CITIZEN CORP. – CORPORATE ACTIVISM AND DEMOCRACY

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ABSTRACT

Corporations are increasingly taking stands on a wide range of social issues: gun control, gender and race, immigration, abortion. Scholars have praised this development as the rise of responsible capitalism. Popularized accounts have attacked the "woke corporation" as ideological, elitist, and fraudulent. Both views examine the new "corporate activism" as a corporate governance matter. This Article, instead, focuses on the "activism" part. It argues that corporations' new political engagement on divisive aims of society has turned them into "supercitizens" (given their size and complexity) and attempts to understand what the normative implications are.

We first show that corporations can *be (super)citizens while remaining "good corporations," i.e., value-maximizing entities. Due to the asset price effects arising from the "moral portfolio" choices of today's largest investors, activism makes corporations more appealing to investors and hence more, not less, competitive. But "good corporations"* cannot *also be "good citizens." Because of the exclusionary nature of activism—one cannot stand on both sides of a highly-charged social issue—and current equity reconcentration patterns, value-maximizing corporations have incentives to choose activist initiatives that exclusively cater to the majoritarian* investor *demand. This "corporate conformity" violates essential principles to which good citizens are held. It undermines the political freedom of stakeholder minorities (especially among employees)*

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and jeopardizes political equality in the public adjudication of divisive issues.

We conclude by discussing potential remedies, but we warn that whether we want good corporations or good supercitizens might have become the new divisive—and quite intractable—issue of the day.

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INTRODUCTION

Corporations have changed. On this much, everybody agrees. Forget Milton Friedman's mantra that the only "[s]ocial [r]esponsibility [o]f [b]usiness [i]s to [i]ncrease [i]ts [p]rofits."[1] Now, corporations are set to change the world, one pressing social issue at the time. From gun control to gender equality, immigration to criminal justice reform, abortion to free speech—the scope of the new "corporate activism" keeps growing.[2] Meanwhile, socially responsible investing has reached a staggering $40 trillion[3] worldwide and this figure is only projected to rise.[4]

So activism is the new hot corporate topic. But what is it?

On the one hand, academic studies have largely framed corporate activism as a new expansionary phase of classic corporate social responsibility (CSR);[5] the response to growing stakeholder demand for a broader social role of the corporation.[6] It is the rise of a new sustainable corporate model, capitalism that has finally turned responsible, they say.[7] On the other hand, a growing chorus of skeptics is labeling what they disparagingly call the "woke corporation" a "scam"—a mix of CEO opportunism, left-wing elitism, and radical ideology.[8] Most importantly, these critics say, the "woke corporation" betrays the purpose for which

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

2. *See infra* Section I.A.2.

3. Anne-Laure Foubert, *ESG Data Integration by Asset Managers: Targeting Alpha, Fiduciary Duty & Portfolio Risk Analysis*, OPIMAS (June 17, 2020), http://www.opimas.com/research/570/detail/ [https://perma.cc/4ZK7-82XL].

4. *See* Alastair Marsh, *Almost 60% of Mutual Fund Assets Will Be ESG by 2025, PwC Says* (Oct. 19, 2020, 3:00 AM) https://www.bloomberg.com/news/articles/2020-10-19/almost-60-of-mutual-fund-assets-will-be-esg-by-2025-pwc-says [https://perma.cc/4HJC-54SD] (reporting that ESG-mandated assets are projected to soon take up half of all managed assets in the U.S.).

5. Today, the focus has shifted to "ESG" (environmental, social and governance) criteria in the conduct of business. For an analysis of the subtle differences between CSR and ESG, see Elizabeth Pollman, *Corporate Social Responsibility, ESG, and Compliance, in* CAMBRIDGE HANDBOOK OF COMPLIANCE 662 (D. Daniel Sokol & Benjamin van Rooij eds., 2021).

6. *See infra* Section I.B.1.

7. *See, e.g.*, Colin Mayer, Amelia Miazad & Rupert Younger, *Building on Common Ground to Advance Sustainable Capitalism*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 19, 2021), https://corpgov.law.harvard.edu/2021/08/19/building-on-common-ground-to-advance-sustainable-capitalism/ [https://perma.cc/J3WM-Z2D7] ("There is a growing consensus in the global business and investment community that sustainable and inclusive capitalism is vital to society, the environment, and the economy."); Martin Lipton, *Stakeholder Capitalism and ESG as Tools for Sustainable Long-Term Value Creation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jun. 11, 2022), https://corpgov.law.harvard.edu/2022/06/11/stakeholder-capitalism-and-esg-as-tools-for-sustainable-long-term-value-creation/ [https://perma.cc/33V4-3BJS] ("We believe stakeholder capitalism and ESG are fundamentally frameworks to enhance the sustainable long-term value of a corporation."); Leo E. Strine, Jr., *Toward Fair and Sustainable Capitalism*, (Univ. of Pa. Inst. For Law & Econ., Research Paper No. 19-39, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3461924 [https://perma.cc/J9PW-UNW8].

8. *See infra* Section I.C.

corporations were originally established: to increase the overall wealth by successfully providing goods and services.[9] Still, both accounts examine activism exclusively through the lens of corporate governance analysis; activism is another dimension of what corporations should—or not—do *qua business organizations*.

This Article takes a different tack, defending a shift in focus from the "corporate" part to the "activist" part of corporate activism. Corporations now take stands on, and contribute to, overall and *divisive* aims of society. Corporate governance analysis is too narrow to capture the implications of this novel corporate "performativity."[10] Activist corporations do what citizens do—they engage with society's focal points of moral and political disagreement.[11] This suggests that we should start studying corporations (also) *qua citizens*—in fact, *supercitizens*, given their size and complexity—and import elements of democratic theory in the debate around corporate activism.[12] Doing so exposes the concern of woke accounts as misplaced: the issue with the activist corporation is not whether it can continue to be a good corporation, which maximizes economic value. We demonstrate that activism is economically efficient. But our study also warns against excessively optimistic conclusions, showing that efficient activism might be incompatible with what we expect from good citizens in a well-functioning democracy and while corrections might be available, they do not come cheap. Thus, we might have to accept that we can have either good corporations or good supercitizens, but not both.

As a positive matter, our theoretical apparatus shares the prevailing academic view that activism responds to a novel moral demand coming

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9. *See infra* note 108.

10. Performativity is the repetitive enactment of activities and capabilities that have subject formation force. *See* sources cited *infra* notes 116–122.

11. *See* THOMAS CHRISTIANO, THE RULE OF THE MANY: FUNDAMENTAL ISSUES IN DEMOCRATIC THEORY 169 (1996) (arguing that "the role of the citizen is to choose the basic overall aims of the society"); *see also* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1366–67 (2006) (arguing that modern liberal democracies are characterized by widespread general disagreement on "'watershed' issues of rights," that is, "major issues of political philosophy with significant ramifications for the lives of many people"). *See also infra* Sections I.B.2 & II.A.

12. In the context of the CSR debate (and the broader debate around corporate purpose), the concept of good corporate citizenship is not new. *See, e.g.*, KENT GREENFIELD, CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT) (2018) (arguing that corporations should be treated more like citizens). For a critique of this use of corporate citizenship, see Amy J. Sepinwall, Citizens United *and the Ineluctable Question of Corporate Citizenship*, 44 CONN. L. REV. 575, 582–83 (2012). Academic and "woke accounts" of activism also occasionally resort to the concept of corporate citizenship. But all of these studies use the concept merely rhetorically, as a device to encourage an emotional response that can make their normative conclusions more compelling. This Article's theory of corporate citizenship moves from the rhetorical to the political. We argue that activist initiatives can be understood as giving corporations "political citizenship" in the proper sense; hence, the need to expand the analysis to democratic theory.

from the marketplace.[13] Today's corporations increasingly produce what we call "moral goods."[14] But in combining the study of the corporation *qua* business organization with that of the corporation *qua* citizen, we depart from a fundamental assumption shared by academic studies of corporate activism: that the activist corporation delivers universal benefits, benefits that are recognized, understood, and valued by *all citizens/stakeholders*.[15] This assumption might be valid for classic CSR initiatives: being employee-friendly, reducing pollution, supporting philanthropic causes, etc.—all initiatives that can be conceptualized as providing *means* to implement societal choices supported by broad consensus in the liberal state.[16] But the activist corporation is concerned with the choice of a society's *divisive ends*—on which individuals can legitimately be expected to disagree[17]—not the means to implement shared ends.

This novel taxonomy of corporate social engagement[18] is crucial to the study of activism, along both the political and economic dimension. As a matter of political theory, first, it grounds the claim that activism has formative force. In a performative conception of citizenship,[19] what matters is what citizens "do," not what they "are." Hence, the contribution to divisive overall ends re-inscribes the corporation as a subject engaged in the "doing" of citizenship. More precisely, activism has transformed the

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13. *See infra* sources at note 77.

14. *See infra* Section I.B.2.

15. *See infra* text accompanying notes 84–86.

16. Put differently, under classic CSR accounts, corporations would operate in substitution for *government*, contributing *means* to implement aims that are supported by broad consensus, i.e., public goods. *See infra* text accompanying notes 87–88. For a recent take on this view of CSR, see Dorothy S. Lund, *Asset Managers as Regulators*, 171 U. PA. L. REV. (forthcoming 2022) (manuscript at 1) (suggesting that asset managers have now "stepped in to serve as regulators of last resort, adopting rules that bind corporate America on issues of great social importance.") The new activist corporation, instead, is increasingly concerned with the choice of a society's divisive ends, which is the role of citizens. *See infra* text accompanying notes 90–91, 94–96.

17. The line between "old" CSR engagement and "new" activist engagement might be blurred at times, as citizens may also disagree on the means of implementation of shared ends. However, unlike legitimate disagreement about a society's ends, disagreement about the means of implementation of shared ends often arises only because of budget constraints. Under a budget constraint, contributing means to one end may detract from the ability to contribute means to another end. Thus, the potential problem with environmentally friendly policies is that a focus on the environment may reduce the means available to pursue other ends. Without a budget constraint, green policies would not be especially contentious. On the contrary, promoting a gun control policy is likely to encounter disagreement independently from budget considerations. *See also infra* note 100. In fact, when one considers that one's moral demand is subject to trade-offs (given that individuals do have budget constraints), any moral issue may potentially turn into a divisive one in practice. *See infra* note 176.

18. In this Article, we use the term "corporate social engagement" to refer jointly to any kind of social engagement by corporations, whether divisive or not.

19. This conception of citizenship draws on the philosophical discourse around personhood. *See* CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN AND STATUS OF CORPORATE AGENTS 171 (2011) (explaining that, under the performative conception, "the mark of personhood is the ability to play a certain role, to perform in a certain way").

corporation into a "supercitizen," and not just because the corporation has "numbers" that gives it an unmatched capacity for "substantial aggregation of wealth."[20] The corporate citizen is "super" because it is a citizen that is formed by an *ordered* collection of stakeholder-citizens. Unlike citizens at large, who stand as equals in their interactions, an order exists among stakeholder-citizens. This order is a reflection of both the corporation's hierarchical structure and the role played by economic power in organizing internal corporate relationships.

Second, under the above taxonomy, the normative analysis of corporate activism cannot abstract away from the question of whether activist corporations are also "good citizens" that abide by the principles of political freedom and political equality.[21] Freedom and equality are the principles that govern the "doing" of citizenship; hence, one cannot be a good citizen if she violates the rules and norms that entail these principles, because one would be infringing upon the freedom and equality of other citizens.[22]

The question of good corporate citizenship connects the political and economic parts of our analysis. For the first-order issue in unpacking the complexity of that question is understanding how corporations choose their citizenship performatives: how they decide *which* divisive moral goods to produce. This inquiry takes us back to the study of the corporation *qua* business organization,[23] exposing three economic factors that have been so far overlooked in the study of the economics of corporate activism. First, divisive moral goods are *exclusionary*. A corporation cannot produce at once moral good x (catering to, say, an individual with progressive preferences, e.g., a policy in favor of gun control) and what we term the "contrarian" moral good y (catering to, say, an individual with conservative preferences, e.g., a policy against gun control), because this would destroy the corporation's ability to satisfy the moral demand of either individual and hence destroy the value to the corporation of either good.[24]

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20. Justice Stevens famously advanced this remark in his dissenting opinion in *Citizens United*. *See* Citizens United v. FEC, 558 U.S. 310, 437 (2010) (Stevens, J., concurring in part and dissenting in part). *Citizens United* invalidated section §203 of the Bi-Partisan Campaign Reform Act of 2002, which bars corporations and unions from spending money from their general treasuries on "electioneering communication[s]." 2 U.S.C. § 441(b) (2006); *Citizens United*, 58 U.S. at 366–72.

21. *See infra* Section II.B.1.

22. Of course, we recognize that different conceptions of the common good might entail different concepts of good citizenship. But this does *not* affect the merit of our normative analysis. If activism has graduated corporations as citizens, the normative question needs to be whether they can be good citizens, regardless of which concept of good citizenship one embraces.

23. The choice of moral goods is in the first place a production decision; moral goods are goods that embody a corporate stance about overall, and divisive, aims of society, but still goods that corporations produce.

24. This production constraint is magnified under moral goods' companion feature of complementarity, as these goods tend to be consumed together. Hence, the choice of moral good x

Second, because of this exclusionary feature, corporations can only capture the *majoritarian*, rather than the universal, economic demand for moral goods. This, on the one hand, explains corporations' partisan engagement as economically rational, rather than the product of CEO opportunism, as argued by woke accounts. On the other hand, it suggests that under the asset price effects of investors' *moral portfolio choices*,[25] investors' moral preferences have a disproportionate impact in the production calculus of moral goods (i.e., relative to the demand coming from other constituencies).[26] By moral portfolio choices we refer to the evidence that the assets of activist corporations are coming to have increasing weight in investors' diversified portfolios.[27] Similar to what happens in a financial bubble, this increased demand for "activist assets" triggers positive asset price effects, translating into a higher share price of activist corporations and hence driving corporations' activist decisions.

But there is more. When one takes into account the increasing equity reconcentration patterns of the U.S. capital market, it is the big index funds that hold the lion's share of moral portfolios. Therefore, and third, it is these funds' economic interest that is pivotal in determining positive asset price effects for activist corporations. Behind that economic interest, there are agents—a "board-sized group," as put by Harvard Law Professor John Coates in a prescient 2018 article on the effects of increasing indexation.[28] But then conforming to the moral preferences of this small group of agents, at the expense of any contrarian preference, is what "good activist corporations" *need* to do in competitive markets. This might explain the *corporate conformity* equilibrium we currently observe, under which corporations tend to offer only progressive moral goods.

Under this conclusion, understanding whether the activist corporation could ever be a good citizen means understanding whether corporate conformity is compatible with the core principles of freedom and equality.

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catering to an individual with a progressive moral identity will likely exclude not just the contrarian good *y*, but any moral goods catering to a contrarian conservative moral identity. *See infra* Section III.B.1.

25. Our characterization of moral portfolios draws on Christian Gollier & Sébastien Pouget, *The "Washing Machine": Investment Strategies and Corporate Behavior with Socially Responsible Investors* (Toulouse Sch. of Econ., Working Paper No. TSE-457, 2014), https://www.tse-fr.eu/sites/default/files/medias/doc/wp/fit/wp_tse_457.pdf, [https://perma.cc/YL8Q-YP55] (developing a model showing that investors can decrease the equilibrium cost of capital of responsible firms by altering their portfolio allocation towards the assets of these firms).

26. This conclusion does not exclude that consumer demand may also matter, but it cuts against the egalitarian assumptions underpinning demand studies of activism, which assume that the moral demands of each constituency group have equal weight. *See infra* note 183 and accompanying text.

27. *See infra* text accompanying notes 187-189.

28. *See* John C. Coates, *The Future of Corporate Governance Part I: The Problem of Twelve* 2 n.4 (Harv. Pub. L. Working Paper No. 19-07, 2019), https://ssrn.com/abstract=3247337 [https://perma.cc/2A2H-3SWA].

Given the existential complexity of the corporation, this analysis needs to be carried out both externally, in the relationship between the corporation-entity and citizens at large, and internally, within the corporation's ordered collection of citizens.

Concerning the activist corporation's "freedom test," we exclude that it may have external relevance; corporations may now have the resources of the largest western states,[29] but they do not have means of political coercion and policing. Internally, however, corporate conformity does create a risk of "defenseless susceptibility to interference"[30] for stakeholder minorities who hold contrarian views. This risk is likely to be especially prominent for employees and other stakeholders who are economically dependent on the corporation. Indeed, these minorities may lack viable exit options under the conformity equilibrium of current corporate activism.[31] We also emphasize that the problem here is not actual interference—the notable cases in which employees holding contrarian views have been fired or ostracized[32]—but the form of self-censorship that the possibility of interference may induce. Self-censorship of this type is enough to violate one's political freedom, inasmuch as it prevents individuals from exercising liberties (e.g., speech) that they would otherwise exercise.

Concerning the "equality test," the analysis is more complex. Per se, equality only matters in the external dimension—the corporation *qua* business organization is not held to consider the interests of all stakeholders equally. Only shareholders have a right to vote. And despite the shareholder democracy appellative, shareholder voting is plutocratic: it is based on the one share, one vote (OSOV) principle rather than the democratic one person, one vote (OPOV) principle. The idea of an efficient division of labor

29. *See infra* note 135.

30. Philip Pettit, *Freedom as Antipower*, 106 ETHICS 576, 576 (1996) [hereinafter Pettit, *Antipower*]. The mere possibility of interference is what matters in the modern conception of freedom as negative freedom à la Berlin and Pettit. *See* ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 122 (1969); PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 577 (1997).

31. One could argue that private companies could provide a viable exit for these employees. Indeed, some among the largest and most successful private companies, like Chick-fil-A or Hobby Lobby, are notoriously engaged in the defense of conservative or even ultra-conservative values. In practice, however, it is unclear whether private companies might provide an effective corrective to corporate conformity when one considers that public corporations are now large economies and the net worth of even the largest private companies is smaller by the trillion. For a full discussion of these arguments, *see infra* notes 260–263 and accompanying text. Further, unlike private companies, public companies like Facebook or Twitter also provide the platform where the political debate takes place these days and retain exclusive control over the platform's engagement rules. This adds to the power of public companies vis-à-vis private ones and, most importantly, raises additional risk for the democratic process. We discuss the role of Big Tech in corporate activism in Saura Masconale & Simone M. Sepe, *Big Tech and Political Equality*, in TECHNOLOGY ETHICS (Gregory Robson & Jonathan Tsou eds., forthcoming 2022) (on file with authors).

32. *See infra* note 225.

justifies this difference. 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, because we can safely assume a commitment to a common end: the maximization of economic value.[33] With the rise of the activist corporation, this division of labor has been lost, but the plutocratic mechanism of corporate governance has stayed to adjudicate non-economic issues. The activist corporation thus fails the equality test vis-à-vis citizens at large because, in its current form, the corporation's internal adjudication process of divisive moral goods is inherently incompatible with the principle of equality.

A failed equality test may lead to two tangible losses. The first is what we call the "Stevens effect," borrowing from the concern first expressed by Justice Stevens in *Citizens United v. FEC*: the risk that ordinary citizens "may lose faith in their capacity, as citizens, to influence public policy."[34] We emphasize, however, that this effect is not per se produced by corporate participation in the public discourse around divisive moral goods, as suggested by Stevens, but by corporate conformity. With a pluralistic morality market, that some corporations may serve as a megaphone for some stakeholders would have only limited impact on equal political activity, because one could assume that other corporations could serve as a megaphone for other stakeholders. With corporate conformity, instead, the largest investors have exclusive access to the corporate megaphone. The second potential loss is what we call the "bargaining effect," arising from the corporation's ability to threaten economic retaliation against non-conformist political outcomes—a stance recently taken by activist corporations in relation to state laws introduced in North Carolina, Georgia, Florida, and various Southern states.[35]

We do not know the magnitude of these potential democratic losses.[36] But we think that the problem should not be framed in quantitative terms.

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33. *See infra* note 229.

34. Citizens United v. FEC, 558 U.S. 310, 470 (2010) (Stevens, J., concurring in part and dissenting in part).

35. *See infra* notes 53, 58–60, and accompanying text. Similar to the freedom test, for both effects, the problem is not limited to just visible violations of equality but is more subtle. Unequal political activity may change citizens' beliefs, something that might be difficult to detect, as only voting outcomes are observable. Further, the anticipation of the bargaining effect might have a similar ex-ante impact on legislators' choices, which might also be difficult to observe. *See infra* Section IV.B.3.

36. Although Dorothy Lund embraces the classic assumption that CSR engagement is a substitute for government intervention (i.e., regulation) (*see* Lund, *supra* note 16), she shares concerns similar to ours about the democratic implications of the new corporate social engagement and the role played by large fund families. *See id.* (manuscript at 7) (observing that index fund managers "lack

We want to pay attention to corporate activism because it can raise doubts about the legitimacy of the democratic adjudication of divisive moral issues and hence the integrity of democratic institutions. In the short term, this is likely to drive the country to be even more polarized. In the longer term, the effects are unpredictable.

As to possible remedies, we see little room for self-corrections—whether coming from investors themselves or broader market dynamics that take into account the role of private corporations.[37] We also discount the viability of mandatory interventions, whether designed to restore a system of moral neutrality of the corporation or, more limitedly, to restrict or modify the power of index funds.[38] A more promising avenue is trying to import remedial democratic features in the adjudication process of corporations' activist initiatives.[39] It is unclear, however, whether these proposals can succeed at making the activist corporation a better citizen without undermining its ability to remain a good corporation. The alternative, of course, is redefining what we expect from good corporations—a debate that exceeds the scope of this Article. We suspect, however, that whether we want good corporations or good supercitizens might well have become another divisive—and quite pressing—social issue.

