects their interests. Because they are affected by marginal changes in the corporation's value, they are sensitive to a wide variety of developments that would be impossible to anticipate and fully address in a contract.²⁹ As a result, shareholders must be protected by the internal mechanisms of corporate governance, which seek to ensure that managers make decisions for shareholders' benefit, whereas other voluntary counterparties to the corporation can be protected by contracts struck on the market.³⁰

who receive payouts only after all other claims to the firm have been satisfied"); Pargendler, *supra* note 4, at 397–98 (describing and critiquing the shareholder primacy norm).

²⁶ See EASTERBROOK & FISCHER, *supra* note 1, at 68 (distinguishing shareholder incentives from those with fixed claims on an income scheme); ARMOUR, ENRIQUES ET AL., *supra* note 3, at 28 & n.80 (describing shareholders as 'residual claimers' of a corporation).

²⁷ See EASTERBROOK & FISCHER, *supra* note 1, at 68 (describing how managers' knowledge of shareholder incentives dictates their decision making).

²⁸ See Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 659 (2006) (describing how contracts may protect interests of corporate stakeholders but identifying ways in which this framework may fail); Oliver Williamson, *Corporate Governance*, 93 YALE L.J. 1197, 1207–08 (1984) (describing a way in which contract law can protect interests of workers without resorting to government intervention in the area of labor law).

²⁹ See Fisch, *supra* note 28, at 656 (describing the shortcomings of contracting); Williamson, *supra* note 28, at 1210–11 (discussing supplemental efforts when contracting cannot fully address shareholder needs).

³⁰ See Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2579–81 (2021) (recounting the development of shareholder primacy doctrine in Delaware courts); 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, 768 (2015) (concluding that Delaware law requires directors to focus only on stockholder welfare, whereas interests of other stakeholders may be considered solely as a means to promote this welfare). A significant literature suggests that corporate governance mechanisms have been tilted in favor of managers' interests. See, e.g., Lucian Arye Bebchuk, *Federalism*

But the shareholder primacy account does require robust government action to protect many other groups, such as people who may be affected by pollution emitted by the company's operations. Such groups would struggle to overcome collective action problems and negotiate for good behavior.³¹ To ensure that shareholder-focused managers make socially optimal decisions, the government must force the company to internalize the costs that its behavior imposes on these groups. As leading shareholder primacy theorists Frank Easterbrook and Daniel Fischel put it:

Given wealth as a maximand, society may change corporate conduct by imposing monetary penalties. These reduce the venturers' wealth, so managers will attempt to avoid them. A pollution tax, for example, would induce the firm to emit less. It would behave as if it had the interests of others at heart. Society thus takes advantage of the wealth-maximizing incentives built into the firm in order to alter its behavior at least cost. . . . We do not make the Panglossian claim that profit and social welfare are perfectly aligned. When costs fall on third parties—pollution is the common example—firms do injury because harm does not come back to them as private cost. Dumping offal may impose costs on downstream users exceeding the gains to the stockholders. . . . The task is to establish property rights so that the firm treats the social costs as private ones, and so that its reactions, as managers try to maximize profits given these new costs, duplicate what all of the parties (downstream users and customers alike) would have agreed to were bargaining among all possible without cost.³²

Of course, this requires the government to have a remarkable capacity to sense the optimal outcome and impose it, even without the benefit of markets that could aggregate all of the relevant information.

The shareholder primacy account also requires robust government action to address the distribution of wealth. The shareholder primacy account is powered by voluntary transactions. Although the invisible hand of the market makes voluntary transactions a powerful tool for maximizing total social

and the Corporation: The Desirable Limits on State Competition in Corporate Law, 105 HARV. L. REV. 1435, 1438 & n.10 (1992) (noting that state law may impact the decision to incorporate in a particular state).

³¹ See, e.g., Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1119 (1972) (explaining that dispersed pollution victims face free-rider and holdout problems that prevent them from bargaining collectively for protection).

³² EASTERBROOK & FISCHEL, *supra* note 1, at 37–39.

wealth,³³ it does little to address disparities in which some individuals lack the resources to lead a decent life. The standard prescription for this problem is for the government to tax and spend.³⁴ Instead of distorting corporate law by shifting it from its efficient shareholder-focused orientation, policymakers should seek to raise revenue with a minimum of distortions and deploy that revenue in ways that maximize wellbeing.

The shareholder primacy account has drawn serious criticism, particularly in periods when the government is perceived to be failing in its responsibility to address externalities.³⁵ The competing stakeholder governance approach suggests that managers can improve outcomes by being attentive to the interests of a broader range of stakeholders, including workers, communities of operation, and the environment.

Although stakeholder governance encompasses a range of approaches and perspectives—and has been criticized as indeterminate on that ground³⁶—most framings center on a breakdown of the mechanisms that drive shareholder primacy. Although competitive markets would allow groups like workers and customers to protect themselves through market transactions, many markets are not competitive. For example, although scholars had long assumed that labor markets were reasonably competitive, emerging evidence and scholarship suggests that monopsony conditions are endemic in the economy.³⁷ As a result, workers may not be able to protect themselves through bargaining. The lack of

³³ See ADAM SMITH, *THE WEALTH OF NATIONS* BOOK IV, ch. 2 (1776) (“[An individual employing capital] generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it . . . [H]e intends only his own gain; and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention.”). The modern economic formulation of this idea is the first fundamental theorem of welfare economics, which asserts that under certain strong assumptions, voluntary market transactions will drive the economy to an economically efficient outcome in which no one can be made better off without making someone else worse off. See ANDREU MAS-COLELL, MICHAEL D. WHINSTON & JERRY R. GREEN, *MICROECONOMIC THEORY* 326 (1995) (“If the price p^* and allocation $(x_1^*, \dots, x_l^*, q_1^*, \dots, q_l^*)$ constitute a competitive equilibrium, then this allocation is Pareto optimal.”).

³⁴ See Louis Kaplow & Steven M. Shavell, *Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 677 (1994) (suggesting that the income tax system is the most efficient tool for achieving redistribution).

³⁵ See *supra* note 2 (collecting sources).

³⁶ See, e.g., EASTERBROOK & FISCHEL, *supra* note 1, at 38 (“[A] manager told to serve two masters (a little for the equity holders, a little for the community) has been freed of both and is answerable to neither.”); Stephen M. Bainbridge, *Making Sense of the Business Roundtable’s Reversal on Corporate Purpose*, 46 J. CORP. L. 285, 301–02 (2021) (discussing how “shareholder wealth maximization” provides much clearer guidance to a board than stakeholder governance).

³⁷ See Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 CORN. L. REV. 1343, 1346 (2020) (“At one time, economists assumed that labor markets were highly competitive. . . . But the new research revealed that these assumptions were faulty.”); Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 537, 541–42 (2018) (describing some recent evidence of labor monopsony and suggesting some reasons for an earlier intellectual blindspot).

competition in the economy suggests that a stakeholder orientation at corporations could improve outcomes.

Shareholder primacy theorists respond that these problems are best addressed by areas of law that are more precisely targeted at the problem. Anti-trust law can be used to challenge the market imperfections that give employers power over their workers, labor law can be used to facilitate the formation of unions that monopolize the supply of labor and can thus bargain with employers on an equal footing, and employment law can be used to impose terms that workers would be expected to bargain for in an idealized market.³⁸ Other problems or harms caused by corporations can similarly be addressed by targeted areas of law, such as environmental law or consumer protection statutes. These regulations provide a more efficient, precise, and effective solution than changes in corporate governance.

For the most part, stakeholder governance theorists have not challenged the idea that direct regulations would be preferable to corporate governance changes. They have simply suggested that existing or likely regulations are not equal to pressing challenges and crises.³⁹ For example, a carbon tax would be a powerful way to combat climate change.⁴⁰ But the American government has not adopted a carbon tax, nor is it likely to do so as long as shareholder-oriented corporations lobby against such changes.⁴¹ As a result, it may be appropriate for corporate leaders to consider climate change when making decisions. When the government fails to take adequate action, stakeholder governance may be a reasonable way to mitigate the problem.

II. IDENTIFYING A GOVERNMENT FAILURE

This Part challenges the government failure rationale for stakeholder governance by suggesting it is difficult to distinguish genuine government failures from legitimate decisions not to intervene. Section A suggests the outcomes of the political process deserve a presumption of legitimacy. Section B discusses

³⁸ See Bebchuk & Tallarita, *supra* note 4, at 168–71 (discussing various “stakeholder-protecting reforms”); Gatti & Ondersma, *supra* note 4, at 191–209 (reviewing policy proposals to reverse trends of decreased labor workers’ rights).

³⁹ See, e.g., Wu, *supra* note 4 (suggesting that “to expect law to fill in all the gaps is to expect far too much”). For a distinctive account suggesting that corporate leaders retain an ordinary moral responsibility to consider harms to stakeholders, see Jeffrey Gordon’s lecture, *The Moral Duty of Directors*, at Emory University School of Law, EMORY SCHOOL OF LAW, *The 2026 Carney Lecture* (YouTube, Mar. 26, 2026), <https://www.youtube.com/watch?v=s8QLCZ5tAOQ> (on file with author).

⁴⁰ See, e.g., Bebchuk & Tallarita, *supra* note 4, at 170; Gilbert E. Metcalf & David Weisbach, *The Design of a Carbon Tax*, 33 HARV. ENV’T L. REV. 499, 500 (2009).

⁴¹ Cf. Soren Anderson, Ioana Marinescu & Boris Shor, *Can Pigou at the Polls Stop Us Melting the Poles?*, 10 J. ASS’N ENV’T & RES. ECONOMISTS 903, 911–12, 921–25 (2023) (identifying several reasons for the failure of a ballot initiative on a carbon tax but flagging possible role of heavy campaign spending in opposition).

criticisms of the substantive outcomes produced by the political process and finds them largely inadequate. Section C identifies process-based objections. Although some process-based objections are potentially promising, they would support only a nuanced approach to corporate reform.

A. The Presumptive Legitimacy of the Political Process

This Section lays out two reasons for respecting the outcomes generated by the political process.⁴² First, the substantive products of the process do meet some basic tests of legitimacy. They command broad respect from the population, they supply a basic minimum of performance, and they are likely to be improvements upon the results that unconstrained companies would provide. Second, the processes for enacting legislation and issuing regulations are constructed to support substantive goals and build legitimacy. Although the processes are arduous, they are arduous precisely because they are designed to filter out bad policies and allow a broad set of groups to participate meaningfully in policymaking.

1. Substance

The products of the legislative and regulatory processes pass the most simple test of legitimacy: they are recognized as legitimate bodies of law by the majority of the public.⁴³ Although the point prompts deep and controversial jurisprudential questions at the level of theory,⁴⁴ it has the straightforward practical implication that any attempt to claim that some different body of rules is a legitimate source of authority is likely to cause controversy and uncertainty.

Formal legislation and regulation have also met a basic minimum of performance. Backsliding is always a concern and there are reasons to worry that the existing level of performance will not be adequate for dealing with challenges ahead. But Americans do live in a remarkably successful society. For example, Americans today are the beneficiaries of a legacy of achievement in

⁴² Cf. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1372–73 (2006) (describing both outcome-related reasons and process-related reasons for showing respect to a decision-making process).

⁴³ The public law literature refers to this concept as “sociological legitimacy.” See, e.g., Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795 (2005) (“In the Weberian sense, legitimacy signifies an active belief by citizens, whether warranted or not, that particular claims to authority deserve respect or obedience for reasons not restricted to self-interest.”); Gadini & Havasy, *supra* note 19, at 1589–90, 1594–95, 1595 nn.53–54 (discussing sociological legitimacy and moral legitimacy in the context of agency operation).

⁴⁴ See, e.g., Stephen Perry, *Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View*, 75 FORDHAM L. REV. 1171, 1171, 1173 (describing H.L.A. Hart’s concept that a rule is “a certain kind of complex social practice that consists of a general and regular pattern of behavior among some group of persons, together with a widely shared attitude within the group that this pattern is a common standard of conduct to which all members of the group are required to conform” and noting some of the complications and controversies associated with that view).

environmental regulation. The Clean Air Act and Clean Water Act have significantly lowered air and water pollution in the decades since their enactment.⁴⁵ The Inflation Reduction Act (IRA) created incentives to engage in activities that will reduce greenhouse gas emissions, in the process creating and empowering constituencies to support further efforts.⁴⁶ Although wildfires in recent years have prompted enormous concern about air quality, they only reversed a fraction of the overall progress: Americans who lived through the wildfires were still breathing cleaner air on average than Americans of previous generations.⁴⁷ There are good reasons to believe that this progress is not adequate given documented inequities, that it will not be enough to deal with worsening crises like climate change, and that political changes will make further progress difficult or even reverse past successes. But, so far, the political system has avoided some of the dystopian outcomes that would plainly discredit it.

Finally, the political system has almost certainly improved upon the outcomes that could be achieved through pure private ordering. Although private governance may be a useful complement to regulation,⁴⁸ it is often a dangerous substitute because markets either suffer from too much competition or too little. A company in an extremely competitive market will have no room to sacrifice profits to deliver social benefits,⁴⁹ and any effort it does make will be un-

⁴⁵ See ENV'T PROT. AGENCY, OUR NATION'S AIR (2022), https://gispub.epa.gov/air/trendsreport/2022/documentation/AirTrends_Flyer.pdf [perma.cc/8QJ3-K7S8] (describing a 91% reduction in sulfur dioxide, 85% in lead, and 79% in carbon monoxide in recent decades).

⁴⁶ See, e.g., Jim Tankersley, *Biden's Climate Law Is Reshaping Private Investment in the United States*, N.Y. TIMES (Sep. 13, 2023), <https://www.nytimes.com/2023/09/13/us/politics/biden-climate-law-investment.html> [perma.cc/2UC7-38TJ] (reporting that IRA tax incentives drove clean-energy investment into Republican-leaning and swing states alike). The second Trump Administration only partially reversed these initiatives, in part because the Inflation Reduction Act successfully created constituencies to support their continuation. See Yusuf Khan, *Carbon-Capture Hub Gets Lifeline from Trump Administration*, WALL ST. J. (Apr. 16, 2026), <https://www.wsj.com/pro/sustainable-business/carbon-capture-hub-gets-lifeline-from-trump-administration-710ad2ac> [perma.cc/LS6X-RBGG] (quoting Trump Secretary of Energy Chris Wright that 80% of clean technology initiatives retained funding).

⁴⁷ See Marshall Burke et al., *The Contribution of Wildfire to PM_{2.5} Trends in the USA*, 622 NATURE 761, 762 (2023) (reporting a twenty-five percent reversal of progress in reducing PM_{2.5} concentrations—fine airborne particulate matter originating industrial emissions and wildfires—over the previous years); Nadja Popovich, *America's Skies Have Gotten Clearer, but Millions Still Breathe Unhealthy Air*, N.Y. TIMES (June 19, 2019), www.nytimes.com/interactive/2019/06/19/climate/us-air-pollution-trump.html [perma.cc/XAR6-YW3D] (attributing much of the historical improvement in air quality within the United States to government regulation).

⁴⁸ See, e.g., EDWARD HUMES, *FORCE OF NATURE* 230–32 (2011) (describing the significant impact of Walmart's voluntary efforts to reduce waste and emissions); MICHAEL P. VANDENBERGH & JONATHAN M. GILLIGAN, *BEYOND POLITICS: THE PRIVATE GOVERNANCE RESPONSE TO CLIMATE CHANGE* 8 (2017) (summarizing ways that private parties can promote progress on difficult environmental issues).

⁴⁹ Mark J. Roe, *Corporate Purpose and Corporate Competition*, 99 WASH. U. L. REV. 223, 226 (2021) ("In a competitive market with thin profit margins, a firm pressed to, say, pay its employees noticeably more than their productivity warrants cannot prosper. It will be unable to raise capital well,

dercut by competitors who are willing to cut corners.⁵⁰ Extreme competition would also make collaboration to raise standards difficult.

On the other end of the spectrum, companies operating in uncompetitive markets have enormous and unaccountable power over customers. A customer who disagrees with choices made by a monopolist or by a coalition of oligopolists cannot simply shift to another supplier.⁵¹ The magnitude of the power that a corporation in this position exercises arguably heightens the need for it to exercise that power in a responsible, prosocial manner. But many policies that are prosocial on their face can also carry harms. For example, an agreement among oil companies to constrict the supply of fuel and raise prices might be good for the climate, but it also sounds like a straightforward conspiracy in restraint of trade that has the potential to cause harms familiar from antitrust law: transferring value from consumers to companies and causing deadweight losses.⁵² Oil companies setting a price increase are unlikely to take account of any deadweight losses or consumer harms from constricting supply and raising prices. As a result, the deals that they strike are unlikely to match the rules that would be set by a benevolent social planner responsive to the full range of stakeholder concerns at play.⁵³

its extra costs will chew away at profits, its sales will suffer, and it will shrink. At the limit it will disappear.”).

⁵⁰ See Hiroko Tabuchi, *Oil Giants Sell Dirty Wells to Buyers with Looser Climate Goals, Study Finds*, N.Y. TIMES (May 10, 2022), <https://www.nytimes.com/2022/05/10/climate/oilfield-sales-pollution.html> [perma.cc/45W5-KWUH] (noting that pressure to clean up operations has led major oil companies to sell dirty wells to smaller outfits that are indifferent to such pressure, that then operate the wells in a dirtier fashion).