The rest of this Article proceeds as follows. Part I examines the rise of the activist corporation, offers a critical assessment of the opposite views taken on it by scholarly studies and so-called woke accounts and explains why a thorough analysis of activism requires that we start studying corporations both *qua* business organizations and *qua* citizens. Part II introduces the Article's political analysis, developing a theory of corporate citizenship grounded in elements of democratic theory and the analytical apparatus of performativity. Part III develops the Article's economic analysis. It shows that once the divisive nature of moral goods is incorporated into their production calculus, the equilibrium of the morality market is one of corporate conformity, under which corporations only cater to the moral preferences of the largest investors. Part IV brings together the Article's political and economic analyses, showing that good corporations cannot also be good citizens, as the activist corporation fails both the

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democratic accountability" and "there is little oversight or transparency surrounding their policies and how they are formulated"). To this extent, our study and Lund's can be considered largely complementary: she focuses on the production and implication of less divisive moral goods and we focus on divisive ones. Further, Lund's study only considers the explicit accountability mechanisms through which index funds can compel management compliance with the funds' activist requests. *See id.* (manuscript at 2). In this study, instead, we primarily focus on the asset price dynamics behind the funds' "demand" for activism. *See infra* Section III.B.3.

37. *See infra* Section V.A.

38. *See infra* Section V.B.

39. *See infra* Section V.C.

freedom test and the equality test under corporate conformity. Part V examines possible corrections, with the primary intent of exposing the very high costs involved in any attempt to make corporations better citizens.

I. THE ACTIVIST CORPORATION

A. The Rise of Corporate Activism

This Part provides anecdotal evidence about the new activist corporation and offers a critical assessment of existing accounts of activism. In spite of stark differences, these accounts share a common corporate governance approach to activism. Occasionally they resort to the rhetorical idea of corporate citizenship to make their conclusions more compelling. But conceptually the debate around activism is as a variation of the long-standing CSR debate and, more broadly, the debate on corporate purpose.[40]

We view this as a reductive approach, which cannot take into full account the transformation brought about by corporate activism. The activist corporation engages in the choice of overall and divisive societal aims—the key role ascribed to citizens in liberal democracies. As we will discuss next in Part II, this change calls for a move from a rhetorical to a proper use of the concept of corporate citizenship, one grounded in elements of political and democratic theory.

1. Classic CSR-ESG

After years at the fringes of the corporate governance discourse,[41] CSR has now gone mainstream. Fortune Global 500 firms currently spend around twenty billion dollars a year on CSR initiatives.[42] Meanwhile, two-thirds of global consumers declare they are willing to spend more for products and services that are sustainable.[43] The changes that have occurred in socially

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40. CSR discussions have loomed in the background of the corporate governance discourse since the Berle-Dodd debate on the purpose of the corporation in the 1930s. *See* William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and* The Modern Corporation, 34 J. CORP. L. 99, 122–35 (2008) (offering an exhaustive discussion of the Berle-Dodd debate throughout the years).

41. *See, e.g.*, Aaron Chatterji & Siona Listokin, *Corporate Social Irresponsibility*, DEMOCRACY J., Winter 2007, at 52, 53 (suggesting that "after years of relative futility," it was time to recognize the failure of the CSR movement).

42. *See* Stephan Meier & Lea Cassar, *Stop Talking About How CSR Helps Your Bottom Line*, HARV. BUS. REV. (Jan. 31, 2018), https://hbr.org/2018/01/stop-talking-about-how-csr-helps-your-bottom-line [https://perma.cc/MX8C-XNV3].

43. *See* NIELSEN RSCH., THE SUSTAINABILITY IMPERATIVE; NEW INSIGHTS ON CONSUMER EXPECTATIONS 8 (2015), https://www.nielsen.com/wp-content/uploads/sites/3/2019/04/Global20Sustainability20Report October202015.pdf [https://perma.cc/KSG7-U2GM]. The number goes up further if one focuses on Millennials, the age group which places the highest premium on social issues. *See id.* at 9.

responsible investments are even more striking. These changes have been so transformational to prompt a "rebranding" of CSR. Today, the focus has shifted to "ESG" (environmental, social and governance) criteria *in the conduct of business*, rather than in the context of charitable activities.[44] Top index funds like BlackRock, State Street, and Vanguard—"the Big Three," which together own the largest stakes in 40% of all U.S. listed companies[45]—stand among the champions of the ESG revolution.[46] Other key players have taken due notice. In the summer of 2019, reversing course from its long-held support for shareholder primacy, the Business Roundtable pledged its commitment to "a modern standard for corporate responsibility"[47] and to manage corporations "for the benefit of all stakeholders."[48]

Yet, it is a different kind of social engagement that is mostly making headlines these days. CSR/ESG engagement—being employee-friendly, reducing pollution, being mindful of local communities, fighting poverty, supporting the arts, universities, and other philanthropic causes[49]—has grown in scale and importance. But the real, transformative change has been the rise of *corporate activism*: the growing engagement by corporations in contentious political and moral matters like gun control, gender and race equality, immigration, abortion, reproductive rights, and free speech.[50] Long gone are the days when most public companies did everything they could to try to stay morally and politically neutral, at least in the eyes of the

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44. *See* Pollman, *supra* note 5.

45. *See* Jan Fichtner, Eelke M. Heemskerk & Javier Garcia-Bernardo, *Hidden Power of the Big Three? Passive Index Funds, Reconcentration of Corporate Ownership, and New Financial Risk*, 19 BUS. & POL. 298, 313 (2017).

46. *See* Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1405–06 (2020). ESG-mandated assets now represent 33 percent of the $51.4 trillion U.S. assets under professional management. *See* FORUM FOR SUSTAINABLE & RESPONSIBLE INV., 2020 REPORT ON US SUSTAINABLE AND IMPACT INVESTING TRENDS (2020), https://www.ussif.org/files/Trends%20Report%202020%20Executive%20Summary.pdf [https://perma.cc/F753-Q439].

47. *See 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 [https://perma.cc/UKC7-QVEC]. The Business Roundtable is a non-profit association bringing together the CEOs of major U.S. companies.

48. *Id.*

49. *See, e.g.*, Roland Bénabou & Jean Tirole, *Individual and Corporate Social Responsibility*, 77 ECONOMICA 1, 2 (2010) (providing a non-exhaustive list of classic CSR initiatives).

50. *See, e.g.*, GLOB. STRATEGY GRP., BUSINESS AND POLITICS: DO THEY MIX? 2 (2016), https://globalstrategygroup.com/business-politics-mix-gsgs-fourth-annualstudy/ [https://perma.cc/22R6-EYT8] (reporting increasing corporate engagement in issues such as immigration, minimum wage, same-sex marriage, the environment, and race relations). *See also* sources cited *infra* at notes 54–55 and 58 (on engagement by corporations on gun control and abortion/reproductive right issues).

public.[51] Corporations now seek to change the world—often aggressively so and while being pressured to do so by their stakeholders, including shareholders.

2. *Divisive Activism*

a. *Corporate-Side*

The new corporate activism is mostly reactive, even though at times it is proactive.[52] In its reactive form, activism tends to address issues of social or moral responsibility as a response to a catalytic event, often a crisis or, anyway, an event drawing significant national attention.

One of the first examples of reactive activism was the 2015 opposition to the contentious North Carolina "bathroom law," which prompted many U.S. corporations to engage in boycotting and other forms of economic retaliation against the state and in defense of transgender rights.[53]

The 2018 shooting at Marjory Stoneman Douglas High School in Parkland, Florida was another catalyst event. In its aftermath, some among the largest gun retailers in the country—including Dick's Sporting Goods and Walmart—declared that they would stop selling guns to anyone under twenty-one.[54] In announcing their decisions, these companies unanimously "emphasiz[ed] the pressure . . . to take a stand" on gun control issues and put stronger restrictions in place than required under federal laws.[55]

In the wake of George Floyd's tragic killing, there was an outpouring of support for the Black Lives Matter movement from America's largest corporations. Amazon, Apple, Facebook, Google, Microsoft, Coca-Cola,[56] and many other Fortune 1000 companies pledged to commit billions of

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51. This is not to say that corporations avoided politics altogether -corporations have always hired lobbyists and made political contributions—but this involvement occurred behind the scenes and was "calculatedly bipartisan." *See* Jason Zengerle, *Can the Black Rifle Coffee Company Become the Starbucks of the Right?*, N.Y. TIMES MAG. (July 14, 2021), https://www.nytimes.com/2021/07/14/magazine/black-rifle-coffee-company.html [https://perma.cc/GC5Z-NSCP]. *See also* infra text accompanying notes 92–93 (discussing the difference between current corporate activism and prior forms of "political engagement" by corporations).

52. Dante Disparte & Tim Gentry, *Corporate Activism is on the Rise*, INT'L POL'Y DIG. (Jul. 6, 2015), https://intpolicydigest.org/corporate-activism-is-on-the-rise/ [https://perma.cc/YZ58-JLWD].

53. *See* Zengerle, *supra* note 51.

54. Joseph Pisani, *US Companies Take a Stand, Raise Age to Purchase Guns*, AP NEWS (Mar. 1, 2018), https://apnews.com/article/north-america-us-news-ap-top-news-ar-state-wire-shootings-a70d3d6e213d4b3a8af92ffd1849b725 [https://perma.cc/YG62-F2QT].

55. *Id.*

56. For an example, Coca-Cola famously introduced a corporate program to teach employees "to be less white." *See* Evita Duffy, *Whistleblower: Coca-Cola Uses Antiracist Training that Tells Employees 'Try to Be Less White,'* FEDERALIST (Feb. 20, 2021), thefederalist.com/2021/02/20/whistleblower-coca-cola-uses-antiracist-training-that-tells-employees-try-to-be-less-white/ [https://perma.cc/H8DP-MK6L].

dollars into programs designed to address systemic racism and promote criminal justice reform in America.[57]

More recently, 187 major U.S. corporations have teamed up against new abortion restrictions introduced in several Southern states.[58] Many large corporations have also stood up against Georgia's SB2 voting law, which introduced a number of controversial changes in electoral rules and voter identification requirements.[59] And Disney, Florida's largest employer, made headlines in March 2022 for slamming the state's new Parental Rights in Education bill, which prohibits Florida educators from teaching about sexual orientation or gender identity before fourth grade.[60]

In its proactive form, corporate activism tends to *initiate* groundbreaking changes. For example, Target's move to gender-neutral store signage back in 2015 was a "huge deal,"[61] which prompted new nation-wide awareness

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57. *See* Tracy Jan, Jena McGregor, and Meghan Hoyer, *Corporate America's 50 Billion Promise*, WASH. POST (Aug, 24, 2021), https://www.washingtonpost.com/business/interactive/2021/george-floyd-corporate-america-racial-justice/ [https://perma.cc/F7NW-WQUR]. *See also* Richard Feloni & Yusuf George, *These Are the Corporate Responses to the George Floyd Protests that Stand Out*, JUST CAPITAL (June 30, 2020), https://justcapital.com/news/notable-corporate-responses-to-the-george-floyd-protests [https://perma.cc/8VR2-PFMF]. In addition to donating money to organizations supporting justice and equity following the rise of the Black Lives Matter movement, companies like Amazon and Microsoft also engaged in openly more divisive initiatives such as declaring that they would stop sharing software/data with the police. *See* Feloni & George, *supra*.

58. *See* Sinéad Baker, *187 Companies, Including Bloomberg, Tinder, and Ben & Jerry's, Teamed Up to Slam Abortion Restrictions Sweeping Southern States*, BUS. INSIDER (June 11, 2019, 5:10 AM), https://www.businessinsider.com/187-companies-criticize-state-abortion-limits-new-york-times-ad-2019-6?r=US&IR=T [https://perma.cc/UHV6-76H6]; Jess McHugh, *More Companies Are Openly Supporting Abortion Rights. That May Be Controversial, but It's Also Good Business*, FORTUNE (Nov. 8, 2019, 7:58 AM), https://fortune.com/2019/11/08/companies-that-openly-support-abortion-access/ [https://perma.cc/G8J2-CSDB]. Following the leak of Justice Alito's draft opinion in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), a number of corporations also announced that they would revise their health policies in response to the then potential overturn of *Roe v. Wade*, 410 U.S. 113 (1973). *See* Cheryl Winkour Munk, *On Roe v. Wade, Big Companies Already Have a Precedent for Effective Action*, CNBC (May 22, 2022, 10:45 AM), https://www.cnbc.com/2022/05/08/on-roe-v-wade-big-companies-already-have-a-precedent-for-action.html [https://perma.cc/DXJ9-6WFH].

59. Georgia's largest public companies, including Coca-Cola and Delta Air Lines, issued strongly worded rebukes of the legislation and threatened economic retaliation against the state. *See, e.g.*, Chip Cutter, Suzanne Vranica & Alison Sider, *With Georgia Voting Law, the Business of Business Becomes Politics*, WALL ST. J. (Apr. 21, 2021, 12:00 AM), https://www.wsj.com/articles/with-georgia-voting-law-the-business-of-business-becomes-politics-11618027250 [https://perma.cc/5W4H-47FB].

60. *See* Giulia Heyward, *What We Know About the DeSantis-Disney Rift*, N.Y. TIMES (Apr. 24, 2022), https://www.nytimes.com/article/disney-florida-desantis.html [https://perma.cc/2DPX-SX7F] (explaining that in response Florida lawmakers "revoked a 55-year-old arrangement that gave Disney a special tax status and allowed it to essentially self-govern its 25,000-acre Disney World complex"); Dana Goldstein, *Opponents Call It the 'Don't Say Gay' Bill. Here's What It Says.*, N.Y. TIMES (Mar. 18, 2022), https://www.nytimes.com/2022/03/18/us/dont-say-gay-bill-florida.html?action=click&module=RelatedLinks&pgtype=Article [https://perma.cc/CQ88-2ATT].

61. *Target Moves Toward Gender-Neutral Store Signage*, ABC NEWS (Aug. 10, 2015, 8:40 AM), https://abcnews.go.com/Lifestyle/target-moves-gender-neutral-store-signage/story?id=32982682 [https://perma.cc/W2Y5-LMM7] (quoting Rachel Simmons, the founder of Girls Leadership).

about gender issues.[62] So was Wells Fargo's decision to run a national ad that included a same-sex couple—the first U.S. bank to do so—and to embrace a larger commitment to the LGBTQ community at large.[63] More recently, Amazon has pledged to no longer test some of its workers for the use of marijuana and to adjust its productivity measures accordingly.[64]

Whether activism takes a reactive or proactive form, the anecdotal evidence suggests that corporations are often motivated to engage in it by the demand of their own investors. We turn to that evidence next.

b. Investor-Side

Investors have become increasingly willing to demand engagement on salient social issues. Index funds, in particular, have grown vocal—at times, even confrontational—in their approach to activist initiatives.[65] The Fearless Girl campaign by State Street, for example, epitomizes the lengths to which index funds are now willing to go in defense of board gender diversity.[66] Among Blackrock's top ESG priorities last year were gender and race issues both at the board and employee levels.[67] Several asset management companies also committed to push companies to do more on racial injustices in conjunction with the rise of the Black Lives Matter movement.[68] And Engine No. 1, a relatively small hedge fund founded in 2020, made headlines for winning three board seats at oil giant Exxon Mobil, while openly advertising its investment strategy as being focused on

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62. *See What's in Store: Moving Away from Gender-Based Signs*, TARGET: A BULLSEYE VIEW (Aug. 7, 2015), https://corporate.target.com/article/2015/08/gender-based-signs-corporate [https://perma.cc/WNR6-NNXF].

63. *See* Jacob Passy, *Wells Fargo: Ad with Gay Couple Reflects 'Demography Reality,'* AM. BANKER (June 23, 2015, 3:27 PM), https://www.americanbanker.com/news/wells-fargo-ad-with-gay-couple-reflects-demographic-reality [https://perma.cc/6V43-5NXW].

64. *See* Annie Palmer, *Amazon Backs Federal Bill to Legalize Marijuana and Adjusts its Drug Testing Policy for Some Workers*, CNBC (June 1, 2021, 7:34 PM), https://www.cnbc.com/2021/06/01/amazon-backs-federal-bill-to-legalize-marijuana-.html [https://perma.cc/EZ68-8AB3].

65. *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, 1256–68 (2020); *see also* Lund, *supra* note 16 (manuscript at 18–30) (providing an overview of recent index funds' efforts to induce corporations to improve board gender diversity and reduce climate risk).

66. On March 7, 2017 (the day before International Women's Day), State Street placed a commissioned statue of a defiant young girl opposite the Charging Bull statue on Bowling Green in the Manhattan Financial District and "announced that it would vote against directors of firms with no female directors." Barzuza et al., *supra* note 65, at 1250.

67. *Corporate Governance 2020 Event: Keynote Interview with Ray Cameron, Head of Investment Stewardship, Blackrock, Inc.*, DEAL, https://www.thedeal.com/solutions/corporate-governance-2020-event-video-library/ [https://perma.cc/6Y77-VQYX] (last visited Sept. 7, 2022).

68. *See* Patrick Temple-West, *Black Lives Matter Provokes Change on Wall Street*, FIN. TIMES (Oct. 11, 2020), https://www.ft.com/content/8813b73d-c39d-41c9-b1a8-ba2d2e2374da [https://perma.cc/C6DE-HUC4].

bringing an activist approach to sustainable investing.[69] It is thus unsurprising that in 2022, elite corporate law firm Wachtell, Lipton, Rosen & Katz declared that investments focusing on "climate change, biodiversity, human capital management, diversity and inclusion" will increasingly influence deal-making in the future.[70]

This brief overview of recent activist initiatives suggests that the scope of corporate activism is much broader than that of classic CSR (or ESG) engagement. In a sense, whatever pressing issue concerns society now also concerns corporations. At the same time, everything a corporation does these days might also turn out to have moral or political implications. However, as we shall see next, neither academic studies nor popularized accounts fully grasp the implications of this transformative change; instead, they both view activism as just another governance matter.

B. Scholarly Theories

Corporate scholars have mostly framed corporate activism as a new, extended dimension of the CSR-ESG debate. However, both the literature's "model" of CSR-ESG and the prevailing normative view have changed in recent times.

1. CSR-ESG Studies

Earlier studies revolved around a "discretionary model" of CSR. These studies shared a view of CSR as the reflection of a discretionary management choice about which set of preferences—*economic* or *moral*[71]—should prevail in the corporate domain, although with opposite assessments of the optimal model. CSR critics endorsed a view of the corporation as an organization belonging to the market and hence falling

69. *See* Evie Liu, *This New ETF Brings ESG Activism to Index Investors*, BARRON'S (July 16, 2021, 5:00 AM), https://www.barrons.com/articles/transform-500-etf-vote-51626398666 [https://perma.cc/PVT9-HCZ8].

70. Andrew R. Brownstein & Carmen X.W. Lu, *ESG and M&A in 2022: From Risk Mitigation to Value Creation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 24, 2022), https://corpgov.law.harvard.edu/2022/01/24/esg-and-ma-in-2022-from-risk-mitigation-to-value-creation/ [https://perma.cc/K6YM-7655].

71. The tension behind that managerial choice can be traced all the way back to what has become known as the "Adam Smith problem," i.e., the apparent inconsistency between Smith's works on moral theory and economic theory and, more broadly, the problem of the relationship between *homo moralis*, who privileges sympathy (today, we would say "empathy"), and *homo economicus*, who focuses on self-interest. On "das Adam Smith problem," see James R. Otteson, *The Recurring "Adam Smith Problem,"* 17 HIST. PHIL. Q. 51 (2000); for a law and economics perspective, see Paul G. Mahoney, *Adam Smith, Prophet of Law and Economics*, 46 J. LEGAL STUD. 207, 221 (2017).

within the domain of *homo economicus*.[72] This is why, as famously put by Milton Friedman, the exclusive "[s]ocial [r]esponsibility [o]f [b]usiness [i]s to [i]ncrease [i]ts [p]rofits."[73] CSR supporters, instead, moved from unspoken assumptions about the primacy of *homo moralis* over *homo economicus*.[74] Because of this primacy, they argued, corporations should take on broader social obligations, even at the expense of profit maximization and shareholder value.[75]

For a long time, under this dichotomic view of individual preferences and the prevailing shareholder primacy orientation of corporate law, critics of CSR have had the upper hand.[76] Things have changed. More recent studies explain the unrelenting expansion of corporate social engagement as a transition to a new model of CSR-ESG which responds to a "moral demand" coming from corporate stakeholders: consumers, workers, and with increasing frequency, also shareholders.[77] That is, these studies share a novel optimism about corporations' ability to satisfy both our economic and moral preferences and celebrate the rise of a sustainable corporate model catering to a new actor, the "*moralized homo economicus*."[78]

Driven by this optimism, the view that CSR qualifies the modern engaged corporation as a "good citizen" has gained increasing traction.[79] Scholars still debate whether being a good corporate citizen is compatible with economic efficiency and shareholder primacy. But they now

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72. *See, e.g.*, Ronen Shamir, *Corporate Social Responsibility: Towards a New Market-Embedded Morality?* 9 THEOR. INQ. L. 371, 375 (2008) ("The invention of the economy [by Adam Smith] as a distinct sphere of human action, therefore, also proclaimed the autonomy of market relations from moral sentiments . . . .").

73. *See* Friedman, *supra* note 1.

74. *Cf.* Mahoney, *supra* note 71, at 222 (suggesting that in Smith's own view "the law[] of justice" limited the pursuit of self-interest).

75. Professor Einer Elhauge is perhaps the most famous advocate of this view. *See* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005).

76. *See e.g.*, Gadinis & Miazad, *supra* note 46, at 1405 ("Friedman's argument was especially influential in part because it assumed a legal mantle . . . . For the last half century, interpreting shareholder primacy as a requirement to maximize profits has remained the reigning credo of the corporate world.").

77. *See, e.g.*, Timothy Besley & Maitreesh Ghatak, *Retailing Public Goods: The Economics of Corporate Social Responsibility*, 91 J. PUB. ECON. 1645 (2007) (offering a formal economic analysis of the morality market); M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 571 COLUM. L. REV. 571, 575 (2009) (examining the economics of the market for corporate philanthropy); Lund, *supra* note 16, (manuscript at 12–18) (focusing on the new demand of asset managers and their largest beneficiary investors for corporate social engagement).

78. Economically, the idea of *moralized homo economicus* implies the existence of market actors with a preference for the consumption of moral actions. While CSR-ESG studies do not go into any technical detail, this idea necessarily assumes an integrability result where the fact that an individual's moral demand shares the properties of demands generated under the *homo economicus*'s utility function implies that the former demand is generated by the same function. *See generally* ANDREU MAS-COLELL, MICHAEL D. WHINSTON & JERRY R. GREEN, MICROECONOMIC THEORY 326–27 (1995) (offering a technical discussion of the integrability problem).

79. *See* Sepinwall, *supra* note 12, at 582–83.

increasingly answer that question positively, arguing that CSR-ESG initiatives (i) help to secure the goodwill of consumers, suppliers, employees and even regulators,[80] (ii) are a means toward long-term returns (even though they have short-term costs),[81] or (iii) operate as an effective risk-management tool.[82] Alternatively, scholars now argue that the incompatibility between CSR-ESG and the shareholder primacy rule calls for the replacement of that rule with a broader shareholder *welfare* paradigm—as shareholders themselves would have an interest in CSR-ESG.[83]

We also understand corporate activism as responding to a novel moral demand of the marketplace. Our analysis, however, departs from a fundamental assumption shared by both earlier and more recent studies of CSR (and ESG): the assumption that activist initiatives deliver benefits that are universally recognized, understood, and valued *by all citizens/stakeholders*.

2. *Missing Taxonomy*

Today's corporations no longer produce just physical commodities or issue commercial or financial claims. As we shall discuss in greater details in Part III, they also produce what we call "moral goods," which give stakeholders a claim to the corporation's engagement in moral actions that the stakeholders care about (and are willing to pay for). This conceptual apparatus is consistent with the recent scholarly shift to a demand model of CSR-ESG. But we challenge the literature's assumption that any form of corporate social engagement delivers universal benefits to all citizens/stakeholders.

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80. *See, e.g.*, Michael E. Porter & Mark R. Kramer, *The Competitive Advantage of Corporate Philanthropy*, HARV. BUS. REV., Dec. 2002, at 58; Michael E. Porter, George Serafeim & Mark Kramer, Opinion, *Where ESG Fails*, INST. INV. (Oct. 16, 2019), https://www.institutionalinvestor.com/article/b1hm5ghqtxj9s7/Where-ESG-Fails [https://perma.cc/734T-ZYPJ].

81. *See, e.g.*, Bénabou & Tirole, *supra* note 49, at 9.

82. *See, e.g.*, Gadinis & Miazad, *supra* note 46, at 1411, 1426–39 (arguing that "ESG remedies gaps in boards' understanding of social risk by turning directly to potentially impacted third parties in order to source information about the consequences of company practices"); Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1, 6 (2020) (arguing that increased institutional investors' activism in social issues, such as climate change, is rationally motivated by investors' interest to internalize the negative externalities that may affect their diversified portfolios).

83. The argument here is that shareholders are ultimately ordinary people, who also care about ethical and social concerns and strive to internalize the negative externalities with which they are concerned (for example, they may buy electric cars to reduce pollution). Hence, it is reasonable to assume that they want the companies they invest in to do the same, even if this might require giving up some expected returns. *See* Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L., FIN. & ACCT. 247, 248 (2017).

Friedman-esque critiques simply assume that it is not up to the corporation to deliver these broad benefits to citizens, but rather to the government.[84] Earlier progressive approaches assume, instead, that *precisely* because CSR benefits are universal, the corporation has a duty to deliver them and thereby increase social welfare.[85] Similarly, the now prevailing view in the literature that rising corporate social engagement is a desirable development is grounded on the assumption that it delivers universal benefits.[86]

Economically, this assumption reflects an understanding of moral goods as public goods,[87] and positions the role of corporations as being closer to governments than citizens[88] (in spite of the literature's recent use of the citizenship rhetoric).

Now, this understanding of moral goods might be valid for classic CSR initiatives.[89] But current corporate activism, as we saw, is different: it focuses on highly divisive matters. These matters coincide with what legal theorist Jeremy Waldron calls "'*watershed' issues of rights*":[90] "major issues of political philosophy with significant ramifications for the lives of many people. . . . They define major choices . . . that are focal points of moral and political disagreement in many societies."[91] Corporate activism is also distinctively different from prior experiences of occasional corporate political engagement, and not just because that engagement took place

84. *See* Friedman, *supra* note 1.

85. *See, e.g.*, Keith Davis, *Can Business Afford to Ignore Social Responsibilities?*, 2 CAL. MAN. REV. 70, 70 (1960) (arguing that corporate social responsibility entails "a broad obligation to the community with regard to economic developments affecting the public welfare"); Dorothy S. Lund, *Corporate Finance for Social Good*, 121 COLUM. L. REV. 1617, 1618–19 (2021) (arguing that CSR is "in the service of social welfare" and advances the "interest of society").

86. *See, e.g.*, Henderson & Malani, *supra* note 77, at 574 (suggesting that all stakeholders receive a utility from the production of moral goods). At most, demand-driven approaches concede that some individuals might be indifferent toward the moral or social utility produced by CSR-ESG. *See* Besley & Ghatak, *supra* note 77, at 1646.

87. As we shall see in Part III, this conception of moral goods leads to identifying free riding as the main friction that hampers corporate social engagement. Free riding would prevent corporations from fully internalizing the moral demand of stakeholders, providing the ultimate reason for why the shareholder primacy rule would need to be replaced by a new shareholder *welfare* rule. *See supra* note 83 and accompanying text. However, to the extent that moral goods are more similar to private than public goods, as we argue, there is no reason for why corporations would not be able to fully internalize stakeholder moral demand. *See infra* notes 178–179 and accompanying text.

88. Some scholars explicitly acknowledge this parallelism, suggesting that rising CSR-ESG would be a response to "government failures" in the production of public goods—failures arising due to the "combination of inefficiency, high transaction costs, poor information and high delivery costs." *See, e.g.*, Bénabou & Tirole, *supra* note 49, at 2–3; Henderson & Malani, *supra* note 77, at 575. For a pioneering discussion, see generally Steven Shavell, *Law Versus Morality as Regulatory of Conduct*, 4 AM. L. & ECON. REV. 227 (2002).

89. *See supra* text accompanying note 49 (providing a non-exhaustive list of CSR intiatives).

90. *See* Waldron, *supra* note 11, at 1367 (emphasis added).

91. *Id.*

behind the scenes and was calculatedly bipartisan.[92] When acting "politically," corporations used to closely conform to the operating logic of interest groups (consider unions or women's organizations for other examples).[93] Under this logic, corporations tended to limit their actions to matters strictly connected to sectarian interests such as corporate taxes or regulation.

The new activist corporation has more ambitious goals: it is increasingly concerned with choices regarding *the overall aims of society*;[94] choices that "entail[] a standpoint on the whole of the society"[95] and "on which it is not reasonable to expect that there would be consensus."[96] Neither government nor interest groups are invested in contributing to these choices. Interest groups have narrower preoccupations. And the government's role is not devising collective ends; it is to provide the *means* by which to bring them about.[97] Choosing a society's ends is the role of citizens. It is also the role that the activist corporation is increasingly taking upon itself.

To sum up, under the CSR tradition of public good production, corporations operate in substitution for *government*, contributing *means* to implement society's aims. Given democratically-gathered majoritarian consensus on certain aims—controlling pollution, the importance of local communities, fighting poverty, etc.—CSR initiatives provide means of implementation, which either add to the government's provisions or fill a governmental void. To this extent, CSR initiatives can be seen as *non-divisive*, as these initiatives tend to focus on implementing end-choices on which societal consensus has already been gathered.[98] Under corporate activism, instead, corporations engage in fundamental first-order choices about aims, like *citizens*. Thus, most activist initiatives are *inherently*

92. *See* Zengerle, *supra* note 51.

93. CHRISTIANO, *supra* note 11, at 247 (explaining that interest groups are charged with the role of articulating "the interests of group of citizens as well as [their] distinctive points of view").

94. *Id.* at 165–201.

95. *Id.* at 169.

96. Waldron, *supra* note 11, at 1368.

97. CHRISTIANO, *supra* note 11, at 171.

98. *Cf.* Henderson & Malani, *supra* note 77, at 594 (assuming that the production of moral goods is supported by broad societal consensus).

divisive because in modern democracies it is to be expected that citizens might legitimately disagree [99] on critical choices of civic association. [100]

In moving forward with this Article's discussion, we will return several times to the implications, and complexities, that arise from this taxonomy of corporate social engagement. In Part II, we will examine how the activist corporation's new focus on "end choices" gives rise to a new a political subject: the corporate "supercitizen." In Part III, we will investigate the overlooked economic implications of the divisive nature of activism. In Part IV, we will bring these analyses together by attempting to understand whether activist corporations, which produce divisive moral goods in competitive markets, can be good citizens. Before moving to these discussions, however, we will first briefly review the radically different stance taken on corporate activism by non-academic accounts.

C. "Woke Accounts"

Most often, non-academic accounts prefer the term "woke capitalism" to describe the corporation's new social engagement. This use of the term was coined by Ross Douthat in a 2018 New York Times article [101] which

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99. To use Rawls' words, disagreement is reasonable—and hence legitimate—if it does *not* arise from "differences [that] are rooted solely in ignorance and perversity, or else in the rivalries for power, status, or economic gain." JOHN RAWLS, POLITICAL LIBERALISM 54–58 (1993). Instead, "many of our most important judgments are made under conditions where it is not to be expected that conscientious persons with full powers of reason, even after free discussion, will all arrive at the same conclusion." *Id.* at 58.

100. There are, however, activist issues—consider racial and gender equality—on which no legitimate disagreement on the ends is in question. Indeed, challenging these ends would violate the assumption that members of a democratic society have a strong commitment to individual and minority rights, which is the very foundation of the idea of legitimate disagreement. *Cf.* Waldron, *supra* note 11, at 1364. But racial and gender equality epitomize complex cases in which disagreement about the means of implementation may interfere with other legitimately contentious ends. For example, when one of corporations' activist initiatives to accomplish racial equality is defunding the police, this may interfere with other ends (e.g., the level of national security) on which there might be legitimate disagreement. The question then is whether the means of classic CSR engagement might bring about a similar interference, as this would weaken the distinction between classic CSR and modern activism. We do not think so, although the class of divisive issues can expand when one considers budget constraints and the tradeoff that arises thereof. Under a budget constraint, contributing means to one end may detract from the ability to contribute means to another end. *See supra* note 17. Still, there remains a substantial difference between these *potentially* divisive forms of social engagement and *inherently* divisive activism. As we saw, without a budget constraint, green policies, for example, would not be especially contentious. On the contrary, pursuing gender equality through gender quotas, to make another complicated example about means of implementation that risk interfering with a society's ends, may hamper meritocratic values independently from budget considerations.

101. Ross Douthat, *The Rise of Woke Capital*, N.Y. TIMES (Feb. 28, 2018), https://www.nytimes.com/2018/02/28/opinion/corporate-america-activism.html [https://perma.cc/ZXS6-SHHP]. The term "woke" is borrowed from the phrase "stay woke," which was historically used in black communities to highlight that being "alert to deceptions of other people was a basic survival tactic" for African-Americans. *See* Aja Romano, *A History of "Wokeness"*, VOX (Oct. 9,

introduced many of the arguments that have later come to characterize so-called woke accounts of the corporation. In brief, these studies view activism as the combined product of CEO opportunism, left-wing elitism, and radical ideology.[102]

As put by Douthat, the interest of corporations for social issues would be a means offered by cynic CEOs to "the activist left pre-emptively" in order to deflect the risk of anti-corporate politics such as increases in corporate taxes or new antitrust regulation.[103] In a more recent book,[104] Vivek Ramaswamy builds on similar arguments to conclude that the woke corporation is a "scam."[105] And this scam would not just rob the American public of its money but also of its voice and identity.[106] For Ramaswamy, woke capitalism invades the sphere of life properly reserved for the democratic process, enabling "big business [and] corrupt politicians" to collude and "implement radical agendas that they could never pass in Congress."[107] Most importantly, woke capitalism would betray the purpose for which corporations were originally established: to increase the overall wealth by successfully providing goods and services.[108]

2020, 10:00 AM), https://www.vox.com/culture/21437879/stay-woke-wokeness-history-origin-evolution-controversy [https://perma.cc/9TJS-ZFQB].

102. *See, e.g.*, Elizabeth Bruenig, Opinion, *The Rise of 'Woke Capital' is Nothing to Celebrate*, N.Y. TIMES (Apr. 28, 2021), https://www.nytimes.com/2021/04/28/opinion/liberals-corporations-woke-capitalism.html [https://perma.cc/RRD5-DS3F]; Frank Furedi, *The Tyranny of Woke Capitalism*, SPIKED (June 25, 2021), https://www.spiked-online.com/2021/06/25/the-tyranny-of-woke-capitalism/ [https://perma.cc/9BKK-J4MU]; Daniel Henninger, *When CEOs Zoom for Democrats*, WALL. ST. J. (Apr. 14, 2021, 5:48 PM), https://www.wsj.com/articles/when-ceos-zoom-for-democrats-11618436906 [https://perma.cc/FZ8R-W6P3]; J.D. Vance, Co-Founder & Partner of Narya, Fighting Woke Capital, Keynote Speech Before the "What to Do About Woke Capital?" Conference Sponsored by the Claremont Institute's Center for the American Way of Life (May 18, 2021), *posted at* THE AM. MIND (June 6, 2021) https://americanmind.org/salvo/fighting-woke-capital/ [https://perma.cc/6FRP-2DQW].

103. *See* Douthat, *supra* note 101 ("[A] certain kind of virtue-signaling on progressive social causes, a certain degree of performative wokeness, is offered to liberalism and the activist left pre-emptively, in the hopes that having corporate America take their side in the culture wars will blunt efforts to tax or regulate our new monopolies too heavily.").

104. *See* VIVEK RAMASWAMY, WOKE INC.: INSIDE CORPORATE AMERICA'S SOCIAL JUSTICE SCAM (2021). For other recent instant books about corporate activism, see STEPHEN R. SOUKUP, THE DICTATORSHIP OF WOKE CAPITAL: HOW POLITICAL CORRECTNESS CAPTURED BIG BUSINESS (2021) (similarly describing corporate activism as a threat to the free enterprise system and American democracy); CARL RHODES, WOKE CAPITALISM: HOW CORPORATE MORALITY IS SABOTAGING DEMOCRACY (2021) (framing corporate activism as a tool in the hands of opportunistic, ideologue CEOs and as both economically and politically detrimental to the public).

105. RAMASWAMY, *supra* note 104, at 3.

106. *Id.* at 2.

107. *Id.* at 7.

108. *Id.* at 21. For Ramaswamy, "[d]emocracy loses twice: . . . . Stakeholder capitalism poisons democracy, partisan politics poisons capitalism, and in the end we are left with neither capitalism nor democracy." *Id.* at 21. Similar to Douthat, Ramaswamy sees "wokenomics" as a new form of managerial opportunism or crony capitalism, under which CEOs abuse their corporate power to advance their own interests at the expense of the shareholders' interests. *Id.* at 20–21.

Unlike academic studies, woke accounts do point out that activism tends to be divisive—in fact, they say, it has a virtually exclusive progressive connotation.[109] But while these accounts provide rich anecdotal evidence, they lack a rigorous analysis of explanatory factors.[110] For example, they treat "wokeness" as a new form of private benefits extraction by ultra-liberal CEOs. But they fail to explain how this conclusion can be reconciled with the prominent governance role gained by index funds under current equity reconcentration patterns.[111] These accounts also never get to the question of why profit-seeking CEOs would not diversify their activist offer as CEOs do with other goods corporations produce. Still, concerning the democratic implications of corporate activism, they fail to explain why corporations' systematic endorsement of progressive values would be a sign of democratic dysfunction while the same conclusion does not hold for other collective organizations or a winning majority in a parliamentary system. And how exactly would the woke corporation endanger democracy? Woke accounts refrain from going into the details of the alleged interference mechanism.

In part, the failure to answer these and other questions is due to the fact that popularized accounts are expected to be evocative (or provocative) rather than analytical. In part, these accounts seem to share a common pessimism about the "value" of activism—if not to lean ideologically to condemn it just because of its progressive colors. Combined, these factors lead to the aprioristic (even though, again, just rhetorical) conclusion that the activist corporation is a "bad citizen."

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Academic studies and popularized accounts draw opposite conclusions on the normative desirability of activism—on whether, rhetorically, the activist corporation is a "good" or "bad" citizen. But they both treat activism as a governance matter: another dimension of what corporations should (or should not) do *qua* business organizations.

Neither account considers the possibility that activism might stretch the contours of the corporation as we have come to know it. Corporations used to just provide "ordinary" goods and services. When engaging socially or politically, they would either focus on narrow corporate interests or broad social interests supported by large consensus. The activist corporation,

109. *See id.* at 4 ("Wokeness has remade American capitalism in its own image. Talk of being 'woke' has morphed into a kind of catchall term for progressive identity politics today.").

110. *See* Brian Knight, *The Dangers of Woke Capitalism*, DISCOURSE (Dec. 14, 2021), https://www.discoursemagazine.com/politics/2021/12/14/the-dangers-of-woke-capitalism/ [https://perma.cc/8E3F-ZN4S] (reviewing Ramaswamy's book).

111. *See infra* Section III.C (analyzing the role of index funds in corporate activism).

instead, engages with choices that concerns society as a whole and on which reasonable people might legitimately disagree—doing what citizens do. Corporate governance analysis is too narrow to fully capture the implications of this novel "performativity" of the corporation, from both a positive and normative perspective. This is why we should start taking the idea of corporate citizenship seriously—to study corporations (also) *qua* citizens. We turn to this task in the following Part.

II. ACTIVISM AND SUPERCITIZENS

This Part focuses on the political fact of corporate citizenship, making two claims. First, as a positive matter, activism has transformed corporations into "supercitizens." Second, if the substance of corporations' actions now gives them political citizenship, we can evaluate the normative implications of those actions only against the benchmark of good citizenship, as defined in democratic theory.

We should also be clear about what we mean when we talk of "political citizenship": we refer to a treatment of citizenship that focuses on the participatory and deliberative functions that characterize citizens' role in liberal democracies. The democratic ideal is premised on safeguarding a process of social decision-making that includes citizens.[112] This is because the modern realization of that ideal acknowledges the existence of fundamental conflicts of interests and convictions in society.[113] Restated, because of the possibility of disagreement over the terms of civic association, no democratic conception of citizenship can abstract away from providing[114] for participative and deliberative attributes.[115] As we shall see,

112. *See* JASON BRENNAN, THE ETHICS OF VOTING 51 (2011) ("In a liberal society, nearly all citizens participate in the process of social construction, of creating and maintaining a society together . . . .").

113. *See supra* Section I.B.2.

114. This does not mean that those attributes *require* their *exercise* for an individual to be categorized as a (good) citizen. *See* BRENNAN, *supra* note 112, at 43–68 (defending an "extrapolitical conception of civic virtue[s]"). It means, however, two things. First, that no conception of citizenship is possible that *excludes* those attributes. Second, it means that when citizens decide to exercise those attributes, they are held to the democratic rules that govern such exercise. *See infra* Section II.B (discussing why being a good citizen requires adhering to the principle of political freedom and political equality).

115. To this extent our treatment of citizenship is compatible with either liberal or republican models. The liberal model views citizenship as a status that allows individuals "to act according to the law and hav[e] the right to claim the law's protection." *See* Dominique Leydet, *Citizenship*, *in* STAN. ENCYC. OF PHIL. (Edward N. Zalta ed. 2017), https://plato.stanford.edu/archives/fall2017/entries/citizenship [https://perma.cc/WKM7-G26U]. The republican model, instead, focuses on citizens as active participants in the governance of society and the formulation of its laws. *See id.* The contemporary understanding of these models, however, highlights how they provide complementary, rather than opposite, explanations of citizenship in liberal

those attributes have now been appropriated, at least in part, by the corporate supercitizen.

A. The Corporation qua *Supercitizen*

1. Performativity and Citizenship

In elaborating a theory of the corporation *qua citizen*—in fact, as we shall explain below, *qua supercitizen*—we draw on a performative approach, which grounds citizenship not in what a citizen "is" but in what it "does."

In political philosophy,[116] performativity is the theoretical apparatus that grounds the attribution of legal personhood to a *persona ficta*.[117] Only under a performative approach, an entity—including the corporation—can be a legal person with enforceable rights and duties, without also being a natural person (i.e., an individual human being). In particular, modern performativity theories[118] focus on utterance—speech—as the central element of the subject formation process brought about by performance.[119] In other words, speech has formative force.

Perhaps the most fecund application of this notion of performativity is due to philosopher Judith Butler, in the context of gender identity studies.[120] According to Butler, the performances one reiterates in the course of their life that conform to a gender norm has the discursive function of re-

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democracies, because the lack of consensus turns political liberty into a necessary guarantee for individual liberty. *See id.* (quoting Michael Walzer, *Citizenship*, *in* POLITICAL INNOVATION AND CONCEPTUAL CHANGE 211–20 (Terence Ball, James Farr & Russell L. Hanson eds., 1989)).

116. LIST & PETTIT, *supra* note 19, at 171. The other conception of personhood is the "intrinsicist" conception, under which "there is something about the 'stuff' that persons are made off [sic] that distinguishes them from non-persons: something that makes persons stand out." *Id.*

117. *Id.*

118. Performativity was first introduced "in legal thought . . . especially in the reworking of Roman law during the Middle Ages." *Id.* (citing PATRICK W. DUFF, PERSONALITY IN ROMAN PRIVATE LAW (1938)). However, it was fully developed as a general theory only with the work of Thomas Hobbes, who was the first to argue that what makes an agent a person "does not depend on the stuff out of which one is made but only on one's performance, specifically one's performance in the space of social norms." *Id.* at 172.