⁵¹ Cf. Adolf A. Berle, Jr., *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933, 951 (1952) (noting that “very considerable concentration of economic power in a given area” has the potential to undermine individual liberty); Elizabeth Pollman, *Quasi Governments and Inchoate Law: Berle’s Vision of Limits on Corporate Power*, 42 SEATTLE U. L. REV. 617, 625 (2019) (summarizing Berle’s views on economic power in corporations).

⁵² See Condon, *supra* note 5, at 73–74 (illustrating this tension through California’s 2019 agreement with four automakers to voluntarily adopt vehicle emissions standards stricter than federal law required). For a nuanced view of this issue and proposed reforms to antitrust law intended to facilitate socially beneficial collaboration, see Amelia Miazad, *Prosocial Antitrust*, 73 HASTINGS L.J. 1637 (2022).

⁵³ See Roberto Tallarita, *The Limits of Portfolio Primacy*, 76 VAND. L. REV. 511, 538 (2023) (“The strategies that companies adopt to mitigate the effects of climate change are motivated by their private interests and therefore will be aimed at increasing ‘producer welfare.’ But the relationship between the company’s welfare and consumer and social welfare can take different forms. . . . It is also possible . . . that the best strategy for the company is the best strategy for total welfare but not for consumer welfare, or it is suboptimal both for consumer welfare and for total welfare.”).

2. Process

The process of enacting and enforcing federal legislation is difficult by design.⁵⁴ The House and Senate must pass legislation; it must be signed by the President or supermajorities of the House and Senate must overcome the presidential veto; the legislation must be translated into regulations and enforced, likely by a future presidential administration; and the courts must allow it to be applied.⁵⁵ Navigating this process requires a broad and durable consensus. Different participants with power over the process are put in office at different times in different ways, answer to different constituencies, and face different accountability structures.

The arduous procedure for enacting legislation and promulgating regulations has the effect of filtering out many unworthy policies. The difficulty of enacting and enforcing legislation likely also means that many worthy policies are *not* put into place. But the design of the process reflects a judgment that errors in which worthy policies are not enacted are less dangerous than errors in which unworthy policies are put into force. Although conservatives appear more eager to insist that policy must go through the legislative process,⁵⁶ even relatively progressive thinkers appear to accept some version of the concept.⁵⁷ Instead of imposing an idealized concept of optimal policy, most lawyers appear to be willing to accept the messy compromises and omissions that emerge from the legislative process.

By demanding agreement across a range of different officials, the process also has the effect of requiring a broad consensus and empowering different groups to resist.⁵⁸ Members of the House are elected every two years from relatively small geographic districts, members of the Senate are elected every six years in statewide elections, the President is selected by an electoral college appointed every four years through nationwide elections, and agency leaders and judges are appointed by the President and confirmed by the Senate. Policy

⁵⁴ See Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1706–07 (2008) (stating that the bicameralism and presentment requirements were designed to make it difficult for legislative majorities to enact law); John F. Manning, *Lawmaking Made Easy*, 10 GREEN BAG 2D 191, 198 (2007) (stating that the constitutional design disfavors voluminous lawmaking).

⁵⁵ See U.S. CONST. art. I, § 7 (providing the process by which the U.S. legislature passes bills into law); Gatti, *Corporate Governing*, *supra* note 4, at 170–71 (attributing political gridlock to constitutional design, including the design of the U.S. Senate).

⁵⁶ See, e.g., Manning, *supra* note 54, at 200–01, 204 (asserting the benefits of the U.S. legislative framework).

⁵⁷ For example, relatively progressive Supreme Court Associate Justice Elena Kagan once declared “We’re all textualists now” during a lecture at Harvard Law School. HARVARD LAW SCHOOL, *The 2015 Scalia Lecture | A Dialogue with Justice Kagan on the Reading of Statutes*, at 8:25 (YouTube, Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg> (on file with author).

⁵⁸ See Manning, *supra* note 54, at 200–01 (discussing theories related to bicameralism and multicameralism).

will only be enacted if the officials agree, and the officials answer to a broad range of different constituencies.

It appears relatively uncontroversial that any policy that survives this process deserves at least a presumption of legitimacy. Ever since the Supreme Court accepted the concept of the New Deal, it has subjected most legislation to a deferential “rational basis” review as opposed to more searching scrutiny.⁵⁹ The modern Supreme Court has arguably departed from that principle,⁶⁰ but the controversy surrounding those departures only reinforces the widely felt support for the underlying norm. The Court has also upheld some politically controversial statutes in the face of withering criticism.⁶¹ These points should not be taken as an endorsement of the modern Supreme Court’s approach or as a claim that it has in fact remained deferential, is playing an appropriate role, or does not require reform. But they do suggest the continuing force of the idea that congressional or administrative actions have some presumptive legitimacy.⁶² Even innovative academic theories appear to embrace

⁵⁹ The major exceptions are generally attributable to process-based criticisms. *See* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (calling for a “more searching judicial inquiry” where legislation may have been affected by prejudice).

⁶⁰ A full evaluation of this point would be beyond the scope of this Article. But three areas of arguable departure have been particularly salient in recent decisions. Under the major questions doctrine, a conservative majority on the Supreme Court has often openly departed from the plain meaning of congressionally enacted statutes based on a general sense that the policies adopted by those statutes were too extreme. *See, e.g.,* *Learning Res., Inc. v. Trump*, 146 S. Ct. 628, 656–57 (2026) (Gorsuch, J., concurring) (noting that “commonsense principles of communication” would often have supported an expansive reading of regulatory statutes given narrow scope under the major questions doctrine); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1012–13 (2023) (noting that major questions decisions often reject the unambiguous meaning of statutes, and identifying some factors that lead the Court to reject administrative policies). The Court’s approach to the Voting Rights Act has similarly narrowed a signature civil rights statute based on questionable claims about constitutional principles. *See* *Louisiana v. Callais*, 146 S. Ct. 1131, 1155–57 (2026) (limiting the scope of section 2 of the Voting Rights Act of 1965); *Shelby County v. Holder*, 570 U.S. 529, 556–57 (2013) (striking down portions of the Voting Rights Act); Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1420, 1485 (2017) (criticizing the use of “antinovelty” arguments against the Voting Rights Act). The Court has also been accused of “Lochnerism” in using the First Amendment to strike down various regulatory schemes. *See* Genevieve Lakier, *The First Amendment’s Real Lochner Problem*, 87 U. CHI. L. REV. 1241, 1243 (2020) (describing historical parallels between contemporary First Amendment law and *Lochner*).

⁶¹ *See* *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 552, 585–88 (2012) (upholding most provisions of the Patient Protection and Affordable Care Act).

⁶² For example, in *Shelby County*, Chief Justice Roberts’s opinion for the Court expressed reluctance to strike down an act of Congress and suggested that the Court had been forced into the position by Congress’s failure to heed earlier warnings. 570 U.S. at 556–57. There is much to critique in this part of the opinion, and there are good reasons to doubt the majority’s sincerity. But the fact that Chief Justice Roberts felt the need to make these claims attests to the strength of the broad consensus around the underlying norm of presuming legitimacy.

the idea that laws surviving the legislative or regulatory process are presumptively legitimate.⁶³

Corporate policymaking is not disciplined by this type of process.⁶⁴ As Milton Friedman pointed out in a famous defense of shareholder primacy:

On the level of political principle, the imposition of taxes and the expenditure of tax proceeds are governmental functions. We have established elaborate constitutional, parliamentary and judicial provisions to control these functions, to assure that taxes are imposed so far as possible in accordance with the preferences and desires of the public We have a system of checks and balances to separate the legislative function of imposing taxes and enacting expenditures from the executive function of collecting taxes and administering expenditure programs and from the judicial function of mediating disputes and interpreting the law.

Here the businessman—self-selected or appointed directly or indirectly by stockholders—is to be simultaneously legislator, executive and jurist. He is to decide whom to tax by how much and for what purpose, and he is to spend the proceeds—all this guided only by general exhortations from on high to restrain inflation, improve the environment, fight poverty and so on and on.⁶⁵

This can be particularly problematic because managers are not representative of the broader population. Corporate leaders are disproportionately white and male relative to both the population and the workforce.⁶⁶ A focused and sustained effort by major institutional investors in recent years was required to achieve minimal levels of gender diversity in the boardrooms of many major corporations.⁶⁷ It remains unclear whether these recent gains will be lasting. And of course, corporate leaders are disproportionately wealthy: there are clearly no individuals in the bottom ten percent of incomes serving as the chief executive officer of a major corporation.

⁶³ ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION 11–12 (2022) (“[T]he American small-c constitutional order has come to feature broad deference to legislatures on social and economic legislation and broad delegations from legislatures to the executive.”).

⁶⁴ For an argument that corporations *should* adopt legitimacy-enhancing processes developed in the public sector, see Gadinis & Havasy, *supra* note 19, at 1598–616.

⁶⁵ Friedman, *supra* note 1.

⁶⁶ E.g., Jill Fisch & Jeff Schwartz, *Corporate Democracy and the Intermediary Voting Dilemma*, 102 TEX. L. REV. 1, 28 n.140, 58 (2023); Tina Shah Paikeday & Nisa Qosja, *How to Fix the C-Suite Diversity Problem*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 25, 2023), <https://corpgov.law.harvard.edu/2023/02/25/how-to-fix-the-c-suite-diversity-problem/> [perma.cc/TVL8-NETN].

⁶⁷ See Michal Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243, 1250–51, 1285 (2020) (describing State Street’s “Fearless Girl” marketing effort and campaign).

Managers are somewhat beholden to shareholders, perhaps mitigating the concern that managers will give away too much shareholder money.⁶⁸ This is not a given. Managers' interests can systematically diverge from shareholders' interests, particularly where stakeholders and social matters are concerned. Managers may be more sympathetic than shareholders to workers and local communities because they interact with coworkers and neighbors, meaning that they are confronted with the consequences of corporate decisions and are subject to social and reputational sanctions.⁶⁹ Managers may also be deeply concerned about the personal career consequences of a public relations disaster even if shareholders would be relatively indifferent.⁷⁰ But a powerful set of arrangements and norms disciplines managers and incentivizes them to focus exclusively on shareholder interests. Shareholders can vote out corporate directors; in unusual cases, managers can be sued for breaching a fiduciary obligation to advance shareholder interests; managers' compensation is normally a function of the returns they generate for shareholders; future managers are taught in professional schools that they should focus on shareholder returns; and the broader business culture treats shareholder returns as the key marker of success.⁷¹

This shareholder focus can create a different set of problems. The rise of national securities markets, diversification, and institutional investors serve to isolate shareholders from corporate decisions, making it difficult for them to perceive the social consequences of profit maximizing behavior or to force managers to behave in a socially responsible way.⁷² The distribution of shares across

⁶⁸ See William Savitt & Anil Kovvali, *On the Promise of Stakeholder Governance: A Response to Bebchuk and Tallarita*, 106 CORN. L. REV. 1881, 1887 (2021) ("Because stockholders can vote out directors, there is no risk that directors seeking to implement stakeholder governance will abandon stockholder interests.").

⁶⁹ See Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 800 (2005) ("Managerial responsiveness to social and moral sanctions should thus compensate for shareholder pressure to ignore those social and moral sanctions."); Lund, *Asset Managers as Regulators*, *supra* note 4, at 100 ("[I]t is possible that the individuals who develop governance policies will use that authority to advance their own private interests.").

⁷⁰ See Michal Barzuza, Quinn Curtis & David H. Webber, *The Millennial Corporation: Strong Stakeholders, Weak Managers*, 28 STAN. J.L. BUS. & FIN. 255, 285 (2023) ("[W]ith respect to negative ESG events, relative to investors, the CEO faces a risk of higher personal harm, that is not diversifiable, and that risk can be mitigated using investors' money.").

⁷¹ See Bebchuk & Tallarita, *supra* note 4, at 103, 106 (describing the cultural dominance of shareholder primacy in the United States since at least the 1920s); Lund & Pollman, *supra* note 30, at 2565 (describing interlocking institutions and mechanisms that work to promote shareholder primacy approach to corporate governance).

⁷² See William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 270 (1992) (noting that the increasing scale of businesses and the rise of large securities exchanges served to isolate shareholders from corporate decisions); Hart & Zingales, *supra* note 13, at 255–58 (analyzing some of the collective action problems that can prevent shareholders from achieving moral goals within corporations); Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L.J. 1870, 1872–74 (2017) (noting that institutional arrangements in which

society can also create problems. If shares were equally held by all members of society, corporations would be plausible tools for advancing general as opposed to special interests. Individuals could theoretically use their power as shareholders to improve overall welfare, balancing their interests as shareholders against their interests as workers, consumers, and people who are exposed to pollution.⁷³ But although most American households have some exposure to equities,⁷⁴ shares are not equally held by all members of society.⁷⁵ More importantly, shareholders are not a representative group. Shareholders are wealthier, whiter, older, and more male than the general population.⁷⁶ As a result, there are good reasons to worry that shareholder interests and social welfare will diverge: a majority of shareholders may approve of an action even if it harms a majority of citizens. Although “shareholder democracy” is a common and powerful analogy, it would be a mistake to assume that it will produce decisions with the same merit and legitimacy as actual political democracy.⁷⁷

savers’ capital is placed in funds can mean that their capital is used to advance financial goals instead of their true interests).

⁷³ Some commentators have suggested that corporations should tap into this potential by pursuing welfare as underlying investors themselves perceive it, as opposed to a narrower financial objective. See Hart & Zingales, *supra* note 13, at 249 (arguing that “shareholder welfare is not equivalent to market value”); Strine, *supra* note 72, at 1873–74 (discussing hedge fund activism); cf. Condon, *supra* note 5, at 8 (noting that diversified shareholders have different financial interests from a concentrated shareholder); Ann M. Lipton, *What We Talk About When We Talk About Shareholder Primacy*, 69 CASE W. RES. L. REV. 863, 865–66 (2019) (noting doctrinal confusion over the difference between shareholders’ actual preferences and legal construction of shareholders’ financial interests).

⁷⁴ Fisch & Schwartz, *supra* note 66, at 28 n.140, 58; see also Hannah Miao, *More Americans Than Ever Own Stocks*, WALL ST. J. (Dec. 18, 2023), <https://www.wsj.com/finance/stocks/stocks-americans-own-most-ever-9f6fd963> [perma.cc/4TEB-S2SS] (“About 58% of U.S. households owned stocks in 2022 . . .”).

⁷⁵ Strine, *supra* note 72, at 1872 (“[F]or all the talk of creating an ownership society, close to half of Americans do not have any investments in equity securities, even in the form of 401(k) and individual retirement account . . . investments in mutual funds.”). For a proposal to address the problem by allocating shares to citizens, see LYNN STOUT, SERGIO GRAMITTO & TAMARA C. BELINFANTI, CITIZEN CAPITALISM: HOW A UNIVERSAL FUND CAN PROVIDE INFLUENCE AND INCOME TO ALL 49–60 (2019); Pargendler, *supra* note 4, at 398.

⁷⁶ William W. Bratton & Michael L. Wachter, *Shareholders and Social Welfare*, 36 SEATTLE U. L. REV. 489, 491 (2013); Fisch & Schwartz, *supra* note 66, at 28 n.140, 58; Sarah C. Haan, *Voter Primacy*, 83 FORDHAM L. REV. 2655, 2700 (2015); Kovvali, *supra* note 24, at 740 n.207; Pargendler, *supra* note 4, at 398; Lenore Palladino, *The Contribution of Shareholder Primacy to the Racial Wealth Gap* 2 (Roosevelt Inst. Working Paper, Paper No. 202001, 2020), <https://rooseveltinstitute.org/publications/the-contribution-of-shareholder-primacy-to-the-racial-wealth-gap/> [perma.cc/3W9T-Y43Z].

⁷⁷ Cf. LISA M. FAIRFAX, SHAREHOLDER DEMOCRACY: A PRIMER ON SHAREHOLDER ACTIVISM AND PARTICIPATION 36–37 (2011) (noting that activists encourage the term “shareholder democracy,” whereas critics find it ill-fitted to the corporate framework); Fisch & Schwartz, *supra* note 66, at 28–29 (2023) (stating that policy decisions made through corporate governance lack the legitimacy of policy decisions imposed through the democratic process); Masconale & Sepe, *supra* note 4, at 266 (“Electoral governance is concerned with political decisions and hence requires equality given the legitimate disagreement of pluralistic societies. Corporate governance is the locus of economic decisions, where incentive reasons can prevail over egalitarian ones . . .”).

More broadly, there is a deep American tradition of distrust of monied elites making decisions for the rest of society.⁷⁸ As Professor Mark Roe has explained, fears about “centralized economic power” have “been part of American ideology since the Jeffersonians through the populists to today, finding modern expression in public choice theories that concentrated private groups can capture government if both are allowed to be powerful.”⁷⁹ Although this sentiment is driven in part by gut feelings—and adroit interest group manipulation—it is also based on concern about real dangers, such as the possibility of financiers duping unsophisticated retail investors and using their funds to make destructive decisions in the real economy, financiers making consequential decisions despite deep conflicts of interest, financiers excluding new entrants and rivals, and threats to political stability.⁸⁰ It is at least plausible that these dangers would be reduced if public policy is made by elected representatives of the people while managers limit themselves to core business matters.