119. The development of modern performativity—or speech act theory—is due to John Austin, who was the first to defend the view that "performative utterance" is a speech act that does more than just generating true of false sentences; instead, it creates events or relations in the world. *See* J. L. AUSTIN, HOW TO DO THINGS WITH WORDS 1–11 (1962).

120. *See* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990) [hereinafter BUTLER, GENDER TROUBLE] (defending the view that political and social discursive forces construct and normalize legal and political practice); JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF SEX (1993) [hereinafter BUTLER, BODIES THAT MATTER] (moving beyond performativity as an extension of discourse theory and suggesting that bodies "speak" without necessarily uttering).

inscribing gender performatives in social and legal practices.[121] Thus, they say, "gender is always a *doing*."[122]

By extension, we argue that to be a citizen is to have the capacity to participate in social decision-making. This capacity has two components. The first concerns the *contribution* that citizens are expected to make to the social decision-making process.[123] As discussed above, citizens' contribution is to choose the overall aims of society.[124] The second component concerns the *modes* through which citizens are expected to make their contribution. What is the participatory and deliberative "doing" that is formative of citizenship?

Drawing on modern performativity, we respond that it is the utterance of participation—the discursive contribution to the adjudication process of the overall aims of society—that matters, rather than having access to status-based modes of participation. In the same way as Butler argues that biological sex is not defining of one's gender, but rather their gender performatives are, we similarly argue that it is not the right to vote (or even less, exercising that right)[125] that defines a citizen's capacity to contribute to the overall aims of society. Instead, it is the citizen's reiterated participatory performance, which primarily occurs as an utterance of the citizen's interests in, and views about, those aims.[126] The reiteration of "forms" or "scripts" of speech[127] around the overall aims of society are the *doing* of citizenship.

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121. *See* BUTLER, GENDER TROUBLE, *supra* note 120, at 2 (focusing on how a "woman" comes to be a subject and how subject status allows one to stand before the law).

122. *Id.* at 34 (emphasis added).

123. Given the immanent complexity of the modern society, different people and/or entities (i.e., citizens, legislators, interest-groups) are expected to perform different tasks in the process of creating and maintaining society together. CHRISTIANO, *supra* note 11, at 123.

124. *See supra* notes 94–95 and accompanying text.

125. *But see* Sepinwall, *supra* note 12, at 595–96 (defining citizenship as being essentially premised on the right to vote). Sepinwall, however, seems to conflate the ability to vote with the ability to participate to the social construction. It is one thing to say that lacking the ability to vote may diminish one's participative capacity. It is another to say that, even when one has that capacity, they are not citizens if they do not have access to voting. Sepinwall seems aware of the contradiction when she says that "it seems likely that exclusion from only some of the institutions of citizenship is insufficient to disqualify one for normative citizenship." *Id.* at 604 (with reference to the exclusion of children or incapacitated adults from Sepinwall's definition of citizenship).

126. Under this conception of citizenship, foreigners are not citizens in virtue of the fact that they are interested in the aims of another *society*, and not because of a "plain social fact." *See* Sepinwall, *supra* note 12, at 605. That some countries allow non-citizen residents to vote in local and even national elections supports this conclusion. It does so by formalizing a performative conception of citizenship into an attribute of citizen status via a "stakeholder principle" (or *jus nexi*), under which citizen status arises from having "a real and effective link" to the political community or a "permanent interest in membership." AYELET SHACHAR, THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY 165 (2009); *see also* Rainer Bauböck, *Stakeholder Citizenship: An Idea Whose Time Has Come?*, *in* DELIVERING CITIZENSHIP: THE TRANSATLANTIC COUNCIL ON MIGRATION 35 (2008).

127. Like Butler, we intend speech broadly, as any performative expression. *See* BUTLER, BODIES THAT MATTER, *supra* note 120.

2. *Formative Activism*

We can now return to the subject-formation of the corporation *qua citizen* that is caused by corporate activism. The language of set theory helps us in this exercise. In set theory, one of the methods of specifying a set is by identifying a predicate that the members need to satisfy.[128] We can thus say that under a performative conception of citizenship the set of citizens includes all those who contribute to the choice of the overall aims of society through discursive participation.

Do corporations satisfy this predicate? As we saw in Part I, they do, by increasingly undertaking activist initiatives that are precisely preoccupied with a society's end choices. A decade ago, whether justly or unjustly,[129] the Supreme Court's decision in *Citizens United*[130] vested corporations with the same right to speak as ordinary citizens. Now, corporations are increasingly exercising that right.[131] And they are doing this not just to advance narrow corporate interests,[132] but to engage in the public discussion around fundamental, and highly divisive, issues. Hence, corporate activism has promoted the corporation to the status of a citizen—*civis ficto*, but nonetheless a *civis*.[133]

Corporations, however, are not citizens like others—they are *supercitizens*. As observed by Justice Stevens in in *Citizens United*, corporations' size and resources, perpetual life, and special advantages, give them an unmatched capacity for "substantial aggregations of wealth."[134] In the past decade, that capacity has exponentially grown. Public corporations

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128. *See* Barbara H. Partee, Alice ter Meulen & Robert E. Wall, MATHEMATICAL METHODS IN LINGUISTICS, STUDIES IN LINGUISTICS AND PHILOSOPHY 7–8 (1993). This way of defining sets is premised on the axiom of Abstraction (or Unrestricted Comprehension). *Id.* While this axiom can bring antinomies, this leaves our conclusion unaltered.

129. For a recent critique, see generally Jonathan Macey & Leo E. Strine, Jr., Citizens United *as Bad Corporate Law*, 2019 WIS. L. REV. 451.

130. *See* Citizens United v. FEC, 558 U.S. 310, 342 (2010).

131. Ramaswamy, *supra* note 104 at 20 (speaking colorfully of current activist initiatives as "*Citizens United* on steroids").

132. *See* Leo E. Strine Jr. & Nicholas Walter, *Conservative Collision Course: The Tension Between Conservative Corporate Law Theory and* Citizens United, 100 CORNELL L. REV. 335, 335–36 (2015) (predicting that *Citizens United* would lead to engagement in political spending "solely to elect or defeat candidates who favor industry-friendly regulatory policies, even though human investors have far broader concerns, including a desire to be protected from externalities generated by corporate profit seeking").

133. Like the *persona ficta*, the *civis ficto* shares the status of citizenship without also being an individual human being.

134. *Citizens United*, 558 U.S. at 437 (Stevens, J., concurring in part and dissenting in part) (quoting FEC v. Mass. Citizens For Life, Inc., 479 U.S. 238, 257 (1986)).

are now large economies, endowed with means and resources that are comparable to those of some among the wealthiest Western states.[135]

But it is not just numbers that make the corporate citizen "super." The corporation is formed by a collection (a nexus) of individuals and entities that are in their turn collections of individuals—the stakeholders—who have a contractual relationship with the corporation. These individuals also belong to the set of citizens as defined above. However, unlike the set of citizens at large (i.e., non-stakeholder-citizens), the set of stakeholder-citizens is "ordered."[136] This order is a reflection of both the corporation's hierarchical structure and the role played by economic power in organizing the corporation's contractual relationships.[137] Therefore, the corporation is a "supercitizen" in this dual sense: a citizen of extraordinary size, resources, and complexity; *and* a citizen which is formed by an ordered collection of other citizens.[138] As we will explain, this feature complicates the analysis of "good corporate citizenship."

B. The Corporation qua *Good Citizen*

To borrow again from the language of set theory, we can think of the set of good citizens as a subset of the larger citizens set (to state the obvious, not all citizens are good citizens). But what is the identifying predicate of this subset?

We saw that citizens' discursive contributions are the "doing" of citizenship, the performative that re-inscribes citizenship in social and legal

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135. The market capitalization of companies like Apple ($2.2 trillion) or Microsoft ($2.04 trillion) or Amazon ($1.73 trillion) is comparable to the gross domestic products of countries like Italy (about $2 trillion) or France ($2.7 trillion). *See Largest American Corporations by Capitalization*, COMPANIESMARKETCAP.COM, https://companiesmarketcap.com/usa/largest-companies-in-the-usa-by-market-cap/ [https://perma.cc/JNE5-UWJT] (last visited Sept. 9, 2022); GDP, WORLD BANK, https://data.worldbank.org/indicator/ NY.GDP.MKTP.CD [https://perma.cc/79M2-TLST] (last visited Sept. 9, 2022).

136. In set theory, an ordered set is a set whose elements are represented in a specific order. That is, an ordered set formalizes and generalizes the intuitive concept of an ordering, sequencing, or arrangement of the elements of a set. For additional information, see generally Partee et al., *supra* note 128.

137. More precisely, stakeholder power may tie to individual purchasing power (for consumers), contractual power (for suppliers and workers) or the number of shares held (for shareholders).

138. We emphasize that the term supercitizen as "a citizen *and* collection of citizens" does not coincide with the court's definition of "associations of citizens . . . that [have] taken on the corporate form." *Citizens United*, 558 U.S. at 349. As pointed out by Macey and Strine, the court's definition overlooks that the corporation is an entity of its own, that cannot be "reduced" to any individual component. *See* Macey & Strine, *supra* note 129. This, for us, is the corporation-citizen (entity). But then there is also the corporation-collection of citizens. Indeed, from a democratic theory perspective, the corporation can also not be reduced to just its entity form alone. However, the collection of stakeholder-citizens has ordered (i.e., vertical) rather than associational (i.e., horizontal) features. The two components (i.e., the entity component that is a citizen and the ordered collection of stakeholder-citizens) are what make the supercitizen.

practices. Two core principles govern this doing: the principles of political freedom and political equality.[139] These principles provide the foundational institutional architecture of the liberal social construction; when they are violated, one can hardly speak of democratic social decision-making.

On this premise, we argue that in a performative conception of citizenship, a citizen that violates the core principles of freedom and equality is a bad citizen. We hence provide a brief overview of these principles and expound on the claim that all good citizens are held to abide by them, including the new corporate supercitizen.

1. Good Citizens, Political Freedom, and Political Equality

The principle of political freedom characterizes democracy as a system that accords liberty primacy as a political value.[140] In the prevailing contemporary conception, this primacy is essentially intended as the absence of arbitrary interference from individuals, groups or governments.[141] What matters, however, is not actual interference, but just the "defenseless susceptibility to interference"[142] (what political philosopher Philip Pettit calls the "eyeball test").[143] Indeed, this susceptibility is enough to induce forms of self-censorship that are against one's freedom. As applied specifically to citizens' contributions to the choice of overall societal aims, political freedom is thus violated when hindrance prevents citizens from choosing an aim, penalizes the choice of an aim, threatens to penalize it, is deceiving about available aims, or just manipulates citizens into misperceiving them.[144]

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139. While there is little disagreement among political philosophers and democratic theorists that freedom and equality are the core principles of liberal democracies, the relationship between the two principles remains highly disputed. *See, e.g.*, Stefan Gosepath, *Equality*, *in* STAN. ENCYC. OF PHIL. (Edward N. Zalta ed. 2021), https://plato.stanford.edu/archives/sum2021/entries/equality/ [https://perma.cc/WMS7-2N4A] (providing an overview of the different understandings of this relationship). We carefully avoid getting into this debate, as it does not affect our analysis of good corporate citizenship. Instead, we assume that both principles are equally central to the governance of democratic decision making.

140. *See* Gerald Gaus, Shane D. Courtland & David Schmidtz, *Liberalism*, *in* STAN. ENCYC. OF PHIL. (Edward N. Zalta ed. 2020), https://plato.stanford.edu/archives/fall2020/entries/liberalism/ [https://perma.cc/SN4Z-DMZL].

141. This is commonly referred to as "'negative' freedom." *See* BERLIN, *supra* note 30, at 122.

142. Pettit, *Antipower*, *supra* note 30, at 577.

143. Under the "eyeball test," citizens are free when, by local social and cultural standards, and having only ordinary courage, they "can look others in the eye without reason for the fear or deference that a power of interference might inspire; they can walk tall and assume the public status . . . of being equal in this regard with the best." PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 84 (2012).

144. Philip Pettit, *Analyzing Concepts and Allocating Referents*, *in* CONCEPTUAL ENGINEERING AND CONCEPTUAL ETHICS 333, 351–53 (Alexis Burgess, Herman Cappelen & David Plunkett eds., 2020).

Political equality is the other core principle of liberal democracies. For without equal consideration of each person's interest, it would be impossible to legitimately settle disagreements among citizens about divisive societal aims.[145] More particularly, the principle of equality is operationalized through fairness requirements that are meant to be conducive to its satisfaction. These requirements include the one-person, one-vote (OPOV) principle, under which citizens are provided with an equally weighted vote in deciding electoral outcomes.[146] They also include an equal distribution of the possibilities for political activity and deliberation as "the means by which citizens inform governing elites of their needs and preferences and induce them to be responsive."[147] Indeed, political activity and deliberation are among the main channels for the reiteration of citizenship performatives. It is thus unsurprising that mere political equality in the aggregation of citizens' choices (through the OPOV principle) is not enough. Since political activity and deliberation can influence citizens' beliefs,[148] these performative channels also need to conform to egalitarian instances.[149]

2. *Bad Citizens*

In examining the risk of violations of core principles, the classic, liberal, treatment tends to focus on "public" violations—describing freedom and equality as citizens' *rights* that the government has the obligation to respect, enforce and guarantee.[150] But the public aspect of the principles' violation has a corresponding "private" aspect—one that concerns *all* citizens as

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145. As put by Tom Christiano, "[i]f nothing else, democracy is a deeply egalitarian method of organizing social decision making." Thomas Christiano, *The Rule of Many*, *in* PHILOSOPHY AND DEMOCRACY: AN ANTHOLOGY 45 (Thomas Christiano ed., 2003).

146. *Id.*

147. SIDNEY VERBA, RUSSELL SAGE FOUND., POLITICAL EQUALITY – WHAT IS IT? WHY DO WE WANT IT? 2 (2001), https://www.russellsage.org/sites/all/files/u4/Verba.pdf [https://perma.cc/93LG-LD49].

148. *See* Christian List, *Social Choice Theory*, *in* STAN. ENCYC. OF PHIL. (Edward N. Zalta ed., 2022), https://plato.stanford.edu/entries/social-choice/ [https://perma.cc/LX5A-FDPF] (discussing how the rules of political deliberation can influence citizens' beliefs). An economist would say that deliberation changes the underlying information, which may lead individual to change their views.

149. This applies to both deliberative procedures and deliberative behaviors. Deliberative procedures are settings in which deliberation can take place. If we give voters an opportunity to talk before voting, this is an instance of a deliberative procedure ("first talk, then vote"). *See generally* Robert E. Goodin & Christian List, *A Conditional Defense of Plurality Rule: Generalizing May's Theorem in a Restricted Informational Environment*, 50 AM. J. POL. SC. 940, 940 (2006). Deliberative behaviors, instead, are the ways in which people actually deliberate: how they treat each other when they communicate, what they say, whether they are truthful or manipulative, whether they change their opinions, and so on. *See* List, *supra* note 148.

150. *See* Gaus et al., *supra* note 140 (explaining that the "Fundamental Liberal Principle" holds "that any limitation of . . . freedom and equality must be justified").

recipients of the government's rules (and social norms) on freedom and equality.

A citizen that violates these rules and norms cannot be a good citizen because she would be hurting other citizens, directly or indirectly limiting their own freedom and equality. This does not mean that citizens must abide by freedom and equality in every aspect of their private lives—it seems clearly mistaken to say that I have to give equal consideration to everyone's interests in deciding how to conduct my love life, for example. But social decision-making cannot be appropriately structured by these core principles if citizens act in *systematic* disregard of the rules and norms protecting freedom and equality.[151]

Consider political freedom first. The government is held to limit both its own conduct and the conduct of individuals when that conduct unduly impedes the freedom of others. Good citizens are held to avoid any conduct that violates those limits. A good citizen does not commit physical or moral violence on others to coerce their political views. A good citizen does not prevent the members of her household from expressing their political opinions.

Similarly, considering political equality, the government is held to ensure procedural fairness requirements (the OPOV rule and equality in political activity and deliberation). But good citizens do not try to alter, manipulate, of otherwise hinder those requirements. A good citizen does not mail in two ballots when she moves from a state to another in the midst of an election. A good citizen also does not storm the Capitol failing to accept the results of an election decided in accordance with procedural fairness requirements.

We can hence redefine our predicate for the set of good citizens as including all citizens that abide by the rules and norms that protect the principles of political freedom and political equality. Understanding whether the corporate supercitizen satisfies this predicate, however, is more complicated than in the case of ordinary citizens.

Take for example, Justice Stevens's concern in *Citizens United* that because of corporations' disproportionate means and resources, granting

151. The argument that good citizens are held to abide by the principles of political equality and political freedom also holds under the assumption that there might a division of moral labor that limits the scope of these principles. *Cf.* Samuel Scheffler and Véronique Munoz-Dardé, *The Division of Moral Labor*, 79 PROC. ARISTOTELIAN SOC'Y 229 (2005). Under that assumption, one could argue that these principles only apply to government behavior rather than individual behavior. This is because, for example, if each individual were to try to further the principle of political equality, by their own lights, they would be less effective than if they simply pursued their own ends within a legal structure that was constructed with an eye to respecting the principle of political equality. This conclusion, however, cannot hold if "simply pursuing one's ends" means systematically acting contrary to the legal structure's provisions that are designed to protect political equality.

them freedom of speech could lead to the marginalization of the voices of ordinary citizens.[152] Building on this concern, opponents of the decisions have pointed to the risk of violation of the principle of political equality.[153] But this inference does not withstand what Amy Sepinwall calls the "Bill Gates objection": that the system "allows individual citizens, who may also accumulate tremendous wealth, to spend as much of that wealth as they choose on political speech."[154] Under that objection, the *prima facie* conclusion is that neither Bill Gates nor corporations should be deemed "bad citizens" for (excessive) spending on political speech because this conduct is not held to violate the principle of political equality.

This conclusion is too fast, however. The Bill Gates objection is grounded on the incorrect assumption that the conduct of corporations in the discursive contribution to divisive societal choices can be analyzed as if they were ordinary citizens. But corporations are supercitizens, because of their size, resources, and organizational complexity. This existential intricacy adds four levels of complexity.

First, it implies that the risk of violations of core principles exists both *outside*, vis-à-vis other ordinary citizens, and *within* the corporation, vis-à-vis stakeholder-citizens. Second, the external dimension is not independent from the internal one. This is because the actual choice of a divisive societal end by the corporation-entity, which has external effects, is necessarily the product of an adjudication process that is internal to the corporation-ordered collection of citizens. Third, while this adjudication process is designed to replicate the regulative competence of ordinary citizens,[155] it is unique to the corporate organization. This means that the corporation's adjudication decisions about which divisive ends to pursue are, in the first place, production decisions. For this is what the corporation does *qua* business organization: it produces goods and services. In the case of activism, the goods the corporation produces are what we call divisive moral goods, embodying a corporate choice about overall, and divisive, aims of society. Fourth, a corporation's production calculus is not unconstrained but is conditioned to the corporation's survival in competitive markets, which requires that corporations can "afford" activism (i.e., costly speech).[156] If it was otherwise, one would have to conclude that only "bad corporations" (i.e., corporations that do not maximize economic efficiency) can be citizens—maybe even good citizens—but not the two things at once.

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152. *See* Citizens United v. FEC, 558 U.S. 310, 475 (2010) (Stevens, J., concurring in part and dissenting in part).

153. *See* Sepinwall, *supra* note 12, at 579 (reporting this position of commentators).

154. *Id.*

155. *See* LIST & PETTIT, *supra* note 19, at 178.

156. *See infra* note 194 (examining the costs of moral goods in detail).

In order to understand whether the activist corporation is a good citizen, one needs to unpack these complexities. We begin this task in the next Part, by taking the first step, which requires going back to corporations *qua* business organizations to understand how good corporations decide which moral goods to produce. After that, in Part IV, we will bring together our political and economic analyses of activism, trying to understand whether being a good corporation is compatible with being a good supercitizen, both relative to the internal and external dimensions of the principles of political freedom and political equality.

III. THE PRODUCTION OF MORAL GOODS

This Part switches from democratic theory to economics. This move is necessary to understand how the activist corporation chooses its citizenship performatives under the constraints it has as a business organization operating in competitive markets. It is a move that involves a reverse exercise: from the supply to the demand side of activism. As suppliers of moral goods, corporations engage in divisive societal aims. But that supply responds to a moral demand that comes from corporate stakeholders. Therefore, the study of moral good production is a study of how corporations internalize stakeholders' moral preferences.[157]

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157. A clarification is in order about the switch from democratic theory's language of "interests" to the economic language of "preferences." For political philosophers, individuals should have equal opportunity to advance their own interests. *See supra* text accompanying note 145. In economics, however, the concept of interest does not exist (i.e., it is not formalized); instead, the primitive concept is that of preference. Preferences can be described as an individual's dispositions to desire. Political philosophers, however, have highlighted how the realization of an individual's desires can conflict with an individual's interest and therefore how the maximization of an individual's desires could fail to maximize an individual's well-being. *See* CHRISTIANO, *supra* note 11, at 71–75. The way to overcome this problem is by imposing some restrictions on preferences through the concept of "second-order preferences": preferences on (first-order) preferences. *See generally* Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFFS. 317, 319, 337–39 (1977); Amartya Sen, *Behaviour and the Concept of Preference*, 40 ECONOMICA 241 (1973) (defining morality as a set of second-order preferences). Suppose that, today, Saura prefers to share a loaf of bread with her neighbor, Simone, rather than watch him starve. This is Saura's first-order preference. But Saura may also have a second-order preference: she may *prefer to prefer* sharing food when she has excess rather than to let somebody near her starve. Second-order preferences can thus be understood as being descriptive of individuals' normative commitments to values. See the seminal article by Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 J. PHIL. 5, 6 (1971) (stating that a characteristic of humans is their ability "to form . . . 'second-order desires' or 'desires of the second order'"). Under this understanding of second-order preferences, we can then say that: (1) each individual states their own preferences (initial dispositions to desire); (2) individuals then determine their second-order preferences based on (1), with second-order preferences as a judgement on individuals' first-order preferences, akin to defining individuals' interests; and (3) whenever (2) conflicts with (1), individuals are committed to revise their first-order preferences based on the normative judgment expressed through their second-order preferences. (The deliberative process leading to an individual's revised preferences is analogous to the reflective equilibrium used by Rawls to determine the principles of justice.) *See* JOHN

A roadmap of the discussion is useful. In Section A, we raise the question of whether the "morality market" can promote pluralistic values in the choice of society's aims. This is a necessary preliminary question because a pluralistic morality market, we show, would appease concerns about core principles violation by the corporate supercitizen. Although the current market equilibrium is not pluralistic,[158] this is not enough to exclude the possibility that the market could readjust to a different equilibrium in the future, as assumed by woke accounts. Instead, any equilibrium conjecture requires the study of the production calculus of moral goods.