None of this is to suggest that the products of the political process should be immune to criticism, including from corporate law scholars. One essential function of legal scholarship is to evaluate the merits of the existing legal regime, including its omissions. But the decisions produced by the political system deserve a presumption of legitimacy, and there is no reason to assume that the outcomes produced by corporate governance will be superior across the board. Advocates urging that corporate action is justified by a government failure must offer some persuasive criticism of the existing legal regime. Scholars and advocates who suggest that some feature of the existing legal regime constitutes a governmental failure that justifies corporate action must offer a reason for the characterization.

B. Substance-Based Criticisms

One set of criticisms centers on the substance of the legal regime. Critics might suggest that the government has failed and independent corporate action is required because the government has not built the capacity to enforce stated policies, because policies are not consistent with scientific or other evidence, or because policies are not consistent with public polling. Each of these arguments suffers from serious problems that make them a shaky basis for corporate law theories.

⁷⁸ ROE, *supra* note 23, at 26, 29.

⁷⁹ *Id.* at 29.

⁸⁰ See *id.* at 36–42. For modern statements of some of these concerns, see GANESH SITARAMAN, THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC 224 (2017); ZEPHYR TEACHOUT, BREAK 'EM UP: RECOVERING OUR FREEDOM FROM BIG AG, BIG TECH, AND BIG MONEY 10–13 (2020).

1. State Capacity

In many instances, the government has asserted a policy but failed to provide adequately for enforcement. For example, labor and employment law include prohibitions on interfering with labor organizing⁸¹ or failing to pay overtime.⁸² But the penalties for violations are not meaningful and the government agencies that pursue such matters are under-resourced.⁸³ As a result, the expected penalty from violating the rule is less than the expected profits, and shareholder profit maximizing businesses lack a direct economic incentive to comply.⁸⁴ Similarly, the government has enacted an extensive tax code. But with the exception of a brief window during the Biden Administration,⁸⁵ Congress has failed to adequately fund the Internal Revenue Service, leading to underenforcement that may have cost the government hundreds of billions of dollars in revenue each year.⁸⁶

This gap between the government's stated policies and its capacity to enforce those policies creates a potential opening for corporate governance. Corporate managers might be encouraged to live up to the government's stated norms, even if the cost of compliance exceeds the expected penalty from a violation. This approach would avoid the need for managers to directly weigh social concerns and strike an appropriate balance when deciding how to behave, thus avoiding criticisms that stakeholderism is indeterminate or that managers and shareholders are not representative of the broader society. Managers would merely be living up to the standard of conduct selected by the government.

To some extent, corporate law already acknowledges the force of this position. Managers who cause a company to run a "legal risk" by violating exist-

⁸¹ See 29 U.S.C. §§ 157, 158 (setting out employees' "right to self-organization" and to "bargain collectively," and identifying "unfair labor practices," including prohibitions against interference, restraint, or coercion against employees exercising labor rights).

⁸² See *Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T OF LAB. (Sep. 2019), <https://www.dol.gov/agencies/whd/fact-sheets/17a-overtime> [perma.cc/959S-L7P9] ("The FLSA requires that most employees in the United States be paid . . . overtime pay.").

⁸³ Anna Stansbury, *Do US Firms Have an Incentive to Comply with the FLSA and the NLRA?* 1–2 (Peterson Inst. for Int'l Econ. Working Paper No. 21-9, 2021) (describing agencies as "resource . . . stretched").

⁸⁴ *Id.* ("For many firms, therefore, it would be profit maximizing to violate the NLRA—even if they knew for certain they would be caught.").

⁸⁵ Alan Rappeport, *I.R.S. Unveils \$80 Billion Plan to Overhaul Tax Collection*, N.Y. TIMES (Apr. 6, 2023), <https://www.nytimes.com/2023/04/06/business/economy/irs-tax-treasury.html> [perma.cc/2VHY-W6AZ] (describing the Internal Revenue Service's plans for the \$80 billion in additional funding included in the IRA).

⁸⁶ The actual size of the "tax gap" is controversial. See Daniel J. Hemel, Janet Holtzblatt & Steve Rosenthal, *The Tax Gap's Many Shades of Gray* 2–4 (U. Chi. L. Sch. Coase-Sandor Inst. for L. & Econ., Working Paper No. 938, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3934044 [perma.cc/M5PT-8TDU] (acknowledging the Internal Revenue Service's estimate of the difference between collected tax and true tax, but noting complexities).

ing law may be liable for a breach of fiduciary duty.⁸⁷ For example, a Delaware court rejected a motion to dismiss a shareholder lawsuit against a company's directors after concluding that the plaintiff had properly alleged that managers had authorized unlawful conduct, "confident that the risk of regulatory detection was low, that most regulatory problems could be solved, and that dealing with regulatory risk was a cost of doing business."⁸⁸ In other words, a corporate director who calculates that the likelihood of detection or meaningful penalties is low and that law-breaking is profitable may be liable if the scheme eventually causes harm to the corporation. This doctrine is arguably a departure from shareholder primacy, but it helps preserve the legitimacy of Delaware corporate law.

But the argument does have serious limitations. First, it may be difficult to infer a standard of conduct from statutes and regulations currently on the books. A company's legal position may be aggressive or controversial under existing law but based on a good faith interpretation of existing statutes and regulations. And aggressive stances may be an important way for corporations to advance or change the law in socially beneficial ways.⁸⁹ To the extent that any bright lines can be confidently inferred, they are likely to cover only a narrow range of conduct. It would certainly be difficult to extract a broad directive to reduce carbon emissions or advance social equity from current statutes and regulations.

Second, following a stated norm even when expected penalties would not lead a shareholder-focused manager to comply might also lead to strange or anomalous outcomes. Corporate directors and officers are normally expected to establish systems to monitor for law-breaking within their organizations.⁹⁰ But a trucking company would not be expected to stamp out every possible instance of drivers going slightly above the speed limit. If company officials are asked to draw distinctions about which norms to follow based on overall social impact instead of the signals sent by the existing enforcement regime, then they will inevitably become embroiled in difficult and controversial efforts to balance stakeholder interests.

⁸⁷ Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2039–41 (2019); Hill, *supra* note 4 at 158.

⁸⁸ Pollman, *supra* note 87, at 2040–41 (quoting *La. Mun. Police Emps. Ret. Sys. v. Pyott*, 46 A.3d 313, 356 (Del. Ch. 2012), *overruled on other grounds*, 74 A.3d 612 (Del. 2013)).

⁸⁹ See Elizabeth Pollman, *Corporate Disobedience*, 68 DUKE L.J. 709, 714–15 (2019) ("[C]orporate disobedience has been an important engine for transforming various areas of law."). But see Hill, *supra* note 4, at 154–55 (suggesting that corporations should respect the spirit and purpose of law given the likelihood that the law does not perfectly capture relevant social interests).

⁹⁰ See *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 971–72 (Del. Ch. 1996) (observing that failures in oversight can impose liability onto directors). Although *Caremark* has long been thought to set an exceedingly weak standard, recent cases may suggest that courts are strengthening this requirement. See Veronica Root Martinez, *Public Reporting of Monitorship Outcomes*, 136 HARV. L. REV. 757, 820 n.337 (2023) (discussing a "flux" of the *Caremark* standard in recent years).

Third, the argument fails to grapple with the fact that decisions about enforcement policy and the size of penalties are just as substantive—and often just as controversial—as decisions about the underlying norms. For example, the Biden Administration’s efforts to boost funding for the Internal Revenue Service met with furious conservative opposition and criticism. Republicans promptly insisted on major cuts.⁹¹ Indeed, corporate and securities law both acknowledge that the choice of enforcement mechanisms is a highly consequential policy decision. Different states have established different regimes to govern whether a shareholder can bring suits alleging breaches of fiduciary duty, and these different policy choices appear to have economic consequences.⁹² And the Supreme Court has refused to apply American ideas about securities litigation to foreign matters in part because foreign jurisdictions might have different approaches.⁹³

Affording respect to policymakers’ decisions about enforcement—total penalties, enforcement mechanisms, and agency budgets—has implications when trying to draw inferences about how corporations ought to behave. If policymakers suggest that corporations should behave in a certain way but decline to provide for robust enforcement, a stakeholderist interpretation would be that the lack of enforcement reflects prudential concerns about empowering government officials or budget constraints.⁹⁴ Government officials might be

⁹¹ Tobias Burns, *Republicans Win Faster IRS Cuts in Funding Deal*, THE HILL (Jan. 10, 2024), <https://thehill.com/business/4395737-republicans-win-faster-irs-cuts-in-funding-deal/> [perma.cc/LT7J-JVKQ].

⁹² Shareholders who seek to bring a case on behalf of the corporation generally must present a demand to the board of directors. Some states, but not all, excuse this requirement if a shareholder-plaintiff can make an appropriate showing, and states vary in the showing required. See Joel F. Houston, Chen Lin & Wensi Xie, *Shareholder Protection and the Cost of Capital*, 61 J.L. & ECON. 677, 681–84 (2018) (discussing some of these differences and estimating the impact of these differences on firms’ ability to raise capital on attractive terms).

⁹³ *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 270 (2010) (concluding that the antifraud provision of the Exchange Act did not apply extraterritorially, in part based on concern that variation in securities law and procedure had made American courts an unduly favorable forum for plaintiffs’ attorneys bringing essentially foreign claims).

⁹⁴ Cf. Masconale & Sepe, *supra* note 4, at 262 n.17 (“[T]he potential problem with environmentally friendly policies is that a focus on the environment may reduce the means available to pursue other ends.”). Policymakers might address this concern while preserving incentives for shareholder-focused managers to comply by dialing up penalties conditional on discovery. For example, suppose that secret violations of an environmental or safety rule have a ten percent chance of developing into a major disaster that will be visible to the public. Policymakers might cut back on regulators’ investigative budgets, reducing the likelihood of detecting secret violations absent a disaster, but increase the magnitude of the penalties if a disaster occurs. This approach would constrain regulators and limit their capacity to engage in unjustified investigations while preserving the incentive for shareholder-focused managers to avoid a violation.

This strategy was arguably used by North Carolina in regulating the activities of Duke Energy. Regulators took a relatively lax approach to Duke’s operations until a major coal ash disaster caused massive environmental harm. *City of Birmingham Ret. & Relief Sys. v. Good*, 177 A.3d 47, 61–64 (Del. 2017). Regulators then imposed significant liabilities on the company. *Id.* A group of shareholder-

lazy, venal, corrupt, or corruptible. Americans have also traditionally been concerned that excessively empowering government officials may lead to tyranny.⁹⁵ More prosaically, current officials might be concerned about empowering future officials, who may be of a different political party and who may have different ideological commitments. Policymakers may also curtail enforcement budgets because of resource constraints or the need to set priorities.⁹⁶ On this account, the apparent mismatch between the law's substantive commands and the lack of robust public enforcement might be resolved in favor of the substantive command. Even if corporate leaders concluded that the expected shareholder profits from misconduct exceeded the expected penalties for the misconduct given weak enforcement, they should still hold themselves to a higher standard.

A shareholder primacy-friendly interpretation is that a refusal to invest in enforcement reflects a policy judgment about the optimal level of policing or activity. If a company faces ruinous liability for a misstep when engaging in a socially valuable activity, the company will be forced to spend heavily to avoid missteps or will be incentivized to quit the activity altogether.⁹⁷ In some cases, policymakers may not believe that those costs are worth bearing. As a result,

ers brought suit against Duke's directors, arguing that they had failed in their duty of oversight. *See id.* (providing the plaintiffs' argument). They argued in part that regulators were known not to investigate adequately and therefore that the regulators were compromised. *Id.* The Delaware Supreme Court rejected the suit, over a vigorous dissent. *Id.* at 65, 68–69 (Strine, C.J., dissenting) (arguing that the facts as pled constitute a breach of fiduciary duty by Duke). The analysis here suggests that the court was right not to second guess the approach of North Carolina regulators, as it may have been a reasonable regulatory strategy that the state was entitled to pursue. But it complicates the question of managers' responsibilities within such a regulatory structure.

⁹⁵ *See* ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 5, 14, 176–77 (2010) (tracing this concern and suggesting that it has veered into irrational "tyrannophobia" that stymies the development of potentially valuable institutional forms).

⁹⁶ If policymakers hold back on enforcement of a particular norm because they believe that social resources are better spent elsewhere, the decision would have ambiguous implications for corporations. For example, suppose that policymakers reduce the budget for enforcing an environmental rule by \$1,000,000 after concluding that social resources should be spent on other issues. If corporations make up for the shortfall by spending an additional \$1,000,000 on internal efforts to ensure compliance, they would effectively reverse policymakers' judgment about social priorities. As long as policymakers have the choice to capture the \$1,000,000 through taxes or fees and to deploy it to enforcement activities, resource constraints will not be a reason for policymakers to cut back on enforcement expenditures if they actually want policing of the norm to occur. *But see* Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, 100 MINN. L. REV. 1051, 1053–55 (2016) (noting that there are political action costs that may prevent policymakers from proceeding in an optimal way, including by using tax and spend policies to redistribute wealth).

⁹⁷ *Cf.* David Gilo & Ehud Guttel, *Negligence and Insufficient Activity: The Missing Paradigm in Torts*, 108 MICH. L. REV. 277, 282 (2009) ("Negligence-based regimes may induce parties to engage too little in a socially desirable activity and forgo investments in efficient prevention. Looking to avoid a duty of care, parties may strategically restrict their activity below the socially desirable level so that the magnitude of the ensuing risk will be lower than the costs of welfare-enhancing precautions.").

they reduce the expected penalties for misconduct by reducing penalties or enforcement budgets in an effort to signal that companies should dial back compliance or increase activity levels. Put differently, the expected penalties set by policy may reflect the actual “price” that the government wishes to put on the conduct. On this second account, corporate leaders should interpret weak enforcement as a signal that they should not take the stated norm too seriously.

Taking these concerns together, the government’s refusal to enforce a legal rule adequately may be a genuine governmental failure that justifies a stakeholderist response. But the argument is at its strongest when the norm is clear, the government is only declining to enforce it for prudential reasons, and corporate enforcement is relatively straightforward and practical. There may be particular contexts where the argument works well, as when a corporation is considering dumping a deadly toxin into drinking water⁹⁸ or considering unlawful steps to prevent union organizing.⁹⁹

2. Science and Expert Judgment

Scientists and experts may determine that government policy is not adequate to meet a challenge.¹⁰⁰ For example, for many years there has been a broad consensus among scientific experts that climate change poses a dire threat to the environment, the economy, and society at large.¹⁰¹ But with a few recent exceptions, the urgency of government policy has not been commensurate with the magnitude of the danger.¹⁰² The government has also refused to ban cigarettes or alcohol, even though there is direct evidence of their disastrous impacts on pub-

⁹⁸ See, e.g., Roy Shapira & Luigi Zingales, *Is Pollution Value-Maximizing? The DuPont Case 3*, 6 (Eur. Corp. Governance Inst., Working Paper No. 723/2023, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3037091 [perma.cc/W4H9-P78J] (describing a decision by the company DuPont to release a toxic chemical called PFOA into local environments).

⁹⁹ See, e.g., Hilary Russ, *Starbucks Shareholders Approve Review of Labor Union Practices*, REUTERS (Mar. 29, 2023), <https://www.reuters.com/business/retail-consumer/starbucks-shareholders-approve-review-labor-union-practices-2023-03-29/> [perma.cc/3NYC-WQ4N] (describing Starbucks shareholder vote in favor of a review of company’s practices regarding labor organizing).

¹⁰⁰ See, e.g., Roe, *supra* note 4, at 10–11 (describing the possibility that “misguided public opinion stops Congress from moving”).

¹⁰¹ See, e.g., Jonathan S. Masur & Eric A. Posner, *Climate Regulation and the Limits of Cost-Benefit Analysis*, 99 CALIF. L. REV. 1557, 1558 (2011) (“There is a broad consensus that global warming threatens the well-being of people around the world, and that national governments should take steps to curb warming and alleviate the harm that climate change causes.”); INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2023: SYNTHESIS REPORT, at v (2023), https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_FullVolume.pdf [perma.cc/6F2V-F9GT] (“[U]nsustainable and unequal energy and land use as well as more than a century of burning fossil fuels have unequivocally caused global warming . . . This has led to widespread adverse impacts and related losses and damages to nature and people. . . . Every increment of global warming will intensify multiple and concurrent hazards in all regions of the world.”).

¹⁰² See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 101, at 11 (describing the emissions gap).

lic health.¹⁰³ And the government has done relatively little to reduce dangerous driving or to limit the use of dangerously large vehicles.¹⁰⁴ In each of these domains, government action seems far behind an evidence-based expert consensus, and corporate action may seem to be a reasonable substitute.

But certainty about an underlying phenomenon rarely translates into certainty about the correct policy response. Policy responses may depend on preferences that are not subject to empirical verification or falsification.¹⁰⁵ For example, on climate change, some individuals may have a higher tolerance for risk, a greater sense of optimism about future scientific developments, or a lower willingness to redistribute wealth from the current generation to future generations.¹⁰⁶ Certainty about the basic facts of climate change thus would not resolve key disputes about the right policy choices. Similarly, cultural values such as a strong preference for liberty or against government overreach may not be measurable even though they shape the correct policy.