We develop this study in Sections B and C, showing that as long as activist corporations want to remain competitive, the equilibrium of the morality market will be one of *corporate conformity*, with corporations exclusively catering to the moral preferences of today's largest investors. Hence, questions about good corporate citizenship are *not* preempted.

The combination of three factors supports the above equilibrium conjecture of corporate conformity. We examine the first two in Section B. The first factor is the *exclusionary constraint* affecting the production of divisive moral goods. Unlike with other goods, a corporation cannot produce at once both moral good x—catering to, say, an individual with progressive preferences—and what we term the "contrarian" moral good y—catering to, say, an individual with conservative preferences. For doing so would destroy the corporation's ability to attract the moral demand of either individual and hence the value to the corporation of either good. This constraint raises the question of how corporations decide *which* moral preferences to satisfy at the expense of others. The answer is that value-maximizing corporations will strive to capture the *majoritarian* economic demand for moral goods: that is, the demand that reflects the largest economic interest in activist initiatives.

This decisional mechanism brings us to the second determinative factor of the morality market equilibrium: the rise of *moral portfolios*. Growing investor demand for corporate activism suggests that today's investors are choosing to hold what we call "moral portfolios," which include increasingly larger holdings of activist corporations' shares. Moral portfolios have not yet received attention in the corporate law literature.[159] But they have crucial implications for corporations' activist choices, as they

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RAWLS, A THEORY OF JUSTICE 18, 42–44 (1971). The "revised preferences" under (3), which are now morally coherent with the individual's values under (2), are preferences which satisfaction leads to the advancement of the individual's well-being. We can then say that maximizing individuals' preferences is isomorphic to advancing individuals' interests and hence use preferences in the place of interests.

158. *See supra* Section I.C.

159. Madison Condon does focus on the relationship between the portfolios of institutional investors and increased activism but does not consider the possibility that investors choose the composition of their portfolios based on their moral preferences. *See* Condon, *supra* note 82, at 6.

trigger positive asset price effects: similar to a financial bubble, the increased demand for activist assets results in an increase in the share price of activist corporations. Because of these asset price effects, investors' moral preferences can be expected to have a disproportionate impact in determining the majoritarian economic demand for moral goods (relative to the demand of other constituencies).

In Section D, we then discuss the last crucial factor leading to an equilibrium of corporate conformity: *the reconcentration of equity ownership*. The conclusion that investor demand takes priority in the calculus of a corporation's activist choices clearly stands at odds with the idea that corporate activism can vehiculate pluralistic values. But it is when one considers where the majoritarian economic demand within the investor class comes from that the possibility of a pluralistic morality market vanishes altogether. Under current patterns of equity reconcentration, a few fund families and the handful of individuals that control them hold the lion's share of moral portfolios. Hence it is only by catering to the moral preferences of the largest investors, at the expense of any contrarian preference, that corporations will be able to capture the bulk of the positive asset price effects triggered by moral portfolios. Finally, the moral preferences of a handful of investors drive the citizenship performatives of good corporations.

A. A Pluralistic Morality Market?

Our analysis of the production of moral goods moves from the same starting point as recent CSR-ESG studies which hold that the rise of corporate activism responds to a novel moral demand of stakeholders.[160] Economically, these studies rely on the assumption that corporations meet the stakeholder moral demand in the same way as they do with anything else individuals desire: by internalizing individuals' heterogenous preferences. This assumption is grounded on the foundational neoclassical idea that competitive markets allow for the greatest diversity in goals and resources.[161] In a general competitive equilibrium, "[e]very desire of each consumer, no matter how whimsical, is met precisely by the voluntary supply of some producer. And this is true for all markets and consumers simultaneously."[162] Hence, in the morality market, CSR-ESG studies

160. *See supra* Section I.B.1.

161. *See* John Geanakoplos, *Arrow-Debreu Model of General Equilibrium*, *in* THE NEW PALGRAVE DICTIONARY OF ECONOMICS 119 (John Eatwell, Murray Milgate & Peter Newman eds., 1st ed. 1987).

162. *Id.*

predict that "different corporations can offer different types of altruism [i.e., moral goods] to different people."[163]

As pointed out by woke accounts, however, we do not currently observe the kind of pluralistic supply predicted by CSR-ESG studies—the current offer of moral goods is consistently progressive.[164] But woke accounts do not go into the economics of the morality market equilibrium. These studies avoid the question of why corporations do not cater to a more bipartisan base even if this would make sense economically under the assumption that activism is opportunistically motivated. Likewise, woke accounts avoid the question of whether the morality market could adjust to a pluralistic supply of moral goods in the future.

Answering these questions matters for our analysis. If a pluralistic morality market is possible, questions about whether the activist corporation can be a good citizen—a citizen that respects the core principles of freedom and equality—are preempted. Under a pluralistic equilibrium, the market would cater to all our moral preferences (e.g., engaging in both progressive and conservative activist initiatives).[165] Hence, stakeholders would be able to enter into a constellation of contracts—voluntary exchanges—with different corporations. The freedom constraint would thus be trivially satisfied as the voluntary nature of stakeholder transactions would create a selection effect where stakeholders "choose" their corporate relationships also based on the citizenship performatives a corporation offers.[166] To the extent the scope for this selection is sufficiently granular to satisfy the moral preferences of all individuals, egalitarian concerns would also be dispelled. Indeed, under the assumptions that stakeholders are a representative cross

163. *See* Henderson & Malani, *supra* note 77, at 575. For example, "[t]hose who care about the environment can deal with Patagonia, which has pledged about one percent of profits to environmental causes, while those who are concerned about poverty in developing countries can engage with Google, which has made a similar pledge to that cause." *Id.* (footnotes omitted).

164. *See supra* Section I.C.

165. Under the assumption of complete markets, there would be a continuous flow of moral goods satisfying the heterogenous moral preferences of all individuals, beyond the coarse distinction between progressive and conservative preferences. Another way to put this is that under the orthodox Walrasian model, the process of economic allocation relies on the construction of the Walrasian auctioneer to aggregate individual preferences (*all* preferences) so as to make plans compatible. *See generally* Kenneth J. Arrow & Gerard Debreu, *Existence of an Equilibrium for a Competitive Economy*, 22 ECONOMETRICA 265 (1954).

166. Under pluralism, which is the outcome of complete markets when different individual plans of actions are mutually compatible, that (i) a stakeholder interacts with corporation A when corporation B is also available and (ii) the two corporations are identical but for the fact they offer different moral goods provides adequate evidence that the stakeholder has voluntary expressed her intention to support corporation A's citizenship performative. In other words, with pluralism one can assume efficient sorting. *Cf.* Canice Prendergast, *The Motivation and Bias of Bureaucrats*, 97 AM. ECON. REV. 180, 180 (2007) (examining efficient sorting and intrinsic job motivations).

section of citizens,[167] under a pluralistic equilibrium corporations would channel the preferences of all citizens over divisive societal aims.

We will show, however, that the lack of a pluralistic morality market is not just a temporary contingency. The demand for divisive moral goods is *not* "like anything else that individuals desire."[168] Markets cannot internalize our heterogenous moral preferences as they do with other preferences.[169] We support this conclusion through an analysis of the production calculus of moral goods, which we carry out first at the individual firm level and then we extend to competitive markets.

B. Moral Goods' Production Calculus

Neither CSR-ESG studies[170] nor woke accounts of corporate activism examine the production calculus of moral goods in detail. Doing so requires incorporating the divisive nature of such goods into the demand-supply mechanism that undergirds their production.

1. Moral Identities and Production Constraints

There exists a fundamental difference between the satisfaction of individuals' ordinary preferences and moral preferences. The satisfaction of our ordinary preferences, through the production of regular commodities (or claims the corporation issues), generally produces no effect on other actors. If I want, say, a pair of red shoes and you want, say, a pair of blue shoes, you will be indifferent to whether my demand is satisfied.[171] Conversely,

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167. Stakeholders are more likely to constitute a representative cross-section of citizens than investors. *See infra* notes 271, 281 (discussing limitations of this assumption as applied to the shareholder class).

168. *Cf.* Henderson & Malani, *supra* note 77, at 585 (arguing that demand for altruism generates a production by suppliers in a market). We agree that the moral demand generates a supply as any other demand does, but that supply is distinctively different than the supply of other goods.

169. As we will explain in Section III.B.3, the problem is not just that markets tend to be incomplete and, therefore, corporations are only able to offer a spectrum, rather than a continuum, of divisive moral goods. If this was the problem, the results would be that the moral preferences of some individuals—on either side, the progressive or the conservative—would remain unsatisfied. Under corporate conformity, instead, only the moral demand of a restricted group of individuals is satisfied, to the exclusion of all individuals holding contrarian preferences.

170. Some demand studies classify moral goods as public goods, viewing free riding as the main friction and advocating for a remedial shareholder welfare maximization norm. *See supra* note 87. Other studies exclude the existence of an internalization problem, but it is not clear how they conceive of moral goods. *See supra* text accompanying notes 80–82. To exclude internalization issues, these studies must necessarily assume a perfect assimilation between the supply of regular commodities (and other corporate claims) and moral goods. Yet they do not consider the nature of moral goods or explain how exactly their costs are internalized.

171. One could argue, however, that individuals benefit from the consumption of others, receiving a positive externality from their consumption. Thus, the consumption of red shoes by A would have an

the satisfaction of individuals' moral preferences inherently entails the production of externalities. This is because the same moral good might be a "good" or a "bad" depending on whether, and to what extent, that good matches an individual's *moral identity*. By the term moral identity, we mean the set of unique moral preferences that characterizes each individual.

Identifying the contours of one's moral identity might not be immediate. However, a reasonable proxy, as suggested by our discussion so far, is given by the political division between conservatives and progressives. We consider this division as the paradigmatic case of "contrarian" moral identities.[172] By contrarian moral identity, we mean that it is highly likely that the production of the same moral good might create a good for one individual and a bad for the individual holding the contrarian identity. So, for example, engagement in favor of gun control[173] is likely to be a good for progressives, but a bad for conservatives.[174] In other words, different moral identities are the source of legitimate disagreement over a society's ends.[175] To this extent a moral good and its contrarian can be understood as promoting opposite societal ends.[176]

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effect on the utility of B. Under general equilibrium theory, however, this objection is not valid. Under the second fundamental theorem of welfare, it is possible to separate efficiency from distributional concerns. According to the theorem, distributional concerns can be addressed through a planner who ex-ante redistributes individual endowments so that the agents will interact in competitive markets to reach an efficient allocation, which will also reflect the desired distribution. For an analytical treatment, see MAS-COLELL, *supra* note 78, at 551–58.

172. The increased level of polarization of the American public strengthens our assumption. *See, e.g.*, Michael Dimock & Richard Wike, *America is Exceptional in the Nature of its Political Divide*, PEW RSCH. CTR. (Nov. 13, 2020), https://www.pewresearch.org/fact-tank/2020/11/13/america-is-exceptional-in-the-nature-of-its-political-divide/ [https://perma.cc/QNK4-3T6Y].

173. *See supra* text accompanying notes 54–55.

174. In a stylized representation, the same moral good x (say, a policy in favor of gun control) will deliver a positive utility $u(x)>0$ to stakeholders with matching identity Ix (e.g., a progressive individual), *but* a disutility $d(x)>0$ to stakeholders with a contrarian identity Iy (e.g., a conservative individual). Contrarian stakeholders would, instead, receive a utility $u(y)>0$ if the corporation produced moral good y (e.g., a policy against gun control). Of course, the more divisive a given moral good is, the greater the disutility conveyed to contrarian stakeholders.

175. In some complicated cases, different moral identities are the source of disagreement over the means that realize non-contentious ends, when these means conflict with other legitimately contentious ends. *See supra* note 100.

176. This characterization of moral goods does not exclude the possibility that the same moral good might match the identity of many individuals. For example, it seems reasonable to assume that virtually all individuals belonging to the *moralized homo economicus* class believe that fighting poverty is a "good." When a moral good matches the identity of many individuals, that good is likely to have the characteristic of a non-divisive public good, a good whose production is supported by large consensus. *See supra* text accompanying note 98. Moral tradeoffs, however, add another complication. Under the reasonable assumption that individuals' utility function is constrained by their budget, one can posit that a substitution effect exists between the demand for moral goods and other commodities. This substitution effect is one of the conditions of the integrability between the demand of *homo economicus* and *homo moralis*. *See supra* note 78. This means that the moral demand is affected by changes in relevant prices and hence admits tradeoffs. But then even the satisfaction of the demand for theoretically less divisive

Because of these distinctive traits, the production of moral goods is subject to a unique constraint: moral goods are "exclusionary." In general, the same corporation can satisfy the demand for commodities with diverse, even opposite, physical characteristics. For example, a corporation may produce both "regular" food and gluten-free food. Auto companies produce both "regular" and hybrid cars. But when a moral good is divisive, the production of moral good x (consider, for example, the endorsement of a pro-choice abortion policy) will prevent the corporation from producing the contrarian moral good y (i.e., the endorsement of a pro-life abortion policy). Producing y would mean "destroying" x, and vice versa if the corporation chooses to produce y in the first place. For an evocative analogy, imagine what would happen if the Vatican Publishing House started to add pornography publications to its catalogue.

Moral goods' exclusionary feature also imports a companion feature, as each moral good tends to be consumed in conjunction with other goods "catering" to the same moral identity. In this sense, moral goods are complementary rather than substitute goods. For example, if a company is engaged in a pro-choice abortion policy, the same company can be expected to support policies in favor of embryonic stem cell research, and to avoid policies against this research. More broadly, if we pose that the pro-choice policy x is representative of a generalized progressive position, this means that once the corporation has chosen x, then it will only be able to produce moral goods that are compatible with that position (i.e., x_1, x_2, x_3, etc.). By extension, this means that the production of x does not just exclude y (a pro-life policy), but also y_1, y_2, y_3, i.e., any moral good associated with opposite conservative positions.

Under these production constraints, moral goods are more similar to private than public goods. This is because only by being willing to pay for a given moral good can individuals prevent corporations from producing goods that are contrarian to their moral identity and avoid the possibility that the corporation might advance societal ends with which they

moral goods might end up creating negative externalities for some individuals. For example, one's propensity to care for the environment might well change if caring entails closing down the factory where an individual works. Viewed through this lens, all moral goods can potentially become divisive.

disagree.[177] In this sense, moral goods are excludable,[178] unlike public goods.[179]

Under this recharacterization of moral goods, the question, then, is how corporations choose *which* moral goods to produce at the expense of others. We turn to this question next.

2. *Majoritarian Moral Demand*

Modern corporations are global institutions that operate at a very large scale and cater to an equally large, often global, investor and consumption base. Attempting to capture the universal economic demand for goods and services is thus an intrinsic element of the modern corporation's business model. This means that corporations cater to both the majoritarian demand, capturing the largest economic interest for goods and services, and minority demands, for which there are niches of interests.

Because of the exclusionary nature of moral goods, however, corporations *cannot* capture *both* the majoritarian demand *and* minority demands for these goods, because minority moral demands are likely to focus on contrarian moral goods (or complementary contrarian goods). Striving to remain competitive, corporations will then have incentives to cater only to the majoritarian economic demand for moral goods.

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177. Individuals may also have assertive rather than defensive reasons to be interested in moral goods. For example, moral goods may satisfy an individual's need for self-identification as a moral agent, allowing people to retain a sense of who they are in the Hegelian sense. *See* G.A. COHEN, KARL MARX'S THEORY OF HISTORY: A DEFENSE 346 (1978). Moral goods also satisfy the *social* aspect of one's irreducible interest in self-definition: the need to signal adherence to some human groupings and affirm our identity vis-à-vis others. *See* Evan Westra, *Virtue Signaling and Moral Progress*, 49 PHIL. & PUB. AFFS. 156 (2021) (arguing that virtue signaling might be a vector for enriching the moral public discourse with information about social norms). Like with defensive interests, neither of these assertive reasons can be delegated to others. Assuming otherwise would be like saying that going to Sunday mass does not matter as long as others go—something with which no good Catholic would ever agree.

178. It is unclear whether moral goods are also rivalrous. To the extent they are not (or only marginally rivalrous), moral goods would fall under the category of "club goods," which are excludable, but nonrivalrous. James Buchanan provided the seminal contribution on club goods. *See* James M. Buchanan, *An Economic Theory of Clubs*, 32 ECONOMICA 1 (1965).

179. This conclusion dispels the persistent concern in the CSR-ESG literature that, even admitting the existence of a moral demand, free riding incentives could jeopardize the ability of corporations to internalize this demand. This would make corporate social engagement unaffordable for "good corporations"—unless, of course, one was willing to relax the shareholder primacy rule (which is exactly what some scholars argue we should do). *See supra* text accompanying note 83. But if moral goods are closer to private goods and hence there is no free riding, there is no reason why the demand for moral goods cannot be fully internalized. A closely-related argument is that corporate social engagement could lead to forsaken profits and hence a decline in share prices, triggering arbitrage opportunities in favor of non-sympathetic stakeholders (i.e., who are not interested in corporate social engagement). *See, e.g.*, Elhauge, *supra* note 75; Hart & Zingales, *supra* note 83 (both examining how collective action problems encourage even prosocial shareholders to tender to hostile acquirers with antisocial goals). This argument, however, rules out the possibility that sympathetic investors might choose their portfolios based on moral preferences as well as the implications of the asset price effects arising from "moral portfolios". *See infra* Section III.B.3.

This conclusion casts new light on the progressive connotation of current activist initiatives. This outcome is unlikely to be a manifestation of managerial opportunism, as argued by anti-woke commentators.[180] Instead, under the exclusionary nature of moral goods, partisan activist engagement is precisely what one should expect to see[181] when corporations try to be *good* business organizations and remain competitive. To this extent, the question to ask is not why activism is partisan but why we do not observe different kinds of partisan engagements at different corporations. Further, partisan outcomes are not, per se, indicative of a democratic dysfunction, as woke accounts also suggest.[182] In a parliamentary system, we do not view the systematically conservative or liberal policies adopted by a ruling majority as evidence of democratic dysfunction. Rather, this is how we expect and hope the system will work unless and until the opposition can win a majority over to its point of view.

These observations suggest that what matters is not the outcome of the morality market per se, but how the majoritarian demand for divisive moral goods is aggregated—both at the individual firm level and at the aggregate level. Demand models of CSR tend to equalize the demand coming from consumers, suppliers, employees, and shareholders,[183] implicitly assuming that the moral preferences of each of these constituencies have equal weight. As we shall show below, however, this approach overlooks the developments that have occurred in investors' moral demand, as well as the crucial implications these developments have for the production calculus of moral goods.

3. Moral Portfolios

In demand models of CSR, the internalization mechanism that channels stakeholders' moral demand into the production of moral goods is represented as involving a positive effect on the stakeholders' willingness

180. *See supra* text accompanying notes 102–103.

181. *But see* Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1558 (2018) ("[T]he new corporate social activism is a *nonpartisan* phenomenon. It can affect causes on both the Left and the Right, with many corporations taking crosscutting positions along the political spectrum.") (emphasis added). Lin's treatment of activism, however, does not incorporate the divisive nature of moral goods, which could explain why he reaches a different conclusion about the equilibrium result of moralized markets.

182. *See supra* text accompanying notes 106–109.

183. *See, e.g.*, Henderson & Malani, *supra* note 77, at 574 (stating that while, for example, only consumers receive utility from the consumption of regular commodities like toothpaste, *all stakeholders* may receive utility from the production of moral goods).

to pay for the corporation's non-moral goods[184]—an effect that moves the stakeholders' reservation price for non-moral goods upward. These models focus on consumers, but they assume that the same internalization mechanism can be extended to other stakeholders.[185]

One limitation of this account, however, is that it conceives of the utility investors derive from moral goods as separated from the price mechanism that informs corporations' decisions in competitive markets—that is, almost as if investors' moral preferences had no implications for capital markets.[186] But this description of the relationship between investors' moral preferences and capital markets (i.e., share prices) has grown increasingly reductive if one considers the current flow of capital into what we call "activist assets." By this term, we refer to equity and other financial instruments issued by corporations that are engaged in activist initiatives. As we saw above, the numbers of "sustainable investments" have reached astonishing levels.[187] And these figures are only expected to rise, with the forecast being that ESG-mandated assets will soon take up half of all managed assets in the U.S.[188] In spite of the branding of these investments as "ESG" or "sustainable," we have also seen that investor demand for activism has never been more prominent.[189]

The growing demand for activist assets suggests that today's investors are choosing to hold "moral portfolios." To characterize moral portfolios,[190] the starting point is portfolio theory, under which all investors diversify their holdings by weighing assets based on expected risks and returns.[191] In a stylized representation, one can thus pose that all investors will include in

184. *See id.* at 588–90 (discussing the production of "altruism" by corporation). The bundling of intangible moral goods with other commodities the corporation produces or claims it issues is the "technology" that enables this internalization mechanism. *See id.* at 593–96. It is worth emphasizing, however, that with the rise of the activist corporation, bundling has come to have much larger scope than initially conceived by demand studies. Today's bundling is with the activist corporation "as a whole": that is, as a supercitizen engaged in the choice of overall aims of society.