The optimal policy on a complex topic is also likely to depend on factual issues that are beyond the reach of the relevant experts, or even experts in general.¹⁰⁷ It is difficult to be certain about how people will react to prohibitions or mandates, even if experts are prepared to hazard educated guesses about mar-

¹⁰³ See, e.g., *Alcohol Use and Your Health*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 14, 2025), <https://www.cdc.gov/alcohol/about-alcohol-use/index.html> [perma.cc/6S9G-QVJ9] (“About 178,000 people die from excessive alcohol use each year in the United States.”); *Cigarette Smoking*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sep. 17, 2024), <https://www.cdc.gov/tobacco/about/index.html> [perma.cc/9V9F-5UDK] (“Cigarette smoking is the leading preventable cause of disease, death, and disability in the United States.”).

¹⁰⁴ See, e.g., Sara C. Bronin & Gregory H. Shill, *Rewriting Our Nation’s Deadly Traffic Manual*, 135 HARV. L. REV. F. 1, 1–4, 6–7 (2021), <https://harvardlawreview.org/forum/vol-134/rewriting-our-nations-deadly-traffic-manual/> [perma.cc/52FF-PVQ9] (noting that “cars kill nearly 100,000 Americans every year,” and identifying ways in which public policy currently encourages use of cars at high speeds despite adverse consequences).

¹⁰⁵ See Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607, 1612 (2016) (“[S]ome debates cannot be resolved by knowing the facts and really do depend on values.”).

¹⁰⁶ See Masur & Posner, *supra* note 101, at 1596 (“[C]limate regulation requires a series of judgments that are political and institutional rather than technical.”). As one example of the controversy, the Stern Review suggested that future costs from climate change should not be discounted, so that governments should be willing to spend \$1 today to avoid \$1 of climate harm twenty years from now. The position was grounded in a controversial ethical and economic analysis. HM TREASURY, STERN REVIEW REPORT ON THE ECONOMICS OF CLIMATE CHANGE 31–33 (2006), https://webarchive.nationalarchives.gov.uk/ukgwa/20100407172811/https://www.hm-treasury.gov.uk/stern_review_report.htm.

¹⁰⁷ See Dan Awrey & Kathryn Judge, *Why Financial Regulation Keeps Falling Short*, 61 B.C. L. REV. 2295, 2311–12 (2020) (arguing that regulators and other experts are often unable to gather information relevant to complex policy problems or to appreciate its limits, and that this is “not a challenge specific to” any one field “but rather one common to all experts”); Jeffrey N. Gordon, *The Empty Call for Benefit-Cost Analysis in Financial Regulation*, 43 J. LEGAL STUD. S351, S352–53 (2014) (“We simply do not have the foresight to forecast how [the financial sector cost-benefit] system will evolve.”); Orbach, *supra* note 11, at 53–55 (describing the difficulty in properly applying cost-benefit analysis to “government failures” after the fact).

ginal changes. Backlashes or rampant criminality can have unpredictable consequences. For example, the science may be clear about the public health impacts of alcohol. But the fact that alcohol is extremely destructive does not mean that a return to total prohibition would be a good idea. Although business leaders may have an informational advantage over elected officials on many matters, they are unlikely to possess special insight into these social effects.

Against this backdrop, corporations that are seeking to second guess the substance of a government policy are likely to confront issues that cannot be resolved objectively or with absolute certainty.¹⁰⁸ Instead, they will call for judgments of the type normally entrusted to elected officials.

3. Public Polling

Critics of government policy could also identify gaps between policy and public opinion polls. For example, Professor Tim Wu has suggested that “one reason there is so much mounting pressure for corporations to take action today is that government has failed to act in many areas that people care about, often by overwhelming margins.”¹⁰⁹ In support of this proposition, Wu cites polling data suggesting supermajority support for measures like higher taxes on the wealthy and guaranteed paid maternity leave.¹¹⁰ This is a serious concern. If a policy does not reflect the preferences of large, stable majorities, it would suggest that the policy is mistaken.

But public opinion polls are a problematic basis for a corporate governance policy prescription. Polls are fickle and can be shaped both by the framing of the poll and the information environment created by the corporations that run mass media institutions. Polls may also fail to capture the depth or seriousness of voters’ feelings. For example, voters in Washington State refused to adopt two different variations of a carbon tax in 2016 and 2018, even though the concept polled quite well.¹¹¹ As one analysis put it, “opinion surveys showing majority support for the carbon tax can be misleading.”¹¹²

In addition, if the public really does support various behavioral changes, even profit-driven corporations would be encouraged to match their preferences.¹¹³ If consumers want products produced in an environmentally sound

¹⁰⁸ Cf. Friedman, *supra* note 1 (“[A manager] is presumably an expert in running his company—in producing a product or selling it or financing it. But nothing about his selection makes him an expert on inflation.”).

¹⁰⁹ Wu, *supra* note 4.

¹¹⁰ *Id.*; Tim Wu, *The Oppression of the Supermajority*, N.Y. TIMES (Mar. 5, 2019), <https://www.nytimes.com/2019/03/05/opinion/oppression-majority.html> [perma.cc/QGD8-Z2JU].

¹¹¹ See Anderson et al., *supra* note 41, at 903.

¹¹² *Id.* at Abstract.

¹¹³ See BAINBRIDGE, *supra* note 4, at 14 (observing that managers focused on shareholder value maximization can consider stakeholder interests in pursuit of that end).

fashion—and are willing to pay for the improvement—companies will have an incentive to supply cleaner products even if they are focused only on maximizing shareholder profits.¹¹⁴ But although they might agree with aspirational language in a poll, it is unclear that consumers really are willing to pay for better conduct.¹¹⁵ Put differently, if people are not willing to pay for better conduct, a contrary poll would not have much normative significance, and if people are willing to pay for better conduct, shareholder primacy should lead companies in that direction even without stakeholder-friendly corporate governance changes.

4. Implications

Although the products of the political process should not be immune from criticism, it would be difficult to base a theory of corporate governance reform on some lines of substantive criticism. Claims that the government lacks capacity to enforce its stated policies overlook the fact that the government's capacity is itself the product of a policy choice, and thus often fail to provide a coherent basis for corporate action. Scientific and expert criticisms overlook the judgment calls necessary to translate objective facts into policy prescriptions. And it is not clear that public polling data provide an adequate basis for stakeholder-friendly corporate governance reforms.

C. Process-Based Criticisms

Systemic issues with the political process may provide a stronger basis for corporate reform because they suggest areas in which corporations are the best institution to take action. This Section identifies four process-based criticisms of the political process—its weakness in dealing with racial and other minorities, fragmentation and race-to-the-bottom dynamics across states, corruption, and electoral accountability—and suggests that they may support specific corporate governance reforms.

1. Race and Other Suspect Classes

The famous footnote 4 in *United States v. Carolene Products Co.* drew a distinction between ordinary regulatory matters where the political process

¹¹⁴ *Id.*; see also Hajin Kim, *Expecting Corporate Prosociality*, 53 J. LEGAL STUD. 267, 267 (2024) (“Expectations of corporate prosociality—rather than of exclusive profit maximization—could thus make it easier for firms to do well by doing good.”). Of course, this mechanism is more likely to be effective in competitive markets than markets characterized by monopoly or oligopoly.

¹¹⁵ See, e.g., Katherine White, David J. Hardisty & Rishad Habib, *The Elusive Green Consumer*, HARV. BUS. REV., July–Aug. 2019, at 125, 127–33, <https://hbr.org/2019/07/the-elusive-green-consumer> [perma.cc/26YP-3CQE] (describing the gap between consumer intention to purchase products that are informed by higher purpose and consumer action and proposing steps that business leaders can take to narrow the gap).

might be expected to generate good outcomes and matters where the political process is less trustworthy.¹¹⁶ For example, courts might be more searching in their “review of statutes directed at particular religious, or national, or racial minorities,” because “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.”¹¹⁷ Put simply, institutions that are designed to be responsive to political majorities are unlikely to invest heavily in generating tolerable outcomes for minorities. A vast body of constitutional law has developed that applies different degrees of judicial scrutiny to legislative enactments based on defects in the way that the political process considers the interests of different minority groups.¹¹⁸

This acknowledged gap in the political process suggests an opening for corporate action. Unlike politicians elected by majorities, corporate leaders have real incentives to attend to the interests of racial, gender, and religious minorities: the young people whom corporations are eager to recruit as employees, consumers, and investors are more diverse and politically progressive than prior generations.¹¹⁹ Admittedly, a corporation that caters to the short-term whims of its shareholders—who are whiter, older, and more male than the general population¹²⁰—may be insensitive to racial or gender concerns. But corporations that are more attentive to stakeholders may create real economic value by addressing concerns that majoritarian political institutions fail to manage.

Real world experience confirms the intuition. Many companies have suffered corporate catastrophes because of inattention to social risks.¹²¹ For example, Papa John’s stock suffered a dramatic decline after its founder and CEO John Schnatter made comments about the National Football League’s handling of players protesting police brutality.¹²² Schnatter was later forced out after

¹¹⁶ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (citations omitted).

¹¹⁷ *Id.*

¹¹⁸ See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1270–72 (2007) (describing judicial development of strict scrutiny and intermediate scrutiny).

¹¹⁹ See Barzuza et al., *supra* note 70, at 276 (describing the progressive views of the millennial generation and predicting major effects on firms); Barzuza et al., *supra* note 67, at 1291–95 (same); Kovvali, *supra* note 24, at 740–41 (same).

¹²⁰ See *supra* notes 75–76 and accompanying text.

¹²¹ See Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV. 1, 33–41 (2022) (maintaining that diversity in firm leadership may be a reasonable way to manage various risks and opportunities); Fairfax & Martinez, *supra* note 10 (manuscript at 4) (arguing that corporations abandoning diversity, equity, and inclusion initiatives fail to account for risks and opportunities underlying such efforts). See generally Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401 (2020) (discussing the phenomenon of social risk in corporations more broadly).

¹²² See Barzuza et al., *supra* note 67, at 1298–99 (describing this as a “consumer-side example[] of how rapidly a company can enter into a near-death spiral by tarnishing its brand”); Kovvali, *supra* note 24, at 739–40 (same).

reports surfaced that he had used a racial slur on a company call.¹²³ Similarly, Adidas delayed taking action on Ye's increasingly bizarre racial and religious commentary until his antisemitism reached a boiling point.¹²⁴ When the company was forced to end its relationship with Ye, its revenues and stock price took a significant hit.¹²⁵

By contrast, firms that are attentive to racial and gender issues may be able to tap into lucrative opportunities. Nike enjoyed extraordinary consumer attention as a result of its marketing campaign featuring Colin Kaepernick, a former professional football player who had played a leading role in the protests.¹²⁶ State Street, a financial institution offering a popular but undifferentiated index fund, found a way to capture the attention of millennial investors with its "Fearless Girl" campaign: State Street made a major push to have corporations achieve minimal levels of gender diversity on their boards and announced the effort with a marketing campaign that included a statue of a courageous young girl facing down the famous statue of a charging bull on Wall Street.¹²⁷ Several other major companies made commitments on racial equity issues based in part on these strategic considerations.¹²⁸ Unlike many elected politicians, firms have a real reason to consider the needs and preferences of discrete and insular minorities.

2. Federalism

State governments decide many important policy issues either because the federal government is powerless to address those matters or because the feder-

¹²³ Barzuza et al., *supra* note 67, at 1298–99; Kovvali, *supra* note 24, at 739–40.

¹²⁴ Kovvali, *supra* note 24, at 739 n.202; Khadeeja Safdar & Inti Pacheco, *Adidas Top Executives Discussed Risk of Staff's 'Direct Exposure' to Kanye West Years Ago*, WALL ST. J. (Nov. 27, 2022), <https://www.wsj.com/articles/adidas-top-executives-discussed-risk-of-staffs-direct-exposure-to-kanye-west-years-ago-11669583910> [perma.cc/CF2J-TZ7L]; Megan Twohey, *Kanye and Adidas: Money, Misconduct and the Price of Appeasement*, N.Y. TIMES (Oct. 27, 2023), <https://www.nytimes.com/2023/10/27/business/kanye-west-adidas-yeezy.html> [perma.cc/ZYT7-AFVC].

¹²⁵ See Bernhard Warner, *Adidas Tumbles as Losses from Its Kanye West Venture Pile Up*, N.Y. TIMES (Feb. 10, 2023), <https://www.nytimes.com/2023/02/10/business/dealbook/adidas-shares-kanye-west.html> [perma.cc/EM4B-NQ35] (detailing Adidas's attempts to sell "the mountain of unsold inventory from the Yeezy line").

¹²⁶ See Kovvali, *supra* note 24, at 742 ("Nike enjoyed substantial benefits from the campaign, obtaining record engagement and hitting a new all-time high on its share price."); Julie Creswell, Kevin Draper & Sapna Maheshwari, *Nike Nearly Dropped Colin Kaepernick Before Embracing Him*, N.Y. TIMES (Sep. 26, 2018), <https://www.nytimes.com/2018/09/26/sports/nike-colin-kaepernick.html> [perma.cc/VP5Q-NURK] (describing that Nike's "risk" to build this campaign "paid off").

¹²⁷ Barzuza et al., *supra* note 67, at 1266.

¹²⁸ See Masconale & Sepe, *supra* note 4, at 270–71 (recounting similar examples involving Dick's Sporting Goods, Walmart, Facebook, Amazon, Apple, Coca-Cola, Google, Microsoft, and Disney).

al government has left the space open to state level experimentation.¹²⁹ This has the potential to create destructive political dynamics as society fragments on central issues or states compete with each other. Corporations could play a useful role in addressing such problems, though they also have the potential to exacerbate them.

Although corporate law varies from state to state,¹³⁰ corporations themselves can help check political fragmentation. Major companies answer to national constituencies—they attract capital from investors nationwide, sell products to consumers nationwide, and employ workers nationwide. To the extent that they draw distinctions, they are especially eager to gain the support of relatively affluent and educated individuals, who are likely to have a relatively consistent ideology. The preferences of educated elites may vary by state, but they vary less than the preferences of the overall population. And corporations face compliance costs that are likely to increase dramatically if different states enact different policies. These forces can lead corporations to encourage or enforce a nationwide consensus.

For example, in 2022, in *Dobbs v. Jackson Women's Health Organization*, the Supreme Court concluded that the federal Constitution did not confer a right to an abortion.¹³¹ The rejection of decades of constitutional jurisprudence has resulted in the balkanization of abortion policy, as some states continue to protect a right to choose while others adopted varying restrictions.¹³² Although no corporation could completely reverse this fragmentation, several major companies have taken steps that could help reduce the danger. Several companies have pledged to cover the costs for employees who live in restrictive states to travel to permissive states for an abortion.¹³³ Other companies have

¹²⁹ There are various examples of modern decisions limiting Congress's authority under the Commerce Clause of the Constitution. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 588 (2012) (holding that the Commerce Clause regulates existing commerce but does not compel individuals to engage in commerce); *United States v. Morrison*, 529 U.S. 598, 601–02, 613–14 (2000) (holding that the Commerce Clause did not authorize Congress to enact a civil remedy of the Violence Against Women Act); *United States v. Lopez*, 514 U.S. 549, 552, 561 (1995) (holding that Congress did not have the authority under the Commerce Clause to pass the Gun-Free School Zones Act). Rulings that pare back on constitutional or statutory rights can have a similar balkanizing effect, as states are freed to impose different standards.

¹³⁰ See, e.g., ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 1, 4–6 (1993) (noting and praising the state-driven character of corporate law).

¹³¹ 597 U.S. 215, 292 (2022).

¹³² See, e.g., Jonathan Weisman, *Spurred by the Supreme Court, a Nation Divides Along a Red-Blue Axis*, N.Y. TIMES (July 2, 2022), <https://www.nytimes.com/2022/07/02/us/politics/us-divided-political-party.html> [perma.cc/84MQ-6UNF] (“[A]bout half the country will soon limit or ban [abortion] while the other half expands or reinforces access to reproductive rights.”).

¹³³ See Emma Goldberg, *These Companies Will Cover Travel Expenses for Employee Abortions*, N.Y. TIMES (Aug. 19, 2022), <https://www.nytimes.com/article/abortion-companies-travel-expenses.html> [perma.cc/D8U7-58JT] (listing examples including “Starbucks, Tesla, Yelp, Airbnb, Microsoft, Netflix, Patagonia, DoorDash, JPMorgan Chase, Levi Strauss, PayPal, Amazon, and Reddit”).

sought to pressure state legislatures to adopt a permissive stance. Major pharmaceutical company Eli Lilly publicly announced that it had chosen to grow outside of Indiana, where it is a major employer, because the state's ban had made it difficult to attract the staff it needed.¹³⁴

As another example, five major automakers struck a deal on fuel efficiency with the state of California in 2019 and formalized a settlement with the state in 2020.¹³⁵ The Trump Administration had rolled back federal fuel efficiency standards, leading to fragmentation as states sought to be more stringent and to uncertainty given the likelihood that a future Democratic administration would reverse course. The automakers welcomed the deal as providing "much-needed regulatory certainty," and "avoiding a patchwork of regulations."¹³⁶ For the five automakers that participated, corporate interest in certainty and uniformity across the country outweighed any interest in minimizing regulatory burdens.¹³⁷

Corporations can also play a role in competition between states. Incentives can vary by topic, leading to a variety of approaches. Corporations might see an advantage in a uniform law, even if it is stringent; they may have reputational constraints or face other pressures that encourage them to adopt a nationwide floor on their conduct that exceeds requirements in many states; or they might have strong financial incentives to play states off of each other and encourage a race to the bottom. The strength of these competing considerations varies by context, and companies have taken different approaches with respect to different issues. Indeed, General Motors (GM) set out to fight the more stringent standards before reversing course upon Biden's election to the presidency.¹³⁸ But the basic failure of the political process to find consensus can create a space where corporate action can be useful.

¹³⁴ *Eli Lilly Says Some Staff Want to Leave Indiana Because of Abortion Ban*, *Financial Times Reports*, REUTERS (Nov. 6, 2022), <https://www.reuters.com/world/us/eli-lilly-says-some-staff-want-leave-indiana-because-abortion-ban-ft-2022-11-06/> [perma.cc/J7RK-2QG5]; see also Kovvali, *supra* note 24, at 730–31 (discussing other instances of corporate pushback on government action). For a broader discussion of the phenomenon of corporate exit, see generally Susan S. Kuo & Benjamin Means, *The Political Economy of Corporate Exit*, 71 VAND. L. REV. 1293 (2018).

¹³⁵ Coral Davenport, *Defying Trump, 5 Automakers Lock in a Deal on Greenhouse Gas Pollution*, N.Y. TIMES (Aug. 17, 2020), <https://www.nytimes.com/2020/08/17/climate/california-automakers-pollution.html> [perma.cc/2CZ6-GDWU].

¹³⁶ Coral Davenport & Hiroko Tabuchi, *Automakers, Rejecting Trump Pollution Rule, Strike a Deal with California*, N.Y. TIMES (July 25, 2019), <https://www.nytimes.com/2019/07/25/climate/automakers-rejecting-trump-pollution-rule-strike-a-deal-with-california.html> [perma.cc/BEV5-9QRJ].

¹³⁷ Not all automakers participated. Several leading automakers including GM sided with the Trump Administration's efforts to strip California of the ability to set more stringent regulations, though GM withdrew from the suit after Trump was defeated in the 2020 presidential election. Kovvali, *supra* note 24, at 748–49.

¹³⁸ *Id.*

3. Regulatory Capture and Corruption

There are also concerns that the political or regulatory process has been captured or corrupted, so that the government cannot be trusted to deliver necessary regulations.¹³⁹ If corporate managers can twist regulatory outcomes through lobbying or other means, it would be problematic to have managers focus solely on shareholders' interests. Academic concern over this problem seems to have increased dramatically in the wake of the 2010 *Citizens United v. Federal Election Commission* decision, in which the Supreme Court invalidated campaign finance rules that had limited corporate political spending.¹⁴⁰

Although it is certainly a valid concern, it can be difficult to use the general fact that corporate money can influence outcomes to identify specific government failures that call for corporate reform. There are two basic reasons to be cautious. First, it is not clear whether corporate money is being deployed on behalf of shareholders or other constituencies. Managers have more direct control over corporate political spending, and they have their own agenda.¹⁴¹ To the extent that shareholders' preferences are reflected in spending, the public welfare implications are unclear. Institutional investors have encouraged corporations to align their lobbying with their environmentally and socially conscious statements.¹⁴² And investors are increasingly aware that seeking rents or

¹³⁹ See, e.g., Roe, *supra* note 4, at 10 (describing the possibility that “[p]owerful interests override democratic preferences”).

¹⁴⁰ See, e.g., Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORN. L. REV. 335, 342 (2015) (“*Citizens United* . . . undermines conservative corporate theory’s reliance upon the regulatory process as an adequate safeguard against corporate overreaching for non-stockholder constituencies and society generally.”); David G. Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social Responsibility After Citizens United*, 89 N.C. L. REV. 1197, 1198–99 (2011) (emphasizing “shareholder primacy theory’s reliance on the availability of external government regulation to curb corporate exploitation of non-shareholding stakeholders in corporate enterprise, including workers, consumers, and communities,” and urging that efforts to protect this mechanism are precluded by *Citizens United*); cf. Jonathan Macey & Leo E. Strine, *Citizens United as Bad Corporate Law*, 2019 WIS. L. REV. 451, 472 (“By the time more stockholder-focused law and economics scholars began theorizing, they accepted as a foundational fact that external law, exemplified by the New Deal, existed to protect other corporate constituents.”); Pargendler, *supra* note 4, at 394 (noting that part of the reaction to the “regulatory retreat” in *Citizens United* was a call for greater *shareholder* control over corporate speech in the “hope” that “market forces can complement government regulations in compelling socially responsible behavior”).

¹⁴¹ See Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 83–84 (2010) (“[A] corporation’s decision to engage in political speech is governed by the same rules as ordinary business decisions, which give directors and executives virtually plenary authority. . . . [T]he interests of directors and executives with respect to political speech decisions may diverge from those of shareholders”; Fisch, *supra* note 28, at 665 (noting that managers can shape a corporation’s political agenda for their own benefit).

¹⁴² See Amelia Miazad, *Investor Climate Alliances*, 102 WASH. U. L. REV. 797, 827 (2025) (discussing Climate Action 100+, an investor led initiative); Kovvali, *supra* note 24, at 730 (explaining that institutional investors, including BlackRock, pressured ExxonMobil over the “misalignment” between its public commitment to the Paris Agreement and its lobbying activities, ultimately voting to

loosening regulations are questionable long-term business strategies.¹⁴³ Corporate lobbying may also be plausibly connected to consumer preferences. When auto manufacturers lobby against fuel economy or emissions standards, they are arguably channeling the preferences of consumers who like larger sport utility vehicles.

Second, it is not always obvious that regulatory outcomes are illegitimate because of corporate influence. In a democracy, political outcomes should reflect input from many constituencies, including those represented by corporations. Workers and other groups may face real disadvantages in obtaining necessary regulatory protections from corporations—a fact that is sometimes given short shrift by corporate law scholars¹⁴⁴—but they have some advantages as well. For example, corporate America has long favored a liberalized immigration regime that would expand access to global talent.¹⁴⁵ But widespread parochial or nativist attitudes have repeatedly doomed reform efforts.¹⁴⁶ It would be difficult to make a general claim that corporations have always tilted regulatory outcomes in the wrong direction.

These considerations may make it difficult to treat problems like inaction on climate change as the result of a corrupt or captured process. Fossil fuel companies plainly have an incentive to encourage inaction, and many have participated in lobbying and campaign finance efforts designed to limit the prospects of

replace company directors over the discrepancy); David A. Katz & Laura A. McIntosh, *EESG Activism After ExxonMobil*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 23, 2021), <https://corpgov.law.harvard.edu/2021/07/23/eesg-activism-after-exxonmobil/> [perma.cc/4UEF-RXLT] (“[T]he institutional investors appeared to share a concern that ExxonMobil’s climate lobbying efforts might be at odds with its various public statements . . .”).

¹⁴³ Dorothy S. Lund & Leo E. Strine, Jr., *Corporate Political Spending Is Bad Business*, HARV. BUS. REV., Jan.–Feb. 2022, at 130, 133, 135, <https://hbr.org/2022/01/corporate-political-spending-is-bad-business> [perma.cc/NY29-SYFQ].

¹⁴⁴ Anil Kovvali & Leo E. Strine, Jr., *The Win-Win That Wasn’t: Managing to the Stock Market’s Negative Effects on American Workers and Other Corporate Stakeholders*, 1 U. CHI. BUS. L. REV. 307, 331–34 (2022) (discussing legal scholarship that is “clever, provocative, and utterly disconnected from real history and the real world in which we live”).

¹⁴⁵ See, e.g., Andrew Kreighbaum, *Business Groups Launch Campaign to Overhaul Immigration Policies*, BLOOMBERG L. (May 1, 2023), <https://news.bloomberglaw.com/daily-labor-report/business-groups-launch-campaign-to-overhaul-immigration-policies> [perma.cc/YTP2-DW25] (describing an attempt from U.S. businesses to pressure Congress into visa reform); Ryan Mac & Ken Bensinger, *Trump Backers Battle Online Over Skilled Immigrants*, N.Y. TIMES (Dec. 27, 2024), <https://www.nytimes.com/2024/12/27/technology/trump-musk-immigration-h1b-visa.html> [perma.cc/C7BE-JY5K] (“[L]eaders of tech companies who rely on skilled foreign labor . . . have wooed Mr. Trump with calls, visits to Mar-a-Lago and donations for his inauguration.”).

¹⁴⁶ Karoun Demirjian, *Over Decades, Congress Failed Repeatedly to Address Immigration Dysfunction*, N.Y. TIMES (May 14, 2023), <https://www.nytimes.com/2023/05/14/us/politics/immigration-legislation-congress.html> [perma.cc/V6DQ-5K5N]; Will Weissert & Adriana Gomez Licon, *Immigration Reform Stalled Decade After Gang of 8’s Big Push*, ASSOCIATED PRESS (Apr. 3, 2023), <https://apnews.com/article/immigration-asylum-trump-biden-gang-of-eight-3d8007e72928665b66d8648be0e3e31f> [perma.cc/4JH7-VA7F].

regulation.¹⁴⁷ But they are also increasingly under pressure from shareholders to align their lobbying with their public stances on environmental and social issues.¹⁴⁸ And their basic positions are often a simple reflection of the preferences of other constituencies. An oil company's "Scope 3" emissions are the carbon emissions generated when customers use the company's product, so efforts to reduce scope 3 emissions entail denying customers the ability to burn the amounts they would otherwise choose.¹⁴⁹ The positions of fossil fuel companies may also align with the preferences of workers in areas where fossil fuels are plentiful. Given these facts, the involvement of fossil fuel companies in the regulatory process arguably helps align the process with public preferences.

4. Electoral Accountability

Although capture and corruption represent a failure to follow the public's policy preferences, excessive deference to short-term public preferences could also create problems. First, electorally accountable officials might pursue policies that provide a short-term political payoff but cause lasting harm. This insight has affected the design of several important political institutions. Senators are elected to six-year terms with staggered cycles to ensure that a temporary political majority cannot capture control,¹⁵⁰ and Article III judges enjoy life tenure.¹⁵¹ Within the economic realm, members of the Board of Governors of the Federal Reserve System are appointed to staggered fourteen-year terms and enjoy significant insulation from the political branches during their tenure.¹⁵² This insulation from political pressure is particularly helpful given the Federal Reserve's mission of managing unemployment and inflation. Politically minded officials might be tempted to run the economy "hot" in the lead-up

¹⁴⁷ See, e.g., Catherine Rocchi, Note, *Climate Protagonists? Strategic Misrepresentation and Corporate Resistance to Climate Legislation*, 74 STAN. L. REV. 1153, 1155–56, 1161–62 (2022); Jillian Ambrose, *US Oil Giants Top List of Lobby Offenders Holding Back Climate Action*, THE GUARDIAN (Nov. 3, 2021), <https://www.theguardian.com/business/2021/nov/04/us-oil-giants-top-list-lobby-offenders-exxonmobile-chevron-toyota> [perma.cc/X3X2-7B34].

¹⁴⁸ See Katz & McIntosh, *supra* note 142 (describing a shareholder proposal, supported by BlackRock and Vanguard, pressuring ExxonMobil to align its lobbying activities with its public commitments to the Paris Agreement); Kovvali, *supra* note 24, at 730 (describing shareholder pressure on ExxonMobil to reconcile its lobbying with its public climate commitments); Miazad, *supra* note 142, at 827 (noting the development of "private regulatory efforts" against climate change).

¹⁴⁹ For a discussion of Scope 3 emissions and the potential value of forcing companies to disclose those emissions, see generally Madison Condon, *What's Scope 3 Good For?*, 56 U.C. DAVIS L. REV. 1921 (2023).

¹⁵⁰ U.S. CONST. art. I, § 3, cl. 2.

¹⁵¹ U.S. CONST. art. III, § 1.

¹⁵² See *Trump v. Cook*, 146 S. Ct. 2234, 2246–47 (2026) (holding that for-cause removal protections related to Federal Reserve governors are constitutional, requiring a process including notice and a hearing); Neil H. Buchanan & Michael C. Dorf, *Don't End or Audit the Fed: Central Bank Independence in an Age of Austerity*, 102 CORN. L. REV. 1, 15–16 (2016) (describing the make-up of the Board of Governors of the Federal Reserve System).

to an election, lowering unemployment rates and driving up activity levels, even if those actions would set the stage for damaging inflation.¹⁵³

Second, political outcomes can be volatile, making it difficult to sustain a consistent policy or support long-term projects. Again, this insight is reflected in important features of public law. Various administrative agencies and large numbers of civil servants had historically been insulated from political pressure. This allowed them to serve as a buffer that prevented wild variations in electoral outcomes—such as the elections of President Obama, then President Trump, then President Biden, and then President Trump again—from immediately translating into wild variations in policy.¹⁵⁴ Various rules of public law also enable officials to lock in a policy choice, making it difficult or impossible for later officials to change direction. When an administrative agency undertakes a rulemaking or interprets an existing rule, subsequent leaders of the agency may find it difficult to reverse the policy without going through the burden of an additional rulemaking process.¹⁵⁵ And when the government grants a contract or property interest to a private party, subsequent leaders may face constitutional challenges in reversing direction.¹⁵⁶ These features serve as a steadying influence on policy, even as public preferences vary.

¹⁵³ Buchanan & Dorf, *supra* note 152, at 23 (“Running monetary policy through either of the political branches . . . would leave open the possibility that the vicissitudes of electoral politics could lead to monetary policy decisions that are keyed to short-term political gains, leading to short-term economic volatility and threatening to undermine longer-term stability and growth.”); Brian Galle & Aziz Z. Huq, *The Constitutional Money Problem*, 92 U. CHI. L. REV. 333, 334–35 (2025); see Christina Parajon Skinner, *Central Bank Activism*, 71 DUKE L.J. 247, 296–97 (2021) (describing concerns that officials subject to electoral pressure will favor short-term political expediency over sound long-term economic policy). *But see* Aneil Kovvali & Jeffery Y. Zhang, *The Market Facing State*, 104 WASH. U. L. REV. (forthcoming 2027) (analyzing this argument in light of recent experience and suggesting that elected officials may evaluate the inflation-employment trade-off differently than has been presumed).

¹⁵⁴ See Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 55 (2008) (“[B]ureaucratic insulation creates a kind of compensatory inertia that mutes the significance of variation in the president’s policy preferences.”). This principle has been seriously undermined by the Supreme Court’s recent decisions exposing more of the administrative state to removal by the president without cause. See *Trump v. Slaughter*, 146 S. Ct. 2283, 2297 (2026) (“[T]he President may remove his subordinates at will.”). The new approach is likely to be highly destabilizing for American governance. See, e.g., Jeffrey Gordon, LINKEDIN (July 3, 2026), [https://www.linkedin.com/posts/jeffrey-gordon-21a174133_i-think-the-decision-in-trump-v-slaughter-share-7477568552724701184-VqE2/\[perma.cc/P625-8VV8\]](https://www.linkedin.com/posts/jeffrey-gordon-21a174133_i-think-the-decision-in-trump-v-slaughter-share-7477568552724701184-VqE2/[perma.cc/P625-8VV8]) (describing *Trump v. Slaughter* as “a Brexit moment for the US, meaning a structural break in an economic governance system that will have long run negative effects”).

¹⁵⁵ See, e.g., Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569, 569 (2006) (describing the *Accardi* doctrine that “[a]gencies must comply with their own regulations”).

¹⁵⁶ See, e.g., *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 655–59 (1819) (applying the Contract Clause of the Constitution to the charter of Dartmouth College); *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1180, 1187–88 (D.C. Cir. 1987) (holding that a regulated utility is entitled to charge a just and reasonable rate, and to not be forced to charge a rate so low as to be confiscatory).

The recognized difficulties of political volatility may also suggest an opening for corporate governance. At least one leading account of the corporate form suggests that it is designed to encourage long-term investments by enabling the corporate board of directors to pursue stable and equitable policy choices: investors, loyal workers, and longstanding customers can all rely on the board to balance their claims on the corporation and create long-term value.¹⁵⁷ Companies can also insulate decision-makers from outside pressure using long-term executive contracts, staggered board arrangements that limit opportunities to replace directors, and takeover defenses that prevent an outsider from taking over and rapidly changing the company's direction.¹⁵⁸

These institutional and legal structures are paralleled by economic and financial forces. In principle, the price of a company's shares reflects the value that the company is expected to generate far into the future. This expectation of future profit can represent a major portion of the current value of a firm's shares. For example, Apple currently has a price-to-earnings ratio of over thirty. Roughly speaking, this means that its earnings this year represent only about three percent of its value.¹⁵⁹ The rest of the value reflects the profits that investors expect Apple to earn in the future. Markets can be myopic and prone to gamesmanship, and managers might be tempted to sacrifice future gains to generate a short-term return.¹⁶⁰ But the basic mechanics create a powerful incentive for managers to at least appear to protect the far future of the firm.¹⁶¹ It

¹⁵⁷ Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 249–51 (1999).