185. *See id.* at 589 ("Shareholders may be asked to accept a lower return on their capital, employees may be asked to accept a lower wage per hour, and consumers . . . pay a purchase price . . . that exceeds what they would otherwise pay.")

186. This is so in part because this mechanism is seen as being distorted by a public good problem *See supra* note 179.

187. *See supra* note 3.

188. *See supra* note 4.

189. *See supra* notes 65–70 and accompanying text.

190. In this characterization, we draw on Gollier & Pouget, *supra* note 25.

191. *See* STEPHEN F. LEROY & JAN WERNER, PRINCIPLES OF FINANCIAL ECONOMICS 214 (2001) ("When security returns have a factor structure . . . diversification can be used to reduce idiosyncratic risk in portfolios (that is, the risk in portfolio payoffs that reflects idiosyncratic risk in securities' payoffs)."). On portfolio diversification and factor pricing, see generally Stephen A. Ross, *The Arbitrage Theory of Capital Asset Pricing*, 13 J. ECON. THEORY 341 (1976). Our argument could be adapted to other asset pricing theories and the inference we derive from it would remain the same. *See* William W. Bratton & Simone M. Sepe, *Corporate Law and the Myth of Efficient Market Control*, 105 CORNELL L. REV. 675, 714–20 (2020) (examining different asset pricing models).

their portfolio *some* activist assets for diversification purposes. "Sympathetic" investors with a taste for moral goods, however, can be expected to alter their allocations so as to include *more* activist assets in their portfolios relative to the equilibrium portfolio choices of "non-sympathetic" investors who are not interested in moral goods.[192] This is what we call a "moral portfolio" choice.

Moral portfolio choices trigger asset price effects: they lead to an increase in the demand for activist assets relative to the diversification we would observe if all investors only based their portfolio choices on fundamental values.[193] Similar to what happens with financial bubbles, this increased demand for activist assets drives the share price of activist corporations to increase, too, helping internalize the costs of moral goods.[194]

Moral portfolios have crucial, and yet overlooked, implications for corporations' activist choices. At the individual firm level, they give corporations a further degree of freedom in deciding whether to pursue activist initiatives. This additional degree of freedom arises from the discretion to engage in cash-flow-reducing activism as long as the asset price effects arising from the moral portfolio more than compensate for the corresponding cash-flow reduction. Restated, as long as sympathetic investors are willing to pay a premium for holding the shares of activist corporations, corporate activism may be compatible with shareholder value maximization even when it is cash flow reducing.[195]

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192. *See* Gollier & Pouget, *supra* note 25 (manuscript at 2) (correlating "shareholder engagement with firms on pro-social issues" with profitability).

193. An activist corporation's fundamental value does not include the "value" of moral goods but factors in the costs of producing such goods.

194. Once one considers their divisive nature, moral goods entail three different sets of costs. Like any other corporate good, all moral goods entail a direct cost, which is the out-of-pocket cost of producing the good. In the case of less divisive moral goods like environmental concerns, consider, for example, the cost of researching fuel-efficient engines or the cost of new technology to reduce carbon dioxide emissions. For more divisive matters, consider, for example, the cost of running a campaign to convey the corporation's stance on a divisive issue or supporting certain causes. Further, divisive moral goods also include opportunity costs, which are intrinsic to the nature of the good (and do not, instead, affect other goods the corporation produces). First, they involve the real opportunity cost that arises from the feature of exclusivity (i.e., the cost of not producing contrarian goods). Second, they involve the financial cost arising from the disutility generated on stakeholders with a "contrarian" identity, as these stakeholders' reservation price for the corporation's non-moral goods or claims shifts downward. *See supra* note 174 (on the disutility borne by contrarian stakeholders).

195. *See* Gollier & Pouget, *supra* note 25 (manuscript at 2). One could argue that this result only holds as long as the asset price effects arising from the portfolio readjustments of sympathetic investors dominate any corresponding effect that may arise from the portfolio readjustments of non-sympathetic investors. This is a valid objection—but two reasons rebut it. The first is the fast growth of activists' investments. Second, even if one were skeptical about the prevalence of these investments, the same asset price effects would hold under a Keynesian view of markets where prices are influenced by herd behavior. *See* JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT INTEREST AND MONEY 156 (1936). For a treatment of the Keynesian view of markets tailored to a legal audience, see

To consider a salient, historical, illustration, think of an early example of corporate activism: the American disinvestment campaign from South Africa (or anti-apartheid campaign) of the 1980s.[196] Although that campaign triggered revenue losses[197] for the participating corporations, it had little effect on stock prices.[198] While several factors may explain this outcome,[199] the anti-apartheid campaign is evocative of the impact of asset price effects from moral portfolios.[200] Given the current numbers and projected growth of activist investments and hence the magnitude of the asset price effects arising from moral portfolios, it is then realistic to assume that financial investors have disproportionate weight in determining the majoritarian economic demand for moral goods.

This conclusion is strengthened when one moves from individual firm dynamics (i.e., where a firm's activist decisions are considered in isolation) to a competitive market context (i.e., where firm decisions are influenced by the competition with other firms). The long-run equilibrium conjecture is that under the "push" from moral portfolios, markets are gravitating toward a new "activist capitalism" model, with systematic corporate

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K.J. Martijn Cremers & Simone M. Sepe, *The Shareholder Value of Empowered Boards*, 68 STAN. L. REV. 67, 113–14 (2016). Herd behavior may induce investors to react to aggregate market demand rather than their own information. As a result, asset price effects may reflect not just market actors' average expectations about fundamental values, but these actors' beliefs about other market actors' beliefs (that is, higher-order beliefs). *See, e.g.*, Philippe Bacchetta & Eric Van Wincoop, *Higher Order Expectations in Asset Pricing*, 40 J. MONEY, CREDIT & BANKING 837, 838–39 (2008); Bruno Biais & Peter Bossaerts, *Asset Prices and Trading Volume in a Beauty Contest*, 65 REV. ECON. STUD. 307, 307–09 (1998). In our applied context, this means that if non-sympathetic investors believe that the portfolio readjustment by sympathetic investors will have positive asset price effects, they could decide *not* to readjust their portfolios or even readjust them in the same way as the sympathetic investors.

196. *See* Craig Forcese, *Globalizing Decency: Responsible Engagement in an Era of Economic Integration*, 5 YALE HUM. RTS. & DEV. L.J. 1, 3 (2002) (defending the efficacy of the American disinvestment campaign from South Africa). *But see* Paul Lansing, *The Divestment of United States Companies in South Africa and Apartheid*, 60 NEB. L. REV. 304, 307–08 (1981) (offering a skeptical view of the anti-apartheid campaign as a means to advance human rights reform).

197. *See Disinvestment in South Africa; Does America Have a Stake in Apartheid?*, N.Y. TIMES, Apr. 14, 1985, at E3, https://www.nytimes.com/1985/04/14/weekinreview/disinvestment-in-south-africa-does-america-have-a-stake-in-apartheid.html [https://perma.cc/AU7P-5DVZ] (detailing the value of American investments in apartheid-era South Africa).

198. *See* Siew Hong Teoh, Ivo Welch & C. Paul Wazzan, *The Effect of Socially Activist Investment Policies on the Financial Markets: Evidence from the South African Boycott*, 72 J. BUS. 35, 37–38, 79 (1999).

199. *See id.* at 37–38 (considering several of these factors).

200. A more recent illustration comes from evidence that during the market collapse in the early stages of the COVID-19 pandemic, firms that experienced more positive sentiments around their responses to the pandemic-related employee and supply-chain issues—responses that the literature suggests were reshaped by novel activist instances—experienced less negative returns. *See* Alexander Cheema-Fox, Bridget R. LaPerla, Hui (Stacie) Wang & George Serafeim, *Corporate Resilience and Response to COVID-19*, 33 J. APPLIED CORP. FIN., Spring 2021, at 24, 24, 30–31. *Cf.* Archie B. Carroll, *Corporate Social Responsibility (CSR) and the COVID-19 Pandemic: Organizational and Managerial Implications*, 14 J. STRATEGY & MAN. 315 (2021) (analyzing impact upon and responses of corporations and stakeholders to COVID-19 within a CSR framework).

activism. When we talk of "long-run equilibrium conjecture," we mean that this is the direction economic theory predicts competitive markets are taking, not what we currently observe.[201] Still, the unrelenting expansion of socially-responsible investing, growing investor demand for engagement in divisive issues, and forecasts that activist initiatives will only multiply in the near future suggest that we might be rapidly moving in this direction.

In stylizing aggregate effects, we move from the observation that in an "activist bubble"—with even more capital flowing to activist assets—investors' moral portfolio choices can be expected to produce a corresponding reduction in the demand for the assets of non-activist corporations, with a consequential decline in the share price of these companies.[202] This means that the shareholders of non-activist corporations would be subsidizing the production of moral goods by activist corporations. Anticipating this outcome, *at the equilibrium*, all corporations will have incentives to engage in activism.[203] This would neutralize negative asset price effects, with the result that the shareholders of each activist corporation would ultimately bear (at least part of) the costs of moral good production.[204] But a decision not to engage in activism would be even more costly to shareholders, as this would trigger negative asset price effects. Hence, at the equilibrium, there is no profitable deviation from activism for public corporations. From here, the conjecture is that corporate activism gravitates toward becoming an endogenous market outcome, one that is binding for corporations that want to remain competitive.

To sum up, the study of the production calculus of moral goods suggests that, under the exclusionary constraint affecting this calculus and the magnitude of moral portfolios' asset price effects, corporations that want to survive in competitive markets have incentives to *exclusively* cater to the

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201. This means that we do not exclude the possibility that some corporations might still "afford" to refrain from corporate activism, which would explain why not all public corporations currently engage in it. But we predict that the number of non-activist corporations is likely to steadily decrease in the future if investments in moral portfolios keep increasing.

202. This is consistent with the literature finding that index inclusion inflates valuations of included firms at the expense of others. *See, e.g.*, Eric Belasco, Michael Finke & David Nanigian, *The Impact of Passive Investing on Corporate Valuations* 38 MANAGERIAL FIN. 1067 (2012).

203. It is important to emphasize that in the long-run competitive equilibrium, there is no "bubble"—because only when some corporations engage in activism and some do not, there will be positive (and negative) asset price effects. But at the equilibrium, *all* corporations engage in activism. Hence, sympathetic investors no longer have reasons to distort their portfolios based on their moral preferences. Of course, the conjecture that all corporations will engage in activism is instrumental to understand what may happen in a state of the world where most corporations, rather than all corporations, are activist—this is the logic of equilibrium conjectures. After it reaches the equilibrium, it is very difficult to understand which direction the market could take. A possibility is that once all corporations engage in activism, in the forms that we know today, some corporations could try to do "more," so as to induce investors to distort their portfolio choices again.

204. We do not exclude the possibility that consumers may also bear the costs of activism, possibly even in large part.

moral demand of financial investors. Now, this conclusion does not bode well for the prospect that the morality market may serve to vehiculate pluralistic values in the choice of a society's contentious aims. But it is only after considering the role played by big fund families in shaping the majoritarian demand within the investor class at large that one can fully grasp the pluralistic loss of this conclusion.

C. Corporate Conformity

Back in 2018, reflecting on the practical implications of fast-growing indexation, Harvard Law School Professor (and current Acting Director of the SEC's Division of Corporation Finance) John Coates coined the term the "Problem of Twelve,"[205] to refer to "the likelihood that in the near future roughly twelve individuals will have practical power over the majority of U.S. public companies."[206] Coates moved from considerations of index funds' economies of scale and access to credible control threats to conclude that indexation could produce "the greatest concentration of *economic* control in our lifetime[]."[207] Coates's primary concern was about the "sharp, general, political challenge to corporate law" arising from the Problem of Twelve: the ability of index funds to dominate the governance of public companies "[i]n decisions both ordinary and extraordinary."[208] His additional concern focused on the *indirect* effects that this governance control could have on the functioning of the economy at large and society more generally.[209]

With the rise of the activist corporation, the Problem of Twelve has a new connotation. When we open the "black box" of investor moral demand, it is the big index funds that hold the lion's share of moral portfolios. Their economic interest is pivotal in determining positive asset price effects for activist corporations. Behind that economic interest, there are agents—a "board-sized group," as put by Coates.[210] But then conforming to the moral preferences of this small group of agents, at the expense of any contrarian preference, is what "good activist corporations" *need* to do in competitive markets.

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205. Coates, *supra* note 28 (manuscript at 2). For a popularized account, see Annie Lowrey, *Could Index Funds be 'Worse than Marxism'?*, ATLANTIC (Apr. 5, 2021), https://www.theatlantic.com/ideas/archive/2021/04/the-autopilot-economy/618497/ [https://perma.cc/28DX-G58R].

206. Coates, *supra* note 28 (manuscript at 1).

207. *Id.* (manuscript at 2) (emphasis added).

208. *Id.* (manuscript at 2, 19).

209. *Id.* (manuscript at 19) (considering, for example, how the pressure to increase shareholder returns could lead to layoffs; how reduced compliance budgets could lead to bribery, mass torts, fraud, etc.)

210. *Id.* (manuscript at 2 n.4).

This claim—that *corporate conformity* with the moral preferences of the funds' agents is unavoidable—is strengthened when one considers the rules of corporate voting. Although activist decisions are driven by asset price effects, they are not independent from those rules. Activist decisions are ultimately managerial decisions and managers respond to shareholders through the rules of shareholder democracy. The OSOV rule of shareholder democracy enters into a corporation's activist decisions through two channels. First, it indirectly informs the determination of the shareholder majoritarian demand and the asset price effects that arise thereof. These effects are not anchored to the number of shareholders supporting a certain moral good, but to the percentage of shares that each shareholder owns. Second, managers anticipate that the failure to satisfy the shareholder majoritarian demand increases the likelihood of retaliatory actions that the shareholders can exercise through their voting powers, including removing managers, voting against them in a control context, or denying voting support in events requiring shareholder approval.[211] Further, failure to comply with the funds' demands can also risk having firms excluded from the funds' portfolios as fund managers can create portfolios that meet certain criteria (even in the context of index investing).[212]

Under either channel, the voting power of index funds is likely to be pivotal, especially if one considers that the way the funds act is by sharing common "policies" regarding various kinds of decisions that the companies in their portfolios must make.[213] At the same time, the anticipation of the funds' pivotality and coordinated influence provides strong incentives to managers to conform to the preferences of the fund agents.

Finally, today, the ability of index funds to exercise influence over society is no longer just an indirect, and to some extent residual, possibility. Instead, it has morphed into a *direct* ability, one that that is precluded to any other citizen and is exercised through the appropriation of corporations' citizenship performatives. Under this conclusion, we can now return to the issue of good corporate citizenship.

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211. Dorothy Lund provides anecdotal evidence that index funds increasingly exercise this kind of lever in "coercing" corporations into a certain kind of activism. *See* Lund, *supra* note 16, at 2, 33–35.

212. A most recent example of this was Tesla exclusion from the S&P 500 ESG Index (despite Tesla being the fifth largest holding in the S&P 500 index). *See* Matt McFarland, *S&P 500's ESG Index Boots Tesla*, CNN BUS., (May 18, 2022, 5:06 PM), https://www.cnn.com/2022/05/18/cars/tesla-sp-500-esg/index.html [https://perma.cc/DYC3-RLK3].

213. *See* Coates, *supra* note 28 (manuscript at 13–15) (explaining that index funds can achieve significant informal coordination over many issues, while this coordination process is reinforced by the actual votes they cast. Because these votes are public, each fund can obtain strong signals about the other funds' views, without any explicit collusion.) *See also* Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721 (2019) (predicting that voting in most public companies will soon come to be dominated by the Big Three).

IV. CAN *GOOD* CORPORATIONS BE *GOOD* CITIZENS?

Part III has shown that corporate citizenship is compatible with economic efficiency. The "price" to pay for it, however, is exclusive conformity with the moral preferences of a handful of investors. The question we pursue in this Part is whether corporate conformity in activist engagement is compatible with good corporate citizenship—abidance by the principle of political freedom and political equality.[214] Unlike Coates, we are not per se interested in the profile of legitimacy and responsibility that the "Problem of Twelve" raises for index funds.[215] What interests us is how this problem intersects with the newly found civic agency of the corporation *qua* supercitizen. Unlike woke accounts, we do not dogmatically assume that any intersection between corporations and the political or moral discourse is necessarily "bad."[216] We have already shown that this intersection does not betray the purpose for which corporations were established, contrary to what popular narratives argue. Corporate activism increases, rather than reduces, shareholder value. But can "good corporations" also be "good citizens"?

A. Freedom Test

As we saw above, the principle of political freedom provides that each citizen's contribution to the choice of divisive societal aims be freed from actual or *possible* hindrance.[217] We also saw that what matters for the principle violation is an individual's "defenseless susceptibility" to hindrance—in Pettit's terms a failed eyeball test.[218] The question, then, is whether corporate conformity results in any form of hindrance vis-à-vis citizens at large and/or the ordered collection of stakeholder-citizens. Call this the "freedom test."

We begin by excluding the violation of the principle vis-à-vis citizens at large (the external dimension of corporate citizenship). Notwithstanding their economic means and resources, corporations lack the systematic ability to coerce political views, silence "dissenters" or otherwise interfere with the exercise of citizens' political freedom. They do not have the means of totalitarian states or even just less-than-democratic regimes. In spite of

214. *See supra* Section II.B.
215. *See* Coates, *supra* note 28 (manuscript at 2, 19).
216. *See supra* Section I.C.
217. *See supra* text accompanying notes 141–142.
218. *See supra* note 143 and accompanying text.

anti-woke narratives ringing alarm bells,[219] we see no room for external violations of political freedom by the corporate supercitizen.

The internal dimension—concerning citizen-stakeholders—of the freedom test is more complex. To see why, we need to first go back to the ideal of a pluralistic morality market. As we saw, no issue of freedom violation would arise under this ideal, because there would be a presumption of stakeholder consent to the choices taken by corporations *qua* citizens.[220]

With corporate conformity, that presumption no longer holds. Assuming otherwise would mean posing that the millions of individuals who interact with corporations on a daily basis share the same moral preferences of the restricted group of agents that directs that conformity. This does not exclude the possibility that many individuals may partake of those preferences—at least if one is to simplify things by considering the coarse division between progressive and conservative preferences.[221] But corporate conformity simultaneously, pro-actively, excludes all those who do not agree with the side chosen by a small group of investors. "Dissenters" are left with no exit options, due to the lack of alternatives in corporations' citizenship performatives under conformist activist engagement.[222] Of course, minority stakeholders always have the "option" to leave the public corporation context, but in the case of employees or other stakeholders that are economically dependent on the corporation (e.g., small suppliers), that might very well be an unaffordable option. And, anyway, the fact of being forced to choose this option would qualify as an obstacle to freedom in Pettit's sense.[223]

These dynamics raise enough red flags to suggest that one should presume the existence of an internal freedom problem under corporate conformity. Can one exclude the possibility that corporate conformity penalizes the choice of non-conformist options by minority stakeholders, or just threatens to penalize these choices, or deceives them about available options? If one cannot, as we think, corporate conformity should be assumed to entail an internal violation of the principle of political freedom.[224] We also emphasize that the real worry here does not come from the few publicized cases where corporations openly fired or marginalized

219. *See* Ramaswamy, *supra* note 104, at 327 ("Our prosperity and individual freedom depend on the integrity of capitalism. Our unity and political freedoms depend on the integrity of democracy. With the birth of woke capitalism, we lose both and are left with neither.")

220. *See supra* text accompanying notes 165–166.

221. *See supra* text accompanying note 172.

222. For a discussion of the limited exit options offered by private corporations, even though these companies might be less subject to the constraints of corporate conformity, *see supra* note 31 and *infra* text accompanying notes 260–263.

223. *See supra* text accompanying note 144.

224. Of course, this does not mean that this presumption could not be rebutted, on a case-by-case base. But rebuttal would require an inquiry into the above questions which delivers a positive answer.

employees for voicing views that did not align with the organization's citizenship performatives.[225] For all the publicity these cases received, who knows how many employees are acting in self-restraint in light of *possible* interference? To the extent the number of these employees is not negligible,[226] as we think, "good corporations" do not pass the freedom test.

B. Equality Test

1. External and Internal Equality

As we saw above, [227] political equality has an essential public connotation, meaning that citizens' violations of the principle tend to be confined to the public sphere as the designated locus of aggregation of citizens' interests. It follows that the scope for equality violations by the corporate supercitizen—call this the equality test—is restricted to the external dimension: the relationship between the corporation-entity and citizens at large.

The corporate organization, as other private organizations, is not held to respect equality in its internal adjudication process, vis-à-vis the ordered collection of stakeholder-citizens. Only shareholders have voting rights. And despite the shareholder "democracy" appellative, corporate voting rules are "plutocratic": shareholders' right to vote is based on the OSOV principle, not the OPOV principle of electoral governance. The idea of an

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225. James Damore is perhaps the most famous among these cases: the Google engineer who was fired for circulating a memo in which he argued that Google's employment policies gave too much weight to discrimination when explaining gender disparities in recruitment and promotion. *See, e.g.*, Paul Lewis, *'I See Things Differently': James Damore on His Autism and the Google Memo*, THE GUARDIAN (Nov. 17, 2017, 1:00PM), https://www.theguardian.com/technology/2017/nov/16/james-damore-google-memo-interview-autism-regrets [https://perma.cc/H5DW-43YV]. The remarks of Jack Dorsey, co-founder and former CEO of Twitter, that Twitter's conservative employees are afraid to express their opinions also received widespread coverage. *See* Kristine Philips, *Twitter CEO Jack Dorsey Admits 'Left-leaning' Bias but Says it Doesn't Influence Company Policy*, WASH. POST (Aug. 19, 2018, 4:37 PM), https://www.washingtonpost.com/technology/2018/08/19/twitter-ceo-jack-dorsey-admits-left-leaning-bias-says-it-doesnt-influence-company-policy/ [https://perma.cc/BV7L-PR4P].