¹⁵⁸ See, e.g., Yakov Amihud, Markus Schmid & Steven Davidoff Solomon, *Settling the Staggered Board Debate*, 166 U. PA. L. REV. 1475, 1480–84 (2018) (describing the debate over staggered boards and finding that they have no effect on shareholder value on average).

¹⁵⁹ MARK J. ROE, MISSING THE TARGET: WHY STOCK MARKET SHORT-TERMISM IS NOT THE PROBLEM I (2022); AAPL Price Quote, WALL ST. J., <https://www.wsj.com/market-data/quotes/CL/AAPL> (last visited Sep. 7, 2026) (reporting trailing twelve month price-to-earnings ratio of 35.38); see Aneil Kovvali, *Countercyclical Corporate Governance*, 101 N.C. L. REV. 141, 165 (2022) (noting that, in 2020, Apple had a “price to earnings ratio of over thirty to one”); Mark J. Roe, *Stock Market Short-Termism's Impact*, 167 U. PA. L. REV. 71, 98 (2018) (stating that the current earnings of firms like Apple do not justify the firms' stock price, and attributing high prices to expectations of long-term growth).

¹⁶⁰ See William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275, 1284 (2002) (suggesting that “obsession with short-term performance numbers” can be a side effect of shareholder primacy); Martin Lipton & Steven A. Rosenblum, *A New System of Corporate Governance: The Quinquennial Election of Directors*, 58 U. CHI. L. REV. 187, 188 (1991) (“[T]ogether with the increasing dominance of institutional stockholders, hostile takeover activity has led to an inordinate focus on short-term results and a dangerous overleveraging of the American and British economies, the ill effects of which are only beginning to emerge.”). For an argument that investors' efforts to forecast cash flows far into the future has created incentives for managers to focus on short-term performance and mislead investors, see JAMES J. PARK, *THE VALUATION TREADMILL: HOW SECURITIES FRAUD THREATENS THE INTEGRITY OF PUBLIC COMPANIES* 3 (2022).

¹⁶¹ This incentive to focus on the future is likely to be strongest at the large and innovative firms that have the greatest potential to drive social changes or share value with stakeholders. That said, this may be partially offset by increased stock price volatility and enhanced incentives to maintain the

also creates a powerful incentive for investors to consider the future of the firm, even if their personal time horizons are limited. Politicians and voters do not have a similar incentive to focus on long-term consequences.

In recent years, some corporations have also shown some willingness to take controversial stances or push back on swings in political outcomes. Nike enjoyed substantial success with a marketing campaign centered on Colin Kaepernick, the former National Football League quarterback who faced significant criticism and ultimately lost his position due to his stance on police brutality.¹⁶² The outcome demonstrated that controversial or unpopular stances can be a winning strategy for profit-focused corporations. Many companies have also pushed back on political officials. Delta publicly criticized efforts by Georgia legislators to limit voting rights,¹⁶³ and Disney criticized Florida legislation designed to limit discussion of homosexuality.¹⁶⁴ Though experiences under the second Trump Administration have revealed important limits to these forces,¹⁶⁵ they remain real.

Companies may also seek a middle path when planning long-term investments.¹⁶⁶ A company that considered a new clean energy plant during the Biden era should have been attentive to the fact that supportive policies could be reversed, just as a company considering a fossil fuel energy plant during the current Trump Administration should be conscious of the likelihood that a future administration would change direction. Simple self-interest should lead companies to take stable and moderate positions instead of chasing sudden shifts in public opinion.

But corporate governance only has a limited ability to address this shortcoming of the political process. Many of the mechanisms of corporate governance serve to focus managers' attention on short-term financial results: corporate officers and directors who fail to deliver shareholder profits will quickly

appearance of bright prospects at innovative companies. Managers may respond to these forces by engaging in manipulation or fraud. *See* PARK, *supra* note 160, at 50 (providing examples of such fraud including Xerox and Penn Central).

¹⁶² Creswell, Draper & Maheshwari, *supra* note 126; Kovvali, *supra* note 24, at 742.

¹⁶³ Kovvali, *supra* note 24, at 743–44; David Gelles, *Delta and Coca-Cola Reverse Course on Georgia Voting Law, Stating 'Crystal Clear' Opposition*, N.Y. TIMES (Apr. 5, 2021), <https://www.nytimes.com/2021/03/31/business/delta-coca-cola-georgia-voting-law.html> [perma.cc/HP29-F98K].

¹⁶⁴ Kovvali, *supra* note 24, at 759–60; Mike Schneider, *Disney, DeSantis Legal Fights Ratchet Up as Company Demands Documents from Florida Governor*, ASSOCIATED PRESS (Sep. 30, 2023), <https://apnews.com/article/florida-disney-desantis-lgbtq-2e0d07f528011f142d1bc167ac2793dc> [perma.cc/CYC6-XGAL].

¹⁶⁵ *See* Fairfax & Martinez, *supra* note 10 (manuscript at 3–4) (describing rapid “recalibration” in which corporate actors sought to abandon prior commitments on diversity, equity, and inclusion issues and align themselves with the second Trump Administration); Aneil Kovvali, *Corporate Resistance* 6, 15–16, 31 (June 26, 2026) (unpublished manuscript) (on file with author) (analyzing instances of collaboration between Trump Administration and corporations).

¹⁶⁶ Kovvali, *supra* note 24, at 746–47.

be replaced.¹⁶⁷ Companies that operate in competitive markets must be attentive to customer attitudes, and managers that fail to react to sudden shifts in customer attitudes will deliver disappointing financial results and face the threat of removal. Bud Light's marketing executives faced serious professional consequences when the company's outreach to Dylan Mulvaney, a transgender influencer, led to a viral controversy that reduced the brand's sales.¹⁶⁸ Companies are also attentive to shifts in the regulatory environment. During the first Trump Administration, GM joined a lawsuit intended to force California to reduce its environmental standards.¹⁶⁹ After Biden won the 2020 presidential election, GM abandoned the lawsuit and committed to embrace a transition to cleaner electric vehicles.¹⁷⁰ Such behavior can amplify shifts in the political environment instead of dampening them.

5. Implications

Process-based criticisms of government regulations are a promising basis for corporate reforms, as they can reveal areas where political institutions are untrustworthy and corporate action could be productive. But these criticisms are strongest only within limited domains, as with the treatment of minorities or the fragmentation of policy across states.

III. LIMITS OF AN IDEAL STATE

As discussed above, it can be difficult to reliably identify instances in which the actual political process has delivered outcomes that fall short of what an ideal state would provide. This Part explores a separate rationale for corporate action by identifying some plausible limits on an ideal state. An ideal state would not operate an all-seeing surveillance apparatus, making perfect ex ante regulation impossible; would not apply different or arbitrary standards to different companies, limiting the potential for regulatory tailoring and experimentation; and would not violate substantive rights such as free speech. These limitations suggest that corporate action would have an important role to play even if the government functioned perfectly.

¹⁶⁷ See Bratton *supra* note 160, at 1284 (discussing managers' "obsession" with short-term financial results); Lipton & Rosenblum, *supra* note 160, at 188 (describing "inordinate" focus on short-term financial results).

¹⁶⁸ Jennifer Maloney, *How Bud Light Blew It*, WALL ST. J. (May 21, 2023), <https://www.wsj.com/business/retail/bud-light-boycott-sales-dylan-mulvaney-6c23bb86> [perma.cc/L8PH-WJ2U].

¹⁶⁹ Kovvali, *supra* note 24, at 748–49.

¹⁷⁰ *Id.*

A. Limits on Government Knowledge

To fulfill its role in shareholder primacy theory, the government must create a regulatory environment that aligns shareholder profits with social welfare.¹⁷¹ This might entail paying companies for desirable conduct or fining companies for undesirable conduct. But information asymmetries and private opportunism limit the government's ability to create optimal incentives. Though some real-world limits are arguably caused by government failures—a gap between actual government capacity and ideal capacity—some limits actually reflect some of the defining features of an ideal state. An ideal state would not renege on contracts or operate an all-seeing surveillance system, limiting its ability to deal with opportunism and correct information asymmetries.

These matters are central to corporate law theory. As Nobel laureates Oliver Hart and Oliver Williamson have argued, governance and ownership rights matter because of the problems of information asymmetries and opportunism.¹⁷² Absent those problems, ownership of productive assets would not matter: private parties would simply write contracts in advance that address all possibilities and provide that whoever owns the assets will behave optimally. Hidden information makes it impossible to write such contracts, and opportunism leads the parties to exploit loopholes. As a result, ownership does matter: contracts written in advance will not cover all possibilities, and the owner will get to decide what happens *ex post*.

Similar problems can affect government regulation. Private parties often possess relevant information about the costs and benefits of behavior.¹⁷³ A company that emits a chemical pollutant in its operations probably has special access to information about the impacts of that chemical, and almost certainly has special access to information about the costs of altering its operations to reduce emissions. If the company's managers are seeking to maximize shareholder profits, they will downplay the negative impacts and exaggerate the costs of transition. The government can try to address the problem through regulation, but profit-maximizing managers will seek to exploit any loopholes in the regulations and will oppose efforts to strengthen those regulations even if new information comes to light.

It is possible to cast this as a government failure that could be remedied by investing in state capacity. The government could surely do a better job of collecting and analyzing information.¹⁷⁴ In many cases it deliberately blinds

¹⁷¹ See EASTERBROOK & FISCHER, *supra* note 1, at 37–38.

¹⁷² *E.g.*, OLIVER HART, FIRMS, CONTRACTS, AND FINANCIAL STRUCTURE 29–33 (1995); OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS 34–35 (1975).

¹⁷³ Kovvali, *supra* note 24, at 747.

¹⁷⁴ For a set of proposals to improve the government's capacity, see generally MONEYBALL FOR GOVERNMENT (Jim Nussle & Peter Orszag eds., 2d ed. 2015).

itself and outside observers.¹⁷⁵ The government arguably could also take a harsher line against companies and managers that behave opportunistically. There have been many harsh critics of the government's forgiving stances toward banks and airlines that took excessive risks in an attempt to increase shareholder profits.¹⁷⁶ An ideal government might take a different approach, so it could be fair to characterize some of the actual government's limitations as reflecting a government failure.

But an ideal government would also face serious limitations. Indeed, some of the defining characteristics of an ideal government would limit its ability to impose the optimal regulations imagined by shareholder primacy theorists.

Fairness and due process impose one set of constraints. In standard corporate governance, actors address information asymmetry and opportunism problems by reserving the power to respond *ex post*.¹⁷⁷ For example, because shareholders are unable to tell managers exactly what to do in advance, they normally reserve the power to remove managers if their performance proves disappointing. If the CEO fails to deliver adequate returns, they could be removed by the board of directors, and if the board fails to act appropriately, they could be removed in an election at the next annual meeting. These *ex post* powers compensate for the shareholders' inability to specify ideal conduct *ex ante*.

Although this type of behavior is common in private industry, it runs contrary to expectations for public regulators. When a regulator takes action against an individual, it is normally expected to ground that action in some standard that had been articulated in advance. Unless the individual had fair notice that their conduct would be deemed wrongful, government action against them can seem unjust.¹⁷⁸ This intuition limits the government's toolkit for dealing with information asymmetries or opportunism.

¹⁷⁵ See, e.g., Haiyun Damon-Feng, *Agency Fact-Making*, 135 YALE L.J. 2525, 2535–36, 2604 nn.385–86 (2026) (analyzing the fact-making functions of administrative agencies, and efforts by the second Trump Administration to control information and public narratives); Hiba Hafiz, *Economic Analysis of Labor Regulation*, 2017 WIS. L. REV. 1115, 1117, 1125–29 (describing 1940 statutory prohibition on the National Labor Relations Board hiring economists). Many public utility commissions also shield a wide array of corporate information that is relevant to rate cases from public view, on the theory that the information is proprietary and confidential. See Aneil Kovvali & Joshua C. Macey, *Hidden Value Transfers in Public Utilities*, 171 U. PA. L. REV. 2129, 2171 & n.173 (2023).

¹⁷⁶ See e.g., GANESH SITARAMAN, WHY FLYING IS MISERABLE AND HOW TO FIX IT 105 (2023) (“[T]he airlines have become like the ‘too big to fail’ Wall Street banks. . . . [P]rivate shareholders get all the upside in the profitable years, and taxpayers are faced with the downsides of bailouts and support in the crisis years.”); Anthony J. Casey & Eric A. Posner, *A Framework for Bailout Regulation*, 91 NOTRE DAME L. REV. 479, 522–27 (2015) (identifying criticisms of various bailouts).

¹⁷⁷ EASTERBROOK & FISCHER, *supra* note 1, at 66–67, 90–91.

¹⁷⁸ It may also be impermissible under existing law. See Theodore J. Boutrous, Jr. & Blaine H. Evanson, *The Enduring and Universal Principle of “Fair Notice,”* 86 S. CAL. L. REV. 193, 193–94

Intuitions about surveillance also limit the government's ability to address information asymmetries and demand optimal behavior. For example, truly eradicating racism and sexism in the workplace would require an extraordinary level of oversight and access. The government would have to acquire enough information to get genuine insight into the motives and goals of every relevant decision-maker. Although the surveillance apparatus required to collect this information would have some noble applications—stamping out racism and sexism are clearly valid goals—it would also sweep in an enormous amount of private or sensitive information that could be put to bad use.

As discussed below, fairness concerns and substantive restraints impose other limits that would prevent an ideal government from playing the role imagined for government by shareholder primacy theory. But they plainly limit the government's capacity to collect information or respond to information asymmetries.

B. Fairness and Due Process

An ideal government would respect fairness and due process norms that may prevent the implementation of an optimal regulatory regime. There is room for serious debate about the scope and content of legal doctrines speaking to due process concerns. But there are broadly shared norms about how a government should operate: moving in a deliberate as opposed to improvisational fashion, following through on commitments and refusing to punish private parties except on the basis of preannounced rules, and providing one consistent set of rules across all parties. Although these norms are grounded in weighty concerns, they can create gaps that corporate governance arrangements might fill. Within corporate governance, experimentation and ex post adjustments are common, making it a plausible candidate to fill the gaps.

Experimentation can be extremely valuable, particularly in contexts where important facts are fluid or innovation is likely or necessary. But the government can struggle to experiment. Legislative processes are slow and deliberative.¹⁷⁹ Although often criticized as a flaw, the pace of these processes often reflects the real need to allow affected stakeholders to provide input. The government is also often expected to reach some level of certainty about the merits of a regulation *before* imposing that regulation on an industry.¹⁸⁰ Although there have been arguments for alternative approaches that call for exper-

(2013) (identifying several limitations on the government's ability to impose penalties without having articulated the relevant rule with sufficient clarity).

¹⁷⁹ See *supra* Part II.A.2.

¹⁸⁰ For arguments that these norms may prevent valuable financial regulation, see Awrey & Judge, *supra* note 107, at 2311–12; John C. Coates, IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 888 (2015); Gordon, *supra* note 107, at S352–53.

imentation or temporary regulations,¹⁸¹ it is often reasonable to expect the government to be reasonably sure before imposing compliance costs or penalties through regulation. By contrast, experimentation is common in corporate governance, both within and across firms.¹⁸²

Optimal regulations would also be adjusted in response to new developments. But this type of adjustment can be difficult for a government. To the extent that adjustments are made in response to new developments, the law often develops in ways that are path dependent or crisis driven.¹⁸³ As a result, the existing body of law often bears no resemblance to something a rational policymaker would design if working from a blank sheet of paper. Undoubtedly, government failure is part of the explanation for this feature of our regulato-

¹⁸¹ See, e.g., Tom Ginsburg, Jonathan S. Masur & Richard H. McAdams, *Libertarian Paternalism, Path Dependence, and Temporary Law*, 81 U. CHI. L. REV. 291, 295–97 (2014) (proposing temporary law to overcome uncertainty); Yoon-Ho Alex Lee, *An Options Approach to Agency Rulemaking*, 65 ADMIN. L. REV. 881, 887 (2013) (proposing an “options” based approach in which an “agency can adopt Rule *x* with a commitment to modify it after a number of years, *in case Rule x should prove to be inefficient*”). For a broader criticism of the ordinary regulatory process, see Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 400–01 (2019). It may also be appropriate for the government to take a different approach when it is acting as a market participant as opposed to using a coercive or regulatory toolkit. Cf. Saule T. Omarova & Brian Richardson, *Public Investment as Constitutional Power and Accountability Challenge*, 92 U. CHI. L. REV. 461, 464 (2025) (suggesting that there is a distinction of constitutional dimension between the government’s role as “rule maker” and its role as “market participant”).

¹⁸² See, e.g., Zohar Goshen & Assaf Hamdani, *Corporate Control, Dual Class, and the Limits of Judicial Review*, 120 COLUM. L. REV. 941, 946 (2020) (arguing that courts should permit experimentation on the allocation of control rights because the “allocation of control rights raises an inevitable tradeoff between investors’ protection from agency costs and the controller’s ability to pursue its idiosyncratic vision, thus making the value of different allocations of control rights both firm specific and individual specific” (footnote omitted)); Dorothy S. Lund, *In Search of Good Corporate Governance*, 131 YALE L.J.F. 854, 870–72 (2022), <https://yalelawjournal.org/essay/in-search-of-good-corporate-governance> [perma.cc/38VF-7HL5] (suggesting that good corporate governance may vary by firm and drawing out implications); Elizabeth Pollman, *Startup Governance*, 168 U. PA. L. REV. 155, 159 (2019) (“With their focus on technology and innovation, and their correspondingly high levels of risk and emphasis on growth, startups are different from both public corporations and traditional closely held corporations. As a result, their governance is also different.”); Marina C. Leary, Benjamin Strauss & Nathan E. Barnett, *Chancery Court Upholds Identity-Based Voting Within Single Class of Stock*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 28, 2023), <https://corpgov.law.harvard.edu/2023/12/28/chancery-court-upholds-identity-based-voting-within-single-class-of-stock/> [perma.cc/H5JF-AQ5M] (discussing judicial approval of a novel arrangement in which different shareholders within a class have different rights); cf. Zohar Goshen & Doron Levit, *Agents of Inequality: Common Ownership and the Decline of the American Worker*, 72 DUKE L.J. 1, 9 (2022) (suggesting that large common owners may be artificially suppressing variation in corporate governance arrangements, leading to suboptimal levels of investment, employment, and wages).

¹⁸³ As one somewhat minor example of the power of path dependence, Major League Baseball is largely exempt from many of the antitrust doctrines that apply to other industries. See STUART BANNER, *THE BASEBALL TRUST: A HISTORY OF BASEBALL’S ANTITRUST EXEMPTION*, at xi, xv (2013) (noting that “[s]carcely anyone believes that baseball’s exemption makes any sense,” and suggesting that it happened because “[a]t each step, judges and legislators made decisions that were perfectly sensible when considered one at a time, but this series of decisions yielded an outcome that makes no sense at all”).

ry system: for example, regulators may react to an industry development too late, after the industry has built up enough political clout to defeat any regulatory effort.¹⁸⁴ But it can also reflect respect for important reliance interests and a need to provide a stable policy environment. An ideal government would respect the reasonable expectations of regulated parties and would not adopt wildly variable positions over time. Sometimes these considerations are baked into law, as with the doctrine on takings and rate regulated utilities.¹⁸⁵ Other times they are merely deeply felt norms. In either case, the government cannot react rapidly to a changing factual context. By contrast, corporate governance does change. Shifts in thinking about corporate governance mechanisms like staggered boards led to rapid shifts across large public firms,¹⁸⁶ and individual firms adopt different corporate governance arrangements over time either because of changes in their status or in response to crises.¹⁸⁷

Optimal regulatory arrangements would also be closely tailored to variations in factual situations. But even an ideal government would face constraints in attempting to tailor regulations. An excessively complex regulatory system would be unfair to the people expected to understand and follow those regulations. Variation can also lead to basic unfairness. There may be good reasons for treating big banks differently from small banks or wealthy investors differently from small investors, but different legal regimes can place the less powerful at a real disadvantage.¹⁸⁸ This unfairness can be compounded by

¹⁸⁴ See, e.g., *id.* at xi, xv, 248–49 (describing how decades of baseball league owners’ reliance on immunity from antitrust liability made the Supreme Court hesitant to impose unexpected consequence); Adriana Z. Robertson, *Timing the Regulatory Tightrope* (noting the risk that delays in regulating creates a political environment where regulation is impossible, as well as risks of regulating too early), in RESEARCH HANDBOOK ON LAW AND TIME 131, 132 (Frank Fagan & Saul Levmore eds., 2025); Elizabeth Pollman, *Adventure Capital*, 96 S. CAL. L. REV. 1341, 1361–64 (2024) (describing lack of accountability mechanisms for startups pursuing problematic experiments and resulting scandals); Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. 383, 385–88 (2017) (providing Uber as an example of a new corporation that built up an operation within a legal gray area and using its scale to prevent hostile regulation).

¹⁸⁵ See, e.g., *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1180, 1187–88 (D.C. Cir. 1987) (“The Commission is not precluded from employing ‘used and useful,’ or any other specific rate-setting formula [for electric utilities]. It must ensure, however, that the resulting rate is just and reasonable.”).

¹⁸⁶ See Amihud et al., *supra* note 158, at 1484–85 (describing the success of academic advocates in eliminating the staggered board at 121 of the 129 companies that they targeted).

¹⁸⁷ See Pollman, *supra* note 182, at 160–61, 187–88 (describing the customized and path dependent governance structures at various notable startups).

¹⁸⁸ On the impact of “too big to fail” policies on smaller banks and the system at large, see Saule T. Omarova, *The “Too Big to Fail” Problem*, 103 MINN. L. REV. 2495, 2500 (2019) (“An actual rescue of a large financial institution is an extraordinary act, a direct grant of explicit and tangible public subsidy not available to smaller entities.”); Mark J. Roe, *Structural Corporate Degradation Due to Too-Big-to-Fail Finance*, 162 U. PA. L. REV. 1419, 1421–22 (2014) (asserting that bailouts create a subsidy for large financial firms, creating an incentive to get or remain big). For more on the “accredited investor” rule that allows only wealthy Americans access to certain investments on essentially paternalist grounds, see Grier E. Barnes, Note, *Racial Exclusion in Private Markets: How the New*

attempts at evasion as sophisticated players engage in regulatory arbitrage and pick their desired regulatory regime for themselves. As discussed above, an ideal state may lack the information or means to curb this type of behavior, perhaps creating a need for a uniform and untailored rule.¹⁸⁹ By contrast, variation is common in corporate governance, even on basic governance features: many companies have contested shareholder elections and other companies like Meta are essentially monarchies because of the dual class stock granted to their leaders. More broadly, productive enterprises have adopted many organizational forms that are well adapted to their particular circumstances.¹⁹⁰

C. Substantive Limits on an Ideal Government

An ideal state also would not take certain substantive actions. This Section explores the limits on an ideal government using constitutional law as a guide. As interpreted by the courts, the Constitution places significant substantive limits on the government's ability to address certain problems. This Section surveys three examples of limitations on government: free speech, diversity promotion, and firearms. These limitations on the government create a space in which private institutions are the only actors capable of achieving desired outcomes.

Of course, the current judicial interpretation of the Constitution may not describe an ideal state. Judicial restrictions on policing speech, engaging in affirmative action, or regulating firearms may represent government failures. But at least some of these restrictions reflect powerful and widely held norms. For example, large majorities of Americans support some conception of the freedom of speech.¹⁹¹ The authors of these doctrines also appear to be striving to implement a political theory about the ideal form of government, whatever

Accredited Investor Standard is Arbitrary and Capricious, 96 N.Y.U. L. REV. 1966, 1970–71 (2021) (arguing that the accredited investor rule “systematically excludes Black investors and Black-owned businesses from private markets in a way that depresses the potential value of those markets as a whole”); cf. Usha Rodrigues, *Securities Law’s Dirty Little Secret*, 81 FORDHAM L. REV. 3389, 3389–90 (2013) (“[G]overnment intervention has created an investing climate that lets the rich get richer, while the poor get left behind.”); Emily Winston, *Unequal Investment: A Regulatory Case Study*, 107 CORN. L. REV. 781, 803 (2022) (“[I]n its current form, the accredited investor standard draws a regulatory divide between the investments of the wealthy and those of ordinary Americans.”).

¹⁸⁹ Cf. Frank Partnoy, *Financial Derivatives and the Costs of Regulatory Arbitrage*, 22 J. CORP. L. 211, 227 (1997) (“Regulatory arbitrage consists of those financial transactions designed specifically to reduce costs or capture profit opportunities created by differential regulations or laws.”).

¹⁹⁰ See HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* 18–22 (1996) (discussing how various organizational frameworks can fit within a “general theory of enterprise ownership”).

¹⁹¹ See *Free Expression in America Post-2020*, KNIGHT FOUND. (Jan. 6, 2022), <https://knightfoundation.org/articles/research/free-expression-in-america-post-2020/> [perma.cc/U6NQ-T6WS] (finding that sixty-three percent of survey participants considered freedom of speech “extremely important,” and twenty-eight percent found it “very important,” while seven percent found it “moderately important”).

the merits of their conclusions or methods.¹⁹² This Section broadly assumes that existing doctrine has some normative appeal in describing the limits of what the government should be able to do, though it should not be taken as an endorsement of existing doctrine. Even apart from its normative weight, existing constitutional doctrine defines the limits of what the government realistically could do within a reasonable timeframe even if it is behaving optimally, meaning that shareholder primacy theorists cannot assume that the government will regulate effectively within these spaces.

1. Free Speech

Current First Amendment doctrine limits the government's ability to police speech in a number of fields,¹⁹³ including misinformation¹⁹⁴ and hate speech,¹⁹⁵ to tamp down on lascivious material,¹⁹⁶ to prevent disclosure of damaging secrets,¹⁹⁷ or to insist on equal or fair coverage of different political positions.¹⁹⁸ Although many of these rules are open to serious criticism,¹⁹⁹ there is a basic and broadly shared intuition that the government should not be in the business of deciding what people can or cannot say.

Because an ideal state would not intensively police speech, there is a need for private parties to restrain themselves.²⁰⁰ A healthy national conversation requires influential companies to take principled stances. The usefulness of X (formerly Twitter) was sharply diminished when the company's new ownership decided to permit—or even actively engage in—hate speech and misinformation.²⁰¹ And the media landscape would suffer if *The New York Times* began to run fake news that was unfit to print in an effort to attract clicks.

¹⁹² For a criticism of the approach, see Christopher S. Havasy, Joshua C. Macey & Brian Richardson, *Against Political Theory in Constitutional Interpretation*, 76 VAND. L. REV. 899, 903 (2023) (“[T]he ‘great ideas’ of Enlightenment political theory—as against demonstrated *uses* of those theories in a constitutional dispute—hold no probative value to discerning Founding-era constitutional meaning.”).

¹⁹³ Evelyn Douek, *Content Moderation as Systems Thinking*, 136 HARV. L. REV. 526, 531–32 (2022).

¹⁹⁴ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that public officials must prove “actual malice” to recover for defamation).

¹⁹⁵ See *Virginia v. Black*, 538 U.S. 343, 363, 367 (2003) (holding that states may ban cross burning carried out with intent to intimidate but may not presume such intent).

¹⁹⁶ See *Miller v. California*, 413 U.S. 15, 24 (1973) (setting out the governing test for obscenity).

¹⁹⁷ See *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (refusing to enjoin publication of the Pentagon Papers).

¹⁹⁸ See *Mia. Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (striking down a statutory right of reply to newspaper criticism).

¹⁹⁹ See, e.g., Steven H. Shiffrin, *The Dark Side of the First Amendment*, 61 UCLA L. REV. 1480, 1498 (2014) (“[T]he European approach to freedom of speech is generally right and the U.S. approach is generally wrong, except when it comes to dissent.”).

²⁰⁰ See Aneil Kovvali, *Trophy Assets*, 51 J. CORP. L. 363, 389 (2025) (describing the consequences of limited regulatory oversight of speech due to First Amendment protections).

²⁰¹ *Id.* at 395–98.

These concerns are only imperfectly mirrored by the incentives created in the marketplace. The *Times* would probably be somewhat less profitable if it was perceived as having traded away its journalistic integrity. But that business strategy has limits. People do not appear to be willing to pay for local journalism despite its importance in ensuring quality local governance,²⁰² cable news outlets appear to have concluded that genuine expertise does not attract viewers,²⁰³ and many outlets appear to be chasing increasingly radicalized audiences by telling them what they want to hear.²⁰⁴ Platforms like Meta and X have their own incentives, as heated content can alienate advertisers but grab attention. At a minimum, the market will frequently create opportunities to grab short-term profits with speech that compromises a media corporation's social role. To protect their integrity, media corporations must make a credible institutional commitment to using their powerful speech rights in a responsible manner.²⁰⁵

2. Diversity

The Supreme Court has also taken a skeptical approach to governmental efforts to boost diversity. In 2023, in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, the Supreme Court held that Harvard College and the University of North Carolina's affirmative action programs violated the Fourteenth Amendment's Equal Protection Clause.²⁰⁶ Most recent-

²⁰² Jennifer Hoewe & Brett Sherrick, *Are You Willing to Pay for News? The Future of Journalism May Depend on It*, FORTUNE (July 16, 2020), <https://fortune.com/article/american-journalism-crisis-save-news-media/> [perma.cc/ZTE3-MX8B].

²⁰³ See Henry Mance, *TV's Talking Heads: Who Are They and Why Do We Need Them?*, FIN. TIMES (Nov. 20, 2015) <https://www.ft.com/content/2d5fd0a6-8ea9-11e5-a549-b89a1dfede9b?syn-25a6b1a6=1> [perma.cc/4LM7-K78A] ("According to research group Media Matters for America, of the 891 guests who appeared on US evening cable and broadcast news shows in the first six months of 2015 to discuss the economy, only 3 per cent were economists.").

²⁰⁴ See Molly Jong-Fast, *Fox News Is No Longer Insane Enough for Fox Viewers*, DAILY BEAST (Nov. 19, 2020), <https://www.thedailybeast.com/fox-news-is-no-longer-insane-enough-for-fox-viewers/> [perma.cc/N333-3EAB] (reporting that Fox News viewers defected to Newsmax and One America News Network (OAN) after Fox accurately projected the 2020 election results); Brian Stelter, *With Tagline, MSNBC Embraces a Political Identity*, N.Y. TIMES (Oct. 4, 2010), <https://www.nytimes.com/2010/10/05/business/media/05adco.html> [perma.cc/PWJ6-WAKD] (describing MSNBC's adoption of the "Lean Forward" tagline as an embrace of an explicitly progressive brand identity).

²⁰⁵ See Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L.J. 2418, 2426 (2020) (noting that Meta faces pressure from both the United States and European Union over Facebook users' issues). This type of commitment can also be achieved through external contracts with employees or labor unions. For example, after billionaire Bill Ackman pressured *Business Insider's* parent company over a story about Ackman's wife, a union noted that its "collective bargaining agreement with Business Insider protects editorial integrity and independence." *Insider Union, The NewsGuild of New York Statement on Axel Springer Call for Review of Business Insider Stories*, NEWSGUILD OF N.Y. (Jan. 9, 2024), <https://www.nyguild.org/post/insider-union-the-newsguild-of-new-york-statement-on-axel-springer-call-for-review-of-business-insider-stories> [perma.cc/37TT-5V2G].

²⁰⁶ 600 U.S. 181, 230 (2023).

ly, in 2026, in *Louisiana v. Callais*, the Supreme Court concluded that the Constitution barred Congress's efforts to address racially based electoral outcomes through the Voting Rights Act.²⁰⁷ Although the Court has taken a somewhat skeptical approach for decades,²⁰⁸ its recent escalation suggests that it may be increasingly difficult for governments to effect positive change in racial matters. The "colorblind" logic of the Supreme Court's jurisprudence suggests that even race neutral policies could be constitutionally suspect if they were adopted to achieve particular demographic impacts.²⁰⁹

These doctrines have already left their mark within corporate law. Partly as a reaction to the Me Too and Black Lives Matter movements, California's state legislature sought to require minimal levels of gender and racial diversity on corporate boards.²¹⁰ The mandate was halted by a court due to constitutional concerns.²¹¹

But while the government was powerless to advance diversity goals, the forces of corporate governance continued to operate. Both to assuage their own customers and to reap the economic benefits of diversity, major institutional investors have demanded that corporations diversify their boards.²¹² Large corporations have increasingly acceded to the demands.²¹³ In effect, private actors played the role that the government could not. Admittedly, many of these corporations retreated from these reforms during the second Trump Administra-

²⁰⁷ 146 S. Ct. 1131, 1162 (2026).

²⁰⁸ See, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 275–76 (2003) (striking down a points-based affirmative action policy in university admissions); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510–11 (1989) (condemning minority set asides in government contracts); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978) (limiting when schools may consider the race and ethnicity of applicants).

²⁰⁹ See Jeffrey D. Hoagland & Vinay Harpalani, *Original Intent, Racial Equality, and the Conundrums of "Colorblindness,"* 83 MD. L. REV. 231, 241 (2023) (discussing challenges to facially race-neutral school admissions policies adopted because of their intended racial-demographic effects).

²¹⁰ CAL. CORP. CODE § 2115.6 (2025); CAL. CORP. CODE § 301.4 (2025), *invalidated by*, *Crest v. Padilla*, No. 20 STCV 37513, 2022 WL 1073294 (Cal. Super. Ct. Apr. 1, 2022); see also Pargendler, *supra* note 4, at 392 (describing an earlier California legislative resolution calling for representation on boards).

²¹¹ *Crest*, 2022 WL 1073294, at *20, *22; see also *All. for Fair Bd. Recruitment v. Weber*, No. 21-cv-01951, 2023 WL 3481146, at *3 (E.D. Cal. May 15, 2023) (holding California's board-diversity mandate facially unconstitutional as a racial quota and enjoining its enforcement). The Fifth Circuit rejected a similar NASDAQ rule on the ground that it was not consistent with the Securities Exchange Act of 1934. *All. for Fair Bd. Recruitment v. Secs. & Exch. Comm'n*, 125 F.4th 159, 185 (5th Cir. 2025).