226. It is unclear whether state laws that prohibit discrimination based on political speech can provide a correction here. *See generally* Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295 (2012) (providing a detailed overview of these statutes). *See also* Richard Hanania, *The Weakness of Conservative Anti-Wokeness*, AM. AFFS. (Nov. 20, 2021), https://americanaffairsjournal.org/2021/11/the-weakness-of-conservative-anti-wokeness/ [https://perma.cc/Z8N2-PLAY] (observing that California, the state in which Damore was employed, already prohibits discrimination based on political views, but this did not prevent Google from firing Damore). According to Hanania, the problem is that civil rights laws were created to protect freedom instances on the "woke side"; hence, they would be useless to address the problems of current corporate conformity. *See id.* We think the problem is different and independent from political characterization; civil rights laws tend to require evidence of actual discrimination, while the real problem with corporate conformity is difficult-to-observe self-censorship.

227. *See supra* text accompanying note 150.

efficient division of labor has provided the traditional argument to justify these different aggregation rules.[228] Overall, societal choices belong to the political sphere—the sphere of citizenship, legitimate disagreement, and political equality. Economic activities are the realm of corporations. In this realm, unlike in the political sphere, shareholder-voters can be safely assumed to partake of the same commitment to *one* end: shareholder value maximization.[229] Shareholders may disagree on the means to achieve this end, but not on its desirability. Under this consensus assumption,[230] it makes sense that a voting system based on incentives[231] may prevail over one based on egalitarian standing, justifying a deviation from the general principle of political equality.

With the rise of activist capitalism, however, the division of labor between what belongs to the corporate sphere and the political sphere has been lost. The adjudication process of divisive moral issues that takes place *within* the corporation's ordered collection of citizens now matters for citizens at large as it may influence how those issues are adjudicated in the public sphere. To this extent, that process can no longer be considered exempt from equality issues. This does not mean that corporate activism imports political equality into the corporation *tout court*—the corporation's economic decisions continue to be unaffected by equality issues. But the principle does matter for the corporation's choices that are determinative of

228. *Cf.* David G. Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social Responsibility After* Citizens United, 89 N.C. L. REV. 1197 (2011) (arguing that by removing the insulation of the political process from corporate influence, *Citizens United* also necessarily undermines the argument that socially responsible activities belong to the political process and profit-maximizing activities are the realm of corporations).

229. This statement does not go without qualifiers. *See* Bratton & Sepe, *supra* note 191, at 707–11 (discussing conditions under which shareholders may not share the same objective function). But in the economic domain, the one share, one vote rule provides a correction to those qualifiers. *See* Peter M. DeMarzo, *Majority Voting and Corporate Control: The Rule of the Dominant Shareholder*, 60 REV. ECON. STUD. 713, 713 (1993) (showing that a dominant blockholder with a financial incentive to move the firm to a production plan that maximizes value can build a majority coalition and solve shareholder disagreement on the firm's objective function).

230. It is interesting to observe that a similar consensus assumption may be seen as justifying the deviation from egalitarian principles within religious organizations.

231. On the one hand, the OSOV rule gives more voice to those with "more skin in the game" and hence the best incentives to devote time and effort to corporate affairs. *See, e.g.*, Grant M. Hayden & Matthew T. Bodie, *One Share, One Vote and the False Promise of Shareholder Homogeneity*, 30 CARDOZO L. REV. 445, 475 (2008) (arguing that "'one share, one vote' is a 'logical consequence' of the theory of shareholder primacy"). On the other hand, *all* shareholders, even if in the minority, still proportionally benefit from successful corporate outcomes. *Cf.* Jill E. Fisch & Simone M. Sepe, *Shareholder Collaboration*, 98 TEX. L. REV. 863, 903 (2020) (arguing that all shareholders are likely to benefit from shareholder "collaboration" with corporate management as "the equity contract provides a premium to all shareholders . . . (proportionally to their equity stake), leveling the bargaining power of all interested parties in the distribution of the gains arising from deliberation"). Further, because shareholders are residual claimants, maximizing shareholder value is assumed to benefit all of the firm's stakeholders. For a definitive exposition of this argument, see FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 36–39, 67–69 (1991).

citizenship performatives, as these performatives unfold in the designated locus of the aggregation of citizens' interests, the public sphere, and vis-à-vis citizens at large.

2. *Formal and Substantial Equality*

Under the existential complexity of the corporate supercitizen, the equality test boils down to whether the corporation's internal adjudication process of divisive moral goods is compatible with the principle of political equality. In examining the answer, it is useful to distinguish between *formal* and *substantial* compatibility. The formal aspect of the equality test requires that an adjudication process be compatible with the requirements of procedural fairness that operationalize political equality (e.g., the OPOV principle).[232] Substantial compatibility, instead, requires that, despite the violation of fairness requirements, the outcome of a political or moral decision be the same that would have obtained if those requirements had been respected. In other words, equality is substantially satisfied when the outcome chosen under a formally non-egalitarian aggregation process is representative of (i.e., is the same or not too distant from) the outcome that would have been chosen under an egalitarian aggregation process.

Now, it is quite apparent that from a *formal* perspective, the adjudication process of the corporation's citizenship performatives fails the equality test. As we saw in Part III, that process is driven by the calculus of the majoritarian *economic* demand for moral goods, which is determined based on the vested economic interests of different corporate constituencies rather than equal consideration of their moral preferences. Corporate conformity is the result of that process, as the economic interests of the largest investors outweigh that of any other constituency.

But could that process be compatible with substantial equality? A positive answer here entails that the corporate conformity outcome can be considered representative of what the majority of corporate constituencies would have chosen under principles of procedural fairness (i.e., if they had all been entitled to a say in the corporation's decisions about citizenship performatives). We do not exclude that some activist corporations may pass the test of substantial equality, especially in the case of corporations headquartered in, or with a concentration of economic activities in, states with larger Democratic Party majorities.[233] As with the freedom test,

232. *See supra* text accompanying notes 146–147.

233. The global nature of many public corporations is not incompatible with a local concentration of non-financial stakeholders such as employees. For example, Amazon's investments in jobs and infrastructure in the states of Washington and California during the past decade have largely

however, we argue that, as a general matter, one should start from the presumption that activist corporations fail the substantial equality test under corporate conformity. Assuming otherwise would mean posing that the outcome that obtains under a system where the preferences of some individuals—in fact, a board-size minority—counts disproportionally more than the preferences of any other individual should be expected to deliver the same result as an egalitarian system where each one counts as one. It would be the same as concluding that one should expect no differences in terms of outcomes between the "householder (or census) franchise" that was in place in England in the nineteenth century[234] and modern democracies founded on the OPOV principle. Hence, the corporate supercitizen can be expected to fail both the formal and substantial aspects of the equality test.

3. *Equality Losses*

We can finally go back to the Bill Gates objection: the question of why corporations would violate the principle of political equality in deploying huge economic resources into political speech while wealthy ordinary citizens would not.[235] The source of the violation is not the corporation's political activity per se, as the argument of Justice Stevens—and the copious literature that has built on it[236]—suggests. Instead, it is the inegalitarian adjudication process through which the corporation decides to engage in that citizenship performative; a process where, in the end, only the preferences of the largest investors matter.

Going back to the outcome that would be obtained under a pluralistic equilibrium helps to fully grasp the implication of this conclusion. With a pluralistic morality market, the fact that some corporations might serve as a megaphone for some constituencies would have a limited impact on equal political activity because one could assume that other corporations would serve as a megaphone for other constituencies. But with corporate conformity, citizens realize that a small group of investors has the corporate megaphone at their *exclusive* disposal to influence the public discourse around divisive societal ends. It is under the weight of this inequality that

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outnumbered the company's investments in other states. *See* Todd Bishop, *Ranked: The States Where Amazon Has Invested Most in Jobs and Infrastructure in the Past Decade*, GEEKWIRE (Aug. 13, 2021, 6:14 AM), https://www.geekwire.com/2021/ranked-states-amazon-invested-jobs-infrastructure-past-decade/ [https://perma.cc/9CJ6-YQ84].

234. The householder (or census) franchise was introduced in England by the Reform Act of 1832, which granted voting rights to all householders who paid a yearly rental of 10 pounds or more. *See The Reform Act 1832*, UK PARLIAMENT, https://www.parliament.uk/about/living-heritage/evolutionofparliament/houseofcommons/reformacts/overview/reformact1832 [https://perma.cc/P8A9-2YQL].

235. *See supra* note 154 and accompanying text.

236. *See supra* note 153.

citizens can be expected to "lose faith in their capacity, as citizens, to influence public policy"[237] and hence suffer a democratic loss.

Now, we recognize that the concern that spending may determine *voting* outcomes seems to have been overstated. Voters' conduct is only partly and noisily influenced by campaign spending. But this does not exclude the fact that the "Stevens effect" might be in place in other forms the corporation's citizenship performatives now take. These performatives mostly intervene in the context of the public debate around divisive societal ends, often through the attempted monopolization of that debate via pronouncements, boycotting, social networking, media messaging, and so on.[238] Similar to the problem with freedom violations, the Stevens effect is likely to be subtle. As we saw, inequality in deliberation can influence citizens' beliefs,[239] which are not as easily observable as outcomes. Hence, observing a certain outcome is not going to be informative about the level of belief distortion that might have taken place because of corporate conformity.

Then there is the risk of direct attempts to interfere with the democratic adjudication of divisive societal aims. Consider, for example, the anecdotal evidence surveyed in this Article about recent corporate threats of economic retaliation (and actual economic retaliation) against the adoption or implementation of "non-conforming" state laws.[240] We call this the "bargaining effect" of corporate activism. Even in this case, the problem is not corporate intervention per se, but the conformist, plutocratic process behind that intervention. The problem is also not confined to visible interference with democratic outcomes. Rather, it is exacerbated by the anticipation of the "bargaining effect" and the impact this may have on legislators' choices, which is also a subtle distortion that might be difficult to detect.[241]

V. BETTER SUPERCITIZENS

To be clear, we do not think the activist corporation is a danger for American democracy, as alarmingly put by woke accounts.[242] Not yet, at

237. *See* Citizens United v. FEC, 558 U.S. 310, 470 (2010) (Stevens, J., concurring in part and dissenting in part).

238. *See supra* Section I.A.2.

239. *See supra* text accompanying note 148.

240. *See supra* text accompanying notes 53, 58–60.

241. When Amazon announced it was going to open a second headquarters, over 200 cities fiercely competed to win the HQ2 contest. *See* Nathan Bomey, *Could your State Land 50,000 Amazon Jobs? Headquarters Contest Kicks Off*, USA TODAY, (Sept. 7, 2017. 1:26 PM), https://www.usatoday.com/story/money/2017/09/07/could-your-state-land-50-000-amazon-jobs-headquarters-contest-kicks-off/641276001/ [https://perma.cc/8H4D-MRKL]. Amazon's example makes it tangible what the costs involved by the bargaining effects might be and hence what legislators could be willing to do to avoid those costs.

242. *See supra* text accompanying note 106.

least. Neither do we believe that activism is the result of a corrupt alliance between big business and Washington to pass agendas that otherwise Congress could never pass.[243] In fact, the expansive phase of corporate activism began *in reaction* to the politics of the prior Trump administration.[244] We are equally skeptical that the current progressive conformity in corporate activism might be instrumental to offset what some see as the systematic conservative bias of the U.S. electoral system.[245] Examining whether this view is accurate is beyond the scope of this Article. But a solution that delegates "system corrections" to a small group of investors seems to us no solution at all.

Corporate conformity does not threaten democracy but does make it weaker—potentially undermining the political freedom of employees and other stakeholders and introducing more or less subtle distortions in the public adjudication of divisive societal issues. We do not know the magnitude of these democratic losses. Framing the problem in quantitative terms, however, is wrong.

The reason we want to pay attention to bad corporate citizenship is not the larger or smaller number of employees that have been fired because they did not "conform." Neither is it the actual number of cases in which corporations have made a difference to state elections or actions. Instead, the argument is qualitative. In a pluralistic society, "where there is significant diversity among persons in the conditions of well-being, and where there is disagreement,"[246] it must not only be the case that people are treated as free and equal, *they must be able to see* they are treated as free and equal.[247] Otherwise, the way in which disagreement is addressed might no longer be considered legitimate, raising questions on the integrity of democratic institutions.[248]

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243. *See supra* text accompanying note 107.

244. Corporations' response to Trump's immigration ban was perhaps the most salient moment of this phase. *See, e.g.*, Jena McGregor, *Deeply Concerned: Corporate America Responds to Trump's Travel Ban*, WASH. POST. (Jan. 30, 2017, 4:58 PM), https://www.washingtonpost.com/news/on-leadership/wp/2017/01/30/deeply-concerned-corporate-america-responds-to-trumps-travel-ban/ [https://perma.cc/YVH9-GEBN].

245. In other words, one should look at corporate activism as a system effect. *See* ADRIAN VERMEULE, THE SYSTEM OF THE CONSTITUTION 15 (2011) ("System effects arise either when what is true of the members of an aggregate is not true of the aggregate, or when what is true of the aggregate is not true of the members.")

246. *See* THOMAS CHRISTIANO, THE CONSTITUTION OF EQUALITY: DEMOCRATIC AUTHORITY AND ITS LIMITS 46 (2008) ("[S]ocial justice requires that justice must not only be done, it must be seen to be done. In the case of justice as equality, it must not only be the case that people are treated as equals, they must be able to see that they are treated as equals.").

247. *See id.* Christiano articulates this argument to explain why social justice needs equality to be public, i.e., to be seen that it is done rather than just done. *See id.* at 75–131. We extend this requirement to the principle of freedom as well.

248. *See id.*

This is the risk with corporate conformity: that people can see that *some* are freer and more equal.[249] This is enough to trigger a process of distrust in democratic institutions. In the short term, this is likely to further exacerbate political polarization—the more contrarian an individual is, the more susceptible she will be to the freedom and inequality losses brought about by corporate conformity. In the longer term, the effects are difficult to predict. But the dramatic events of January 6th, 2021 have shown us the danger of underestimating what may happen when people even just *believe* they can no longer trust democratic institutions.

On this understanding of the problems raised by corporate conformity, in this Part we investigate possible remedies. We first explain why we see little room for self-corrections—whether coming from investors themselves or broader market dynamics that take into account the role of private corporations. Next, we discount the viability of mandatory interventions, whether designed to repristinate a system of "moral neutrality of the corporation" or, more limitedly, to restrict or modify the voting power of index funds. Lastly, we explore possible avenues to import remedial democratic features in the adjudication process of corporations' activist initiatives. It is unclear, however, whether these proposals can succeed at making the activist corporation a better citizen without undermining its ability to remain a good corporation.

This conclusion revisits the very question that has confronted corporate law scholars for decades in matters of corporate social responsibility: whether the pursuit of broader social purposes is compatible with economic efficiency.[250] There is a twist, however. Today's question is not whether good corporations can profitably pursue a broader social purpose. It is whether doing so is compatible with what we expect from good citizens in a well-functioning democracy. The alternative, of course, is redefining what we expect from good corporations[251]—a debate that exceeds the scope of this Article. We suspect, however, that whether we want good corporations or good supercitizens might well have become another focal point of legitimate disagreement in modern societies.

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249. The fact that some equality losses might be less visible does not contradict this—as long as there are some visible cases, people may infer there are also subtle cases. Hence, subtle cases make the problem more, not less, severe.

250. *See supra* text accompanying note 71.

251. We warn, however, that simply replacing shareholder wealth maximization with shareholder *welfare* maximization might not be enough. *See supra* note 83 and accompanying text. Under the existing rules of corporate voting, the weight of shareholder welfare would still be determined by their economic interest in the corporation. Hence, the welfare of index funds would matter more, which would leave the corporate conformity result unchanged.

A. Why Self-Correction is Unlikely

Could the development of a robust public discourse around the democratic implications of corporate conformity prompt a self-correction process on the side of investors? This is a complex question as it first requires an understanding of the motivations behind the funds' moral portfolio choices.[252] Space constraints prevent this Article from exploring these motivations in detail. A brief discussion of the main working hypotheses, however, is sufficient to raise major doubts on the possibility of self-correction.

One hypothesis, consistent with Coates' analysis of the Problem of Twelve,[253] is that a few senior people at the top of the funds' internal hierarchy direct corporate conformity based on their personal preferences. If the motivation of these agents is exclusively moral, we don't see why they would ever have incentives to change their posture toward activist initiatives.[254] If the motivation is economic—for example, because of the funds' interests in promoting and exploiting an activist bubble—the choices of fund agents would be constrained by asset pricing dynamics. Indeed, only by acting in a coordinated manner can the funds fully appropriate the liquidity effects arising from moral portfolio choices.[255] Put differently, no profitable deviation exists for some index funds to invest in contrarian moral goods and add pluralism to the morality market, in the same way as it does not exist for activist corporations.

The competing hypothesis is that index funds themselves respond to a moral demand: one coming from the funds' beneficiary investors. In particular, some scholars have suggested that the funds' progressive posture aims at winning "the soon-to-accumulate assets of the millennial generation, who place a significant premium on social issues in their economic lives."[256] Others have suggested that the real driving force behind the funds' activist demand comes from "corporate and public pension

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252. *See supra* Section III.B.3.

253. *See supra* text accompanying notes 205–210.

254. Stephen Bainbridge seems to think this is the case, suggesting that "what we're seeing is the culmination of what Christopher Lasch called *The Revolt of the Elites*": a split between the most affluent components of society and the masses, under which the former would regard the latter with "mingled scorn and apprehension." *See* Stephen Bainbridge, *Senator Marco Rubio's "Mind Your Own Business Act" Would Make Bad Law and is Premised on Dumb Policy Grounds*, PROFESSORBAINBRIDGE.COM (Sept. 24, 2021), https://www.professorbainbridge.com/professorbainbridgecom/2021/09/senator-marco-rubios-mind-your-own-business-act-would-make-bad-law-and-is-premised-on-dumb-policy-gr.html [https://perma.cc/8DT3-2T2G] (quoting CHRISTOPHER LASCH, THE REVOLT OF THE ELITES: AND THE BETRAYAL OF DEMOCRACY (1996)).

255. This might explain why index funds take a consensus approach in their voting and governance interventions. *See* Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493, 516 (2018).

256. *See* Barzuza et al., *supra* note 65, at 1244.

plans," which account for most of the funds' revenues.[257] If either explanation is correct, index funds would have even less room for discretionary choices, as they would be constrained by the exclusionary nature of moral goods in the same way corporations are. If the funds supported progressive moral goods at some corporations and conservative moral goods at others, this would destroy their ability to attract either progressive or conservative beneficiary investors.[258]

Therefore, investor-driven self-corrections to corporate conformity seems an unlikely possibility at best. One could object, however, that there are other possibilities. For example, there are mutual funds out there that specialize in ethical investing based on conservative values.[259] We have also not yet considered the role played by private companies in the morality market. Some among the largest and most successful private companies, like Chick-fil-A or Hobby Lobby, are notoriously engaged in the defense of conservative or even ultra-conservative values.[260]

The first phenomenon seems limited enough to exclude the possibility that it might produce any meaningful change in public corporations' activist decisions. But we are also skeptical that pluralistic options may come from non-publicly listed corporations.

In theory, in private companies, the urgency to cater to the majoritarian economic demand might be compensated by the willingness of the controlling shareholder to internalize the cost of minority demands for contrarian moral goods. These corporations also often operate at a more local or regional level. Hence, they may cater to a local consumer or worker base that may strongly support the demand for diverse moral goods. Both these factors could cause the production calculus of moral goods in private companies to change from one company to the other and hence add pluralism.

In practice, however, it seems unlikely that private companies might provide an effective corrective to corporate conformity. As we saw, public corporations are now large economies.[261] The financial resources of even

257. *See* Lund, *supra* note 16, at 4–5.

258. *See supra* Section III.B.1.

259. These funds, for example, exclude companies that support abortion or have any involvement with the pornography industry. *See* Jeff Cox, *For this Fund, Abortion and Porn Out, Profits In*, CNBC (Nov. 12, 2013, 6:00 AM), https://www.cnbc.com/2013/11/11/for-this-fund-abortion-and-porn-out-profits-in.html [https://perma.cc/LU4M-SX3D].

260. *See, e.g.*, Lauren Kelley, *Five Radical Right-Wing Food Companies*, SALON (July 24, 2012, 2:39 PM), https://www.salon.com/2012/07/24/right_wingers_food_companies_salpart/ [https://perma.cc/CD6U-QPCD].

261. *See supra* note 135.

the largest private companies are smaller by the trillion.[262] Therefore, while private companies outnumber public companies, it seems difficult to imagine that the pluralistic options they might add might be meaningful enough to balance out the distortionary effects of corporate conformity. Further, it is not entirely clear that the majoritarian investor demand would have only limited effect on private companies. These companies could anticipate the costs of sustaining a contrarian "identity" if they ever decided to become public, due to the negative asset price effects these companies would suffer from moral portfolios.[263] As a result, private companies could also fail to be fully immune from the effect of corporate conformity, which further reduces the likelihood of market-driven corrections.

B. Moral Neutrality and other Mandates

One radical solution to corporate conformity—of course, unless one wants to consider the equally radical idea of redefining what a "good corporation" is—would be to revert to a model of moral neutrality. Under this model, as we saw, the assumption is that of a division of labor: markets are designed to cater to our economic sphere, democratic institutions should deal with our moral and political sphere, and no interference between the two is permitted.