²¹² Barzuza et al., *supra* note 67, at 1248; Lund, *Asset Managers as Regulators*, *supra* note 4, at 105–13.

²¹³ Barzuza et al., *supra* note 67, at 1248; Lund, *Asset Managers as Regulators*, *supra* note 4, at 105–13; see also Peter Cziraki & Adriana Z. Robertson, *Continuity and Change on Corporate Boards*, J. FIN. & QUANTITATIVE ANALYSIS (forthcoming) (manuscript at 1–3, 12–13), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4626217 [perma.cc/UM6W-XMPV] (describing mechanisms by which women directors were integrated onto corporate boards).

tion, often without full consideration of the relevant tradeoffs.²¹⁴ But the experience of Target, which faced consumer boycotts and investor unrest for its retreat, suggests that the forces continue to operate despite political hostility.²¹⁵

3. Firearms

The Supreme Court's Second Amendment jurisprudence has also been in flux. As of this writing, the Supreme Court has not clarified precisely what firearms regulations are prohibited, or even precisely how courts should work through the question.²¹⁶ But it is clear that a majority of Justices is prepared to strike down a broad range of previously uncontroversial gun control legislation.²¹⁷

Again, this could be understood as a governmental failure. Large and stable majorities of American citizens favor more intensive gun control regulations, but those majorities have not translated into legislation. Even if legislation did survive the political gauntlet, it is unclear what would survive judicial review. But a substantial number of Americans do appear to support the Supreme Court's approach, and there is a widespread belief that the government ought to be prevented from interfering with a traditional or natural right to self-defense.²¹⁸

Despite these limits on the government, corporate governance continues to play a role in the space. Dick's Sporting Goods gradually scaled back sales of certain firearms in the wake of the Parkland shooting; competitors like Walmart, L.L. Bean, and Kroger quickly announced similar policies.²¹⁹ These corporate decisions were the result of complex forces. For example, Walmart

²¹⁴ Fairfax & Martinez, *supra* note 10 (manuscript at 2–4) (describing the trend of “reform to retrenchment” that may “reflect[] a failure by firms to take risk seriously when it is politically uncomfortable to do so”).

²¹⁵ Fairfax & Martinez, *supra* note 10 (manuscript at 15).

²¹⁶ In *United States v. Rahimi*, Chief Justice Roberts simultaneously insisted that the scope of the Second Amendment was to be assessed by reference to “our regulatory tradition” but that the law was not “trapped in amber.” 602 U.S. 680, 691–92 (2024).

²¹⁷ See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 17–18, 70–71 (2022) (holding that the Second Amendment protects a right to carry a handgun in public for self-defense and adopting a text-and-history test for firearms regulations); *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010) (concluding the Second Amendment right is fully applicable to the States through the Fourteenth Amendment); *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (holding that the Second Amendment protects an individual right to keep a handgun in the home for self-defense).

²¹⁸ See 1 WILLIAM BLACKSTONE, COMMENTARIES *139 (discussing “the natural right of resistance and self-preservation”).

²¹⁹ See Jay Fitzgerald, *Dick’s Sporting Goods Followed Its Conscience on Guns—and It Paid Off*, HARV. BUS. SCH. WORKING KNOWLEDGE (Apr. 18, 2022), <https://www.library.hbs.edu/working-knowledge/dicks-sporting-goods-followed-its-conscience-on-guns-and-it-paid-off> [perma.cc/89UH-PJ27] (discussing Dick’s Sporting Goods’ and Walmart’s decisions, after the Parkland shooting, to go beyond federal law and stop selling firearms to buyers under twenty-one); Masconale & Sepe, *supra* note 4, at 270 (noting companies’ stated commitment, at the time, to “take a stand”).

had previously defeated an attempt by shareholders to put its policy on firearm sales up for a shareholder vote.²²⁰ But pressure from investors continued. Major investors divested from firearm related companies, and financial services firm BlackRock sought to accommodate institutional investors seeking to avoid shares of firearm manufacturers or retailers.²²¹ Although Walmart resisted, in part due to its long history of selling firearms, the company capitulated in the face of new pressure from competitors like Dick's, employees, and investors after mass shootings outside two Walmart stores killed twenty-four people in a five-day period.²²²

It would be a mistake to conclude that the forces of corporate governance could fully regulate firearms. As long as there is demand for the weapons and their sale is not prohibited, smaller or private retailers are likely to be willing to meet that demand. Conservative government officials have also successfully pressured financial firms to continue support for firearms companies.²²³ But corporate governance could reduce the availability of firearms and create a cultural understanding that they are a niche product that must be sought out deliberately by consumers who are interested in purchasing them.

IV. GOALS BEYOND THE REACH OF GOVERNMENT

This Part considers objectives that, by definition, could not be addressed by external government interventions. If individuals are entitled to some measure of participation in decisions that affect their lives, or to be considered as whole people, corporate governance must be tailored to satisfy those entitlements.

A. Democratic Participation

It is valuable to give people a say in decisions that affect their lives. One reason is purely instrumental: democratic participation in a process can yield better outcomes for people who are empowered to participate.²²⁴ But absent other problems, democratic participation in government or other external bodies can provide this instrumental benefit without requiring democratic participation

²²⁰ *Trinity Wall St. v. Wal-Mart Stores, Inc.*, 792 F.3d 323, 328–30 (3d Cir. 2015).

²²¹ See Clare Curran, Note, *Walmart and Guns: A Case Study in Modern Corporate Governance*, 2020 COLUM. BUS. L. REV. 1071, 1103.

²²² *Id.* at 1102–03.

²²³ Roe, *supra* note 4 (manuscript at 20).

²²⁴ CLARK, *supra* note 4, at 691 (“Another argument sometimes offered for interest-group variations of high idealism is that a large corporation always has a powerful impact on the lives of certain groups of people, such as employees, consumers, and neighbors. These groups, therefore, ought to have a direct voice in determining how the corporation runs, in order both to protect their interests and to develop participatory decision making as an end in itself.”); cf. AMARTYA SEN, DEVELOPMENT AS FREEDOM 16 (1999) (“[N]o famine has ever taken place in the history of the world in a functioning democracy . . .”).

in corporate governance. Workers can protect themselves by voting for public officials who will advance worker interests through regulation or by voting to be represented by union officials who will obtain concessions through contracts. At least in an ideal state, empowering workers to vote for corporate officials would not be necessary to obtain worker-friendly corporate conduct.

But democratic participation at the level of corporate decision-making can deliver two distinctive benefits. First, it can create civic externalities as individuals gain experience with democracy.²²⁵ Clarifying preferences, voicing opinions, organizing, making plans as a group, and finding compromise are skills that people develop only through experience. Americans have relatively few opportunities to develop these skills, and that fact can have negative consequences for the political process.²²⁶ Put differently, democracy in the workplace may provide necessary support for an effective democratic state.²²⁷

Second, democracy may be valuable in and of itself.²²⁸ It is good for people to feel empowered to affect decisions that have an impact on their lives, both because a sense of agency has psychological and physical benefits and because it

²²⁵ See HANSMANN, *supra* note 190, at 43 (“[P]articipation in collective decision making within the firm may be useful training for participation in the democratic political processes of the larger society, and might be valued for this reason not only by the individuals involved but also by the rest of society.”). The existence of externalities also suggests that private individuals left to their own devices will not bargain for the socially optimal level of democracy within corporations. The total social benefits from a scheme to enhance worker voice within a corporation may exceed the private benefits to workers. If management offers workers a wage increase to abandon the scheme, they may agree even if the social benefits are meaningful. The point suggests that a contractarian approach to corporate governance will not necessarily achieve socially optimal outcomes in this space. By contrast, other arguments for representation such as workers’ sense of satisfaction from their involvement in decision-making may be internalized by workers and appropriately handled through bargaining.

²²⁶ Partly for this reason, the United States approved of labor organizing and worker representation at corporations within Germany after World War II. Ewan McGaughey, *The Codetermination Bargains: The History of German Corporate and Labor Law*, 23 COLUM. J. EUR. L. 135, 164–65 (2016); cf. Daniel A. Crane, *Fascism and Monopoly*, 118 MICH. L. REV. 1315, 1360–61 (2020) (noting that extreme concentration of economic power in Germany in 1933 facilitated Nazis’ consolidation of political power). The reverse can also be true. Without experience in navigating a democratic process, workers are unlikely to effectively exercise any rights granted to them within corporate governance. See Leo E. Strine, Jr., Anel Kovvali & Oluwatomi O. Williams, *Lifting Labor’s Voice: A Principled Path Toward Greater Worker Voice and Power Within American Corporate Governance*, 106 MINN. L. REV. 1325, 1367–69 (2022) (“In the past when union prevalence was higher, union representatives were often presented as potential worker directors in a potential U.S. codetermination scheme. . . . The problem now, however, is that private sector union density is now below ten percent, making this solution impractical for most companies.”).

²²⁷ An alternative route to this conclusion focuses on instrumental impacts. If worker representation on corporate boards would prevent corporations from using their economic strength to undermine political institutions, corporate democracy would enhance political democracy. See Jens Dammann & Horst Eidenmüller, *Corporate Law and the Democratic State*, 2022 U. ILL. L. REV. 963, 966–70 (“[C]odetermination can serve as a mechanism to protect the democratic process by curbing excessive corporate power.”).

²²⁸ CLARK, *supra* note 4, at 691; SEN, *supra* note 224, at 16.

is morally desirable.²²⁹ This principle is central to the basic structure of our government. Officials who are selected through elections make policy decisions, and the general tendency of constitutional reform has been to make officials more accountable to citizens through elections: the Fifteenth, Nineteenth, and Twenty-Sixth Amendments expanded the franchise; the Seventeenth Amendment provided for direct election of senators; and in presidential elections most states now allocate their electoral votes to the plurality winner in the state. Even those who advocate for changes that would have the effect of disenfranchising some voters normally defend their positions as protecting the value of votes cast by legitimate voters—a nod to the basic consensus that democracy is a good thing.²³⁰

The principle has important implications for corporations.²³¹ In competitive markets, a corporation may have limited power over its workers or customers. Workers could easily shift to another job and consumers could easily shift to another supplier, leaving the company with little power to make decisions that are actually meaningful in the lives of workers or consumers. But in reality, many corporations do have the power to affect lives. Most workers cannot quit and find another job without cost, and many consumers lack meaningful alternatives in a broad range of important industries, including tech, utilities, health care, and pharmaceuticals. At a minimum, the difficulty of quitting or shifting suppliers is often comparable to the difficulty of leaving a state of residence, and few people would suggest that citizens' ability to leave a state renders state governments powerless and obviates the need to let citizens vote in state elections.

As a result, corporations exercise power. Democratic norms suggest that this power should be exercised in a manner that is responsive to the will of the workers and customers that are affected by corporate decisions.²³² This can only be done through corporate governance. Subjecting a corporation to external constraints—tougher contracts or stricter regulations—might achieve instrumental goals by causing better outcomes for workers or customers. But it would not achieve the moral goal of empowering workers or customers within the corpora-

²²⁹ HANSMANN, *supra* note 190, at 43.

²³⁰ See, e.g., *Safeguarding the Electoral Process*, HERITAGE FOUND., <https://www.heritage.org/election-integrity/heritage-explains/safeguarding-the-electoral-process> [perma.cc/PHL3-N5NJ] (suggesting that restrictions are needed because voter fraud means “everyone’s vote gets diluted”).

²³¹ For an extended argument applying principles on democratic participation to the corporate context, see HAYDEN & BODIE, *supra* note 2, at 161–71.

²³² *Id.* Adolf A. Berle, Jr., one of the leading corporate law theorists of the twentieth century, offered the related argument that corporations exercise quasigovernmental power and therefore should be subject to constitutional limitations like nondiscrimination. Adolf A. Berle, Jr., *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933, 942–51 (1952); see also Pollman, *supra* note 51, at 621–26 (examining Berle’s writings in the context of subsequent legal decisions).

tion. Corporate governance would have to achieve the goal by reshaping accountability so that officials answer to the affected groups. Even an ideal government would not be able to achieve the goal without corporate reform.

B. Dignitary Values

Various statutes and rules seek to provide workers with a basic minimum of respect and dignity within the workplace. Rules by the Occupational Safety and Health Administration provide workers some rights to access a sanitary bathroom.²³³ Rules that discourage employers from demanding excessive working hours create space for workers to have their own lives apart from work.²³⁴ More fundamentally, rules on racial or gender discrimination require employers to consider workers as more than members of a minority group when making decisions.²³⁵

But these are relatively thin protections that are framed negatively. Invidious discrimination is not easy to prove; absent intrusive monitoring of managers to detect their hidden motivations and preferences, it will not be possible to stamp out all instances where members of minority groups are treated differently on account of their minority status.²³⁶

More broadly, most people want and expect more than to simply avoid invidious discrimination or truly abusive working conditions. Immanuel Kant's second formulation of the categorical imperative suggests that people should not be treated as a means to some selfish end, but rather as ends unto themselves.²³⁷ Although they may not cite Kant, most people intuitively distinguish

²³³ See *Restrooms and Sanitation Requirements*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/restrooms-sanitation> [perma.cc/25LY-SZG5] (discussing 29 C.F.R. §§ 1910.141 (2026), 1926.51 (2026), and 1928.110 (2026)).

²³⁴ See LOUIS BRANDEIS, *True Americanism* ("Leisure . . . is an essential of successful democracy."), in BRANDEIS ON ZIONISM 3, 6–7 (1942); Aneil Kovvali & Jonathan S. Masur, *Labor, Leisure, and Law*, 103 N.C. L. REV. 1671, 1674–75 (2025) ("[W]orkers may lack incentives to choose the socially optimal amount of leisure because they do not internalize the full consequences of their choice. Non-work activities such as raising children, engaging in civic or social activities, and simply resting all have substantial positive externalities that a worker may not consider if they choose to pull more hours.").

²³⁵ See *Bostock v. Clayton County*, 590 U.S. 644, 658 (2020) (stating that Title VII "tells us three times—including immediately after the words 'discriminate against'—that our focus should be on individuals, not groups").

²³⁶ Even apart from questions of proof, the law has arguably failed to keep pace with ways that employers can impose costs and harms on account of protected classes. See, e.g., Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1762 (2003) ("[G]aps in both antidiscrimination law and current societal conceptions of racial discrimination allow employers to make race-based employment decisions."); Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE L.J. 891, 894 (2014) ("Sex discrimination law has not kept pace with the lived experience of sex discrimination.").

²³⁷ IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* 44 (Allen W. Wood ed., 2018) (1875).

between being used as a tool and being valued as a person. Treating a worker as a person requires a specific approach to their needs and interests.

The issue is presented most clearly in the context of “identity capitalism,” in which companies seek to extract value from the race, gender identity, or sexual orientation of workers or customers.²³⁸ There is a clear difference between respecting an individual for their unique qualities and seeking to exploit those qualities to avoid criticism or send a profitable marketing message. A corporation that is only motivated by shareholder profits can *only* exploit. It will accept diversity as a goal if and only to the extent that the external environment makes acceptance a profitable strategy.

In many instances this type of acceptance will be a profitable strategy, and firms focused exclusively on shareholder profits may well seek to present themselves—or even behave—as if they care about racial, sexual, or gender diversity.²³⁹ A company that is overtly hostile to diversity may be unable to tap valuable business opportunities such as recruiting relatively affluent and well-educated individuals as employees or customers, may run the risk of viral incidents that suddenly damage goodwill, and may draw undesirable levels of regulatory attention. But a corporation united only around profit maximization cannot *actually* care about diversity. To actually care, corporations must be reformed to consider objectives beyond profits.

CONCLUSION

A wide variety of commentators have invoked the idea that stakeholder governance is a response to government failure. The reality is more complicated. Many situations that seem to be government failures may in fact reflect the normal operation of democratic processes under conditions of disagreement and uncertainty. Identifying a genuine political breakdown that calls for a corporate response requires a nuanced analysis that identifies a plausible substantive or procedural problem.

Stakeholder governance would also play an important role even absent government failure. An ideal state would be unable to address certain problems through external statutes and regulations because they would require extensive surveillance, experimentation and improvisation with little notice, or violation of norms like free speech. The government also cannot achieve certain goals through external steps. An internal corporate governance reform is required to

²³⁸ See NANCY LEONG, *IDENTITY CAPITALISTS: THE POWERFUL INSIDERS WHO EXPLOIT DIVERSITY TO MAINTAIN INEQUALITY* 3 (2021) (discussing identity capitalism in both social and economic contexts, and how institutions may also benefit from the practice); Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2153–54 (2013) (discussing race-specific identity capitalism).

²³⁹ See *supra* Part III.C.2. For accounts suggesting that diversity may be a valid strategy for maximizing value or avoiding financial risks, see, for example, Brummer & Strine, *supra* note 121, at 26–41; Gadinis & Miazad, *supra* note 121, at 1426–30, 1440–44.

empower employees at their workplaces or cause companies to respect workers as human beings. These realities show the need for care when invoking the government failure justification for stakeholder governance and suggest the existence of a more complex role for corporations within our political system.