It is not clear, however, how this solution could be implemented. On the one hand, it seems unrealistic to imagine that corporations will spontaneously go back to a model of moral neutrality when their largest investors demand otherwise. On the other hand, a mandatory model of moral neutrality seems normatively undesirable, as it is unclear how regulators could draw the line between a corporation's economic and moral decisions, while avoiding inefficient one-size-fits-all solutions.[264]

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262. For example, the net worth of Chick-fil-A is $15 billion. Hetal Kabra, *Chick-fil-A Net Worth 2021*, MD DAILY RECORD (July 17, 2021), https://mddailyrecord.com/chick-fil-a-net-worth-2021-2022-2023 [https://perma.cc/U73B-P8VE]. Even the Cargill family, who collectively own a commanding majority of Cargill, Inc., the largest privately held company in the United States, have a net worth dramatically smaller than the valuations of their public analogues. *See Cargill-Macmillan Family*, profile within *Billion-Dollar Dynasties: These Are The Richest Families In America*, FORBES (Dec. 17, 2020, 6:00 AM), https://www.forbes.com/profile/cargill-macmillan-1/?sh=3c28fb2f23b6 [https://perma.cc/ DY9Z-PADF]; *America's Largest Privately Held Companies*, FORBES, https://www.forbes.com/largest-private-companies/list/#tab:rank [https://perma.cc/Q6DH-XSW3] (last visited Sept. 9, 2022).

263. Truett Cathy, the founder of Chick-fil-A, might thus have had an economic reason to contractually bind the company to stay private. *See* Kate Taylor, *Why Chick-fil-A Will Never Go Public*, BUS. INSIDER (Jan. 28, 2016, 1:06 PM), https://www.businessinsider.com/chick-fil-a-will-never-go-public-2016-1 [https://perma.cc/8ZUL-8SC5].

264. A moral neutrality model could also prevent corporations from producing non-divisive moral goods, including in cases in which a corporation's production activity is not separable from its damage-generating activity (think, for example, of pollution that is produced by the corporation itself). *See* Hart

Nonetheless, the moral neutrality model provides a useful benchmark to evaluate the soundness of alternative policy options. Take, for example, the proposals, advanced by several scholars, to restrict or otherwise dilute the voting power of index funds.[265] These proposals are concerned with the effects of index funds' concentrated power on corporate governance rather than corporate activism. But could they also serve to advance a more morally neutral corporate model?

Restricting the voting power of index funds would reduce their influence on corporate voting and hence the funds' ability to pressure firms for conformist activism.[266] But unless voting restrictions were accompanied by ownership caps,[267] they would have no effect on the asset pricing channel through which index funds are able to influence a corporation's activist decision. And even assuming that a package of measures could be introduced to curb the control of index funds on corporations, it is unclear what consequences this would produce. These measures could boost the ability of other investors such as hedge funds to gain control over moral decisions.[268] As a result, the principal (i.e., the party with the power to determine corporations' activist choices) would change, but, if we assume the existence of a cultural correlation across investors (i.e., that investors belonging to different classes tend to share similar profit maximizing preferences), corporate conformity could very well stay.

Another possible regulatory intervention, which has recently gained traction in the broader debate around excessive index fund power,[269] is the implementation of pass-through voting or survey voting. Under these proposals, voting rights would pass from fund managers to the beneficiary

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& Zingales, *supra* note 83, at 248–49. In these cases, the corporation is the party best suited to mitigate damages and hence moral neutrality would be problematic.

265. *See, e.g.*, Sean J. Griffith, *Opt-in Stewardship: Toward an Optimal Delegation of Mutual Fund Voting Authority*, 98 TEX. L. REV. 983, 983 (2020) (proposing that mutual funds should not vote the shares they hold for their beneficiary owners on environmental and social issues because "meaningful information is not produced nor can mutual funds assume a common investor purpose" on these issues); Lund, *supra* note 255, at 506, 528–30 (suggesting voting restrictions for passive index funds on the ground that their weak incentives to invest in monitoring will "distort" the market for corporate influence).

266. Less index fund influence would not per se add pluralistic options to the morality market, but could induce corporations to maintain a more morally neutral balance in their approaches to activism in the attempt not to alienate constituencies with different moral preferences. Put differently, if the rise of index funds explains the rise of the activist corporation, neutralizing the effects of the former would help restore the moral neutrality that for years has represented the standard in the U.S. marketplace

267. Ownership caps have been proposed to curb the power of index funds but present their own problems. *See* Coates, *supra* note 28 (manuscript at 21–22) (noting that ownership caps could further reduce the weak incentives of index funds to monitor companies in their portfolios).

268. *See id.* (manuscript at 21).

269. *See, e.g.*, Jeff Sommer, *Shareholder Democracy is Getting Bigger Trial Runs*, N.Y. TIMES (Oct. 15, 2021), https://www.nytimes.com/2021/10/15/business/shareholder-democracy-stocks.html [https://perma.cc/4YJB-ZK2M] (surveying both private initiatives and regulatory proposals moving in the direction of pass-through voting).

investors.[270] The intuition behind this intervention is that leveraging the diversity of the funds' investors—which represent a sizable share of society at large, including different age and political groups[271]—would help mitigate concerns about the concentration of index funds' power and increase heterogeneity in funds' decision-making.[272] Could pass-through voting also help add pluralistic options to the morality market?

The difficulty in answering this question is understanding whether the beneficiary investors would exercise their voting rights according to the paradigm of *homo economicus* or *homo moralis*.[273] In the first case, diversity would not matter much because the beneficiary investors would have the same incentives as index funds' moral agents to vote uniformly so as to appropriate the liquidity effects of moral portfolios. In the second case, it is possible that different groups, or "coalitions," of beneficiary investors could demand different moral goods, e.g., more progressive and more conservative activist initiatives. One could then imagine a separating equilibrium in which some index funds and corporations specialize in catering to the progressive coalition and others to the conservative coalition.[274]

Even under this optimistic scenario, however, we are not sure activist corporations would pass the equality test. This is because a system of pass-through voting would still channel the beneficiary investors' moral preferences based on the weight of their investments, not the equal consideration of preferences. When combined with the specific traits of beneficiary investors—who in many cases are employee-investors with limited interests in managing, or even knowledge of, their index fund

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270. *See, e.g.*, Caleb N. Griffin, *We Three Kings: Disintermediating Voting at the Three Index Fund Giants*, 79 MD. L. REV. 954, 989–96 (2020); Jill E. Fisch, *The Uncertain Stewardship Potential of Index Funds* (November 2020) (European Corp. Governance Inst., Working Paper No. 490/2020, 2020) https://ecgi.global/sites/default/files/working_papers/documents/fischfinal_1.pdf [https://perma.cc/2YUA-CVKA] (considering pass-through voting to enhance the stewardship potential of index funds).

271. *See* Griffin, *supra* note 270, at 968. This is a strong assumption: in 2021, only 45.4% of U.S. households owned shares of mutual funds. *See Share of Households Owning Mutual Funds in the United States from 1980 to 2021*, STATISTA, https://www.statista.com/statistics/246224/mutual-funds-owned-by-american-households/ [https://perma.cc/D9C2-AFHN] (last visited Sept. 9, 2022). Thus, it is not entirely clear this percentage is large enough to be considered representative when over half of American households are not invested in mutual funds.

272. *See* Griffin, *supra* note 270, at 996.

273. *See supra* note 71 and accompanying text.

274. Of course, this would require that the asset price effects arising from the moral portfolio choices of the two coalitions of investors were roughly equivalent.

investments[275]—pass-through voting could thus result in only the wealthiest among the beneficiary investors exercising their voting rights.[276]

C. *Importing Democracy*

The above discussion suggests there might be no way of remedying the distortionary effects of corporate conformity without considering possible departures from the OSOV rule of shareholder democracy. This rule has served U.S. corporations well in the domain of economic rights and decisions for over two centuries. Today's corporations, however, are increasingly engaged in the citizens' domain of contributing to divisive societal choices. The OSOV rule has been automatically carried over to this entirely different domain, even though the justification for the rule's deviation from the egalitarian OPOV principles, as we saw above, does not hold within it.[277]

We thus conclude our study of corporate activism by exploring two policy proposals that would help democratize corporations' activist decisions. The first proposal envisions the replacement of the OSOV majority rule, *for activist decisions only*, with a democratic OPOV majority rule. The second proposal suggests turning shareholder democracy into stakeholder democracy *for corporate decisions about activist issues*.

We recognize that either proposal is fraught with difficulties, from issues of feasibility to more radical questions about their compatibility with the idea of the corporation as we know it today. But as we remarked at the beginning of this Part, there is no easy way around these questions if one is to take the implications of corporate conformity seriously. Thus, the proposals that follow should be considered as an exercise that exposes what it would take to make corporations better citizens—an exercise that should help us decide whether we want good corporations or good supercitizens.

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275. *See* Fisch, *supra* note 270, at 122–23 (reporting that "94% of mutual fund investors held their funds inside employer-sponsored retirement plans, IRAs, and variable annuities" and examining the implications of this evidence on both the incentives of mutual fund investors to be actively engaged and their ability to do so); *see also* Jennifer S. Taub, *Able but Not Willing: The Failure of Mutual Fund Advisers to Advocate for Shareholders' Rights*', 34 J. CORP. L. 843, 888–89 (2009) (arguing that pass-through voting would be an "ineffective" measure to address the perceived failure of mutual fund advisers to act in the funds' best interest, due to "[t]he passivity of individual mutual fund customers").

276. *See* Fisch, *supra* note 270, at 124–25 (observing that limited voting participation clearly cuts against the alleged democratizing effects of pass-through voting, especially considering that there are "reasons to question whether the preferences of wealthy retail shareholders . . . mirror those of less sophisticated workplace-only investors.").

277. *See supra* Section IV.A.1.

1. Whither Democratic Model?

We begin with the proposal to replace the OSOV majority rule for shareholder voting (limitedly to activist decisions). This rule has now become so familiar as to seem timeless and natural. Until the end of the nineteenth century, however, many U.S. corporations adopted the OPOV voting rule or otherwise had restrictions in place to limit the voting power of larger shareholders.[278] In more recent times, Senator Elizabeth Warren has proposed to introduce a new Accountable Capitalism Act which, among other requirements, provides that corporations should obtain shareholder consent, as determined by use of a OPOV voting rule, before making certain corporate expenditures.[279]

As a matter of theory, then, it is possible to envision an enabling model under which corporations could opt into an OPOV rule for voting on activist decisions.[280] For index fund voting, this proposal would need to be combined with pass-through voting or survey voting, with the remarkable difference that each beneficiary investor would have one vote regardless of the weight of its investment. On the assumption that shareholders represent a cross section of citizens, an OPOV rule would make it more likely that activist outcomes reflecting the majoritarian shareholder demand may approximate the outcomes that the majority of the corporation's constituencies would have chosen, which would help add pluralism.

However, if we relax the assumption that shareholders are a representative cross section of citizens at large, it is not clear how inclusive this proposal would actually be. Under the OPOV rule, each shareholder would only need to buy one share of a corporation to be able to have an egalitarian voice in activist decisions. In many cases, this is going to be affordable for a large part of Americans. But in some cases, it will not. For

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278. *See* Colleen A. Dunlavy, *Social Conceptions of the Corporation: Insights from the History of Shareholder Voting Rights*, 63 WASH. & LEE L. REV. 1347, 1356 (2006); David. L. Ratner, *The Government of Business Corporations: Critical Reflections on the Rule of "One Share, One Vote,"* 56 CORNELL L. REV. 1, 5–8 (1970).

279. S. 3348, 115th Cong. § 8(b) (2018).

280. An alternative could be the adoption of a supermajority requirement with a high threshold, in line with the classic argument in the political science literature that supermajority rules can provide protection to minorities by enhancing the inclusiveness of collective decisions. *See, e.g.*, MELISSA SCHWARTZBERG, COUNTING THE MANY: THE ORIGINS AND LIMITS OF SUPERMAJORITY RULE (2014) (examining, and criticizing, classic arguments in favor of modern supermajority rules in political democracies). In theory, a supermajority rule would make it less likely that corporate activism might only reflect the moral preferences of the largest investors by attributing a sort of veto power to the minority shareholders. In practice, however, it is not clear whether limited voting participation could jeopardize the egalitarian features of a supermajority rule, similar to what would happen with pass-through voting rules. *See supra* text accompanying notes 275–276.

example, the current cost of one Amazon share is $ 3,500.[281] Further, if assumptions about the passivity of most beneficiary investors are to some extent independent from their ability to affect changes in portfolio companies, the OPOV rule could be insufficient to correct for these investors' limited voting participation and hence fail to add democratization to activist decisions. More radically, the OPOV proposal would likely face strong opposition from the largest investors, which would see their corporate weight in activist decisions radically diluted.

In response to these difficulties, an alternative would be to extend voting rights on activist issues to constituencies other than shareholders, such as employees and consumers, without changing the OSOV rule for shareholder democracy. Concerning implementation, one could imagine a system under which each stakeholder class would have one vote. The shareholders would continue to vote based on the OSOV principle, which would avoid the difficulties raised by the OPOV proposal. Consumers and employees, instead, would vote based on the OPOV principle, which would help avoid the issue that a greater consumption stock, for example, could re-introduce inegalitarian distortions. While this would raise bureaucratic costs, in a wired world, these costs are likely to be more than bearable; one may think of how corporations routinely manage customer satisfaction surveys these days.[282]

Overall, this system should help balance out the risk of corporate conformity driven by the majoritarian investor demand, giving teeth[283] to the currently unrealistic egalitarian assumptions of CSR demand studies.[284] There is, however, a substantial objection against this proposal, which comes from a classic argument against the stakeholder model in general. This argument draws on social choice theory to suggest that, according to Arrow's impossibility theorem, a corporate electorate made of different groups of stakeholders would produce a permanent lack of consensus and inconsistent corporate decisions.[285] While this argument has been criticized as overestimating the concerns raised by Arrow's theorem in the real

281. On the other hand, there could also be a massive push by media and "right wing" organizations to get "right thinking" individuals to buy one share in major firms (as long as they can afford it, of course), which could, again, lead to a selection effect of the most active versus the less active citizens. We thank Brian Cheffins for pointing this risk out to us.

282. *See, e.g.*, Hart & Zingales, *supra* note 83, at 271 (referring to the "bureaucratic cost of administering proxy votes as trivial"). Either way, these costs would not be greater than the costs involved in pass-through voting proposals for index funds.

283. While a constituency vote would not fully solve the problem that only the most socially engaged and active citizens would be enfranchised, broadening the voting base and allowing for a diversification across classes would likely mitigate this problem.

284. *See supra* note 183 and accompanying text.

285. *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 405 (1983). *See also* MAS-COLELL ET AL., *supra* note 78, at 792–96 (offering a formal discussion of Arrow's theorem).

world,[286] the positive effects of a constituency vote would not change even if these concerns were accurate. Under a model of extended voting rights, a lack of agreement among a corporation's constituencies on activist decisions would return the corporation to a model of moral neutrality, which we consider normatively more desirable than the current corporate conformity model.

However, we have still not answered the most difficult question here, which concerns both proposals. When we talk of an enabling model, we mean that the details of the model—especially concerning the difficult choice of how to draw the line between activist and non-activist decisions—would be left to firm insiders as the parties with the best information on firm-specific situations.[287] In practice, this would require a modification of the company's charter and hence a concerted action of the board and the shareholders, as charter amendments can only be initiated by the board but require shareholder approval.[288] This raises the first-order difficulty for either proposal: what incentives would corporations have to switch to such models under the current posture of their largest investors? We turn to this question in our concluding section.

2. *Disclosure and Self-Implementation*

One set of incentives for the self-implementation of this Article's corrective proposals could come from the threat of future, and more invasive, regulatory interventions, à la Senator Warren. For example, in September 2021, Senator Marco Rubio introduced the Mind Your Own Business Act.[289] Under Rubio's proposal, directors of "woke" corporations would be required to prove that their actions were in shareholders' best interest to avoid liability for breach of fiduciary duty over corporate actions relating to certain social policies.[290] While, economically, this proposal misses the mark, as we argue that corporate conformity promotes shareholder value maximization, the prospect of similar initiatives could

286. *See* Grant Hayden & Matthew Bodie, *Arrow's Theorem and the Exclusive Shareholder Franchise*, 62 VAND. L. REV. 1217, 1219 (2009).

287. Consistent with the tradition of modern business corporation acts, an enabling model is characterized by "freedom of choice in who among the interested parties takes what in the way of risks, control, and profit . . . ." Elvin R. Latty, *Why Are Business Corporation Law Largely "Enabling"*, 50 CORNELL L.Q. 599, 599 (1965).

288. *See* DEL. CODE ANN. TIT. 8, § 242(b) (2015); MODEL BUS. CORP. ACT 10.03 (AM. BAR ASS'N 2016).

289. S. 2829, 117th Cong. (2021).

290. *See id.* at §§ 2(5)–(7), 3.

create enough of a risk for corporations to adopt their own anticipatory responses, including an OPOV model or a constituency vote model.[291]

Alternatively, one could think of a model of experimental soft regulation under which the Securities Exchange Commission (SEC) would require corporations to disclose how they aggregate the moral demand for activist decisions. Many commentators are currently urging the SEC to create a comprehensive, mandatory ESG disclosure regime, and a recent House bill moves in the same direction.[292] Mostly, these proposals are concerned with the quality of voluntary ESG disclosures on the undisputed assumption that ESG delivers universal benefits to investors. We suspect that unqualified mandatory ESG disclosure rules could induce the morality markets to move toward even more conformity by exposing non-conformist (or only allegedly conforming) corporations.[293] However, the SEC's ESG disclosure framework could be remedially adapted to mitigate this risk by requiring corporations to disclose information on the inclusiveness of activist decisions. For example, corporations could be asked to answer questions of the following tenor: was the decision supported by the corporation's employee or consumer base? How did the corporation garner such support? Was the decision put to a constituency vote?

Of course, we recognize that we are navigating uncharted territories here, but so was the SEC when it first decided to introduce disclosure obligations on executive compensation, obligations that now require companies to

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291. Some commentators, for example, interpret the creation of Facebook's Oversight Board precisely along these lines: as an anticipatory response to avoid future, and more invasive, government regulation. *See* Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L.J. 2418, 2488 (2020).

292. For a survey and critique of these proposals, see Amanda M. Rose, *A Response to Calls for SEC-Mandated ESG Disclosure*, 98 WASH. U. L. REV 1821, 1827 (2021).

293. This risk seems even more prominent under recent French and European regulatory developments regarding integration of CSR requirements into company law. In 2019, France introduced the "PACTE law," applicable to *all* companies registered in France and imposing a duty to take into consideration the social and environmental impacts of companies' activities. *See generally* Alain Pietrancosta, *Codification in Company Law of General CSR Requirements: Pioneering Recent French Reforms and EU Perspectives* (Euro. Corp. Governance Inst. – L., Working Paper No. 639/2022, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4083398 [https://perma.cc/MBX8-LFZJ]. Among other requirements, the PACTE law provides for the mandatory disclosure of a company's CSR initiatives. *See id.* The law has also inspired the recent introduction by the European Commission of a new directive proposal on Corporate Sustainability Due Diligence (CS3D). *See id.* The proposal provides for both due diligence obligations and a general duty of care requiring large European companies' directors and executives to take into account sustainability matters in fulfilling their fiduciary obligations. *See id.* Under this Article's analysis of the role played by the largest investors in the new activism context and the asset price effects arising therefrom, the anticipated result of the directive, if implemented, would be to legally oblige directors and executives to pursue corporate conformity.

disclose not just "how much [officers and directors] are paid but *why*."[294] The same qualitative questions should be asked concerning activist decisions. More broadly, the public interest rationale that informs securities regulation[295] seems broad enough to be able to accommodate a similar kind of SEC intervention.

In principle, a similar system should create strong reputational incentives for corporations. At the equilibrium, the expectation is that few corporations will want to acknowledge that their citizenship performatives are driven by plutocratic mechanisms. This should help promote a desirable sorting effect: corporations would decide whether they want to be good corporations or good supercitizens. However, an off-the-equilibrium-path outcome, under which corporations remain indifferent to non-mandatory disclosure requirements, cannot be excluded. In such a case, the only alternative, especially if activism and indexation continue to rise, would likely be costly mandatory regulation.

CONCLUSION

With the rise of the activist corporation, the time has come to take the idea of corporate citizenship seriously. By engaging in social initiatives, corporations are no longer concerned with sectarian interests or calculatedly bipartisan initiatives. They are now increasingly taking up the role that is proper for citizens, discursively contributing to the choice of the overall, and *divisive,* aims of society—from gun control to abortion, from immigration to criminal justice reform, and any other watershed issue of rights. Corporate governance analysis is too narrow to fully capture the implications of this transformation, both as a positive and as a normative matter. To understand the new activist corporation, we need to combine the study of corporations *qua* business organizations with that of corporations *qua* (super)citizens, extending the analysis to elements of democratic and political theory.

This Article begins that task. It shows that corporations can be citizens without ceasing to be good, wealth-maximizing business organizations. But the price to pay for this new holism is "corporate conformity": a market equilibrium under which corporations' contributions to the choice of the

294. Mary Jo White, Chair, Nat'l Ass'n of Corp. Dirs., Speech to the 2013 Leadership Conference in National Harbor, Maryland: The Path Forward on Disclosure (Oct. 15, 2013) (emphasis added), *posted at Speeches and Statements*, SEC (Oct. 15, 2013), https://www.sec.gov/news/speech/spch101513mjw# ftnref6 [https://perma.cc/DZ3V-HUF2].

295. *See* Securities Exchange Act of 1934, Pub. L. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78(a)–78(nn)) The seminal article here is Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669 (1984).

overall aims of society are likely to be dictated by a small group of wealthy agents.

Hence, corporations cannot be at once good corporations and good citizens. For corporate conformity violates the core principles to which good citizens are held; it subtly undermines the political freedom of stakeholder minorities and jeopardizes political equality among citizens at large. Although these democratic losses might not be as dramatic as suggested by woke accounts of corporate activism, this does not mean that they are less insidious. In the short run, they might drive the country to polarize further and faster. In the long run, the effects are unpredictable, as democratic losses might very well erode citizens' trust in democratic institutions.

Finally, there are no easy remedies to the problems raised by the new corporate supercitizen. We have tried to outline a few tentative proposals, with the primary intent of exposing the costs that such proposals would have. Recognizing these costs is essential to decide whether we want to have good corporations or good supercitizens. It might very well be that we cannot have both.