

BUSINESS PLAYING POLITICS: STRENGTHENING SHAREHOLDERS' RIGHTS IN THE AGE OF CEO ACTIVISM

by
Savannah J. Wolfe*

The United States has entered a new age of business: the Age of CEO Activism. "CEO activism" is the phenomenon where Chief Executive Officers ("CEOs") and other C-Suite members use their executive platforms to speak out on political, social, and environmental topics not directly related to their businesses. These fiduciaries have become more and more vocal about their political or social ideology, especially around largescale political events.

In this age, however, shareholders are left with scant rights due to the overbroad protections granted by the business judgment rule. Instead, shareholders must sit passively as their C-Suite members charge blindly into the political arena. To help strengthen shareholders' rights in this new age, courts should do away with the business judgment rule for political statements. In its place, courts should use increased scrutiny for political or social statements and require a close fit between the statement and the company's best interests. This enhanced review would enforce the current corporate law that shareholder primacy and wealth maximization remain the number one priority, rather than the personal crusades of a corporation's leadership.

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* J.D. Lewis & Clark Law School; B.S. University of Arizona.

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INTRODUCTION

Business and politics are more entangled than ever before. The United States is experiencing a new age, where Chief Executive Officers (“CEOs”) and other C-Suite members speak out on political, social, and environmental topics and use their executive roles to take a stance on issues not directly related to their businesses.¹ This phenomenon, coined “CEO activism,” has been gaining traction and momentum among executive officers across the nation.² CEO activism is an exercise of intentionally courting controversy while trying to advance the CEO’s personal political or social agenda.³

Businesses have been playing politics for centuries,⁴ but in different forms than the CEO activism of today. For example, businesses will quietly lobby to secure their positions in the marketplace and to shape policy to benefit their bottom lines.⁵

¹ Sam Walker, *You’re a CEO—Stop Talking Like a Political Activist*, WALL STREET J. (July 27, 2018), <https://www.wsj.com/articles/youre-a-ceostop-talking-like-a-political-activist-1532683844>.

² Although the term is coined “CEO activism,” it is not limited only to CEOs, but instead encompasses statements by other C-Suite members, founders, executives, and directors. “CEO activism” should also not be confused with the term “activist shareholders,” which is defined as: [A] range of activities by one or more of a publicly traded corporation’s shareholders that are intended to result in some change in the corporation. The activities fall along a spectrum based on the significance of the desired change and the assertiveness of the investors’ activities. On the more aggressive end of the spectrum is hedge fund activism that seeks a significant change to the company’s strategy, financial structure, management, or board.

Mary Ann Cloyd, *Shareholder Activism: Who, What, When, and How?*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Apr. 7, 2015), <https://corpgov.law.harvard.edu/2015/04/07/shareholder-activism-who-what-when-and-how/>.

³ Aaron K. Chatterji & Michael W. Toffel, *Starbucks’ “Race Together” Campaign and the Upside of CEO Activism*, HARV. BUS. REV. (Mar. 24, 2015), <https://hbr.org/2015/03/starbucks-race-together-campaign-and-the-upside-of-ceo-activism> [hereinafter Chatterji & Toffel, “*Race Together*”].

⁴ Don Mayer, *The Law and Ethics of CEO Social Activism*, 23 J.L. BUS. & ETHICS 21, 33 (2017).

⁵ See Chaterji & Toffel, “*Race Together*,” *supra* note 3.

Corporations also take implicit social and political positions with their economic decisions, such as participating in the slave trade, doing business with the Third Reich, or even refusing to create a wedding cake for a homosexual couple.⁶ These decisions were all directly related to the company's business but also incidentally happened to convey the company's political or social stances.

Today, CEO activism is much more than quiet lobbying and taking implicit social positions. CEO activism now consists of social media posts, network interviews, and internal memos to employees about how the CEO or other C-Suite members personally feel about a political or social cause.⁷ CEO activists "rarely, if ever, lay out a thorough *business* case for the positions they've taken,"⁸ and instead focus on how their positions are "just" and "moral." This form of CEO activism differs drastically from the standard methods businesses have used to engage in politics and is at odds with current U.S. corporate law.

The current law in the U.S. requires that corporations exist to maximize shareholder wealth.⁹ Shareholders investing in corporations are one of the largest driving forces of innovation.¹⁰ When shareholders make such investments, they place their trust in the management of that corporation, which is "arguably the most important aspect of a healthy capital market."¹¹ That trust is protected by the directors' and officers' fiduciary duties owed to the shareholders and corporation and is enforced through lawsuits. The ability to bring lawsuits places shareholders in the best position to police fiduciary behavior that potentially erodes investor value.

In a lawsuit for an alleged breach of the duty of care, however, fiduciaries are automatically presumed to have acted "on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company," otherwise known as the business judgment rule.¹² Shareholders wishing to defeat this presumption must demonstrate that the fiduciary did not in fact act "on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."¹³ When the business judgment rule is applied to

⁶ See Adam Edelman, *Baker Who Refused to Make Cake for Gay Wedding: "I don't discriminate,"* NBC NEWS (June 5, 2018), <https://www.nbcnews.com/politics/politics-news/baker-who-refused-make-cake-gay-wedding-i-don-t-n880061>.

⁷ See Leslie Gaines-Ross, *What CEO Activism Looks Like in the Trump Era*, HARV. BUS. REV. (Oct. 2, 2017), <https://hbr.org/2017/10/what-ceo-activism-looks-like-in-the-trump-era>.

⁸ Walker, *supra* note 1.

⁹ Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 576 (2003).

¹⁰ See William Kaplan & Bruce Elwood, *Derivative Action: A Shareholder's "Bleak House"?*, 36 U. B.C. L. REV. 443, 443 (2003).

¹¹ *Id.*

¹² *Parnes v. Bally Entm't Corp.*, 722 A.2d 1243, 1246 (Del. 1999).

¹³ *Id.*

too broad of a range of fiduciary actions and decisions, however, it becomes more difficult for a shareholder to defeat this presumption.

Currently, the presumption that a fiduciary has acted in good faith and in the best interests of the company allows fiduciaries to “enjoy virtually unfettered legal discretion to determine the corporation’s goals” and to consider interests other than those of their shareholders.¹⁴ This substantial discretion effectively allows directors to escape liability when they fail to do their most important statutory requirement: maximize shareholder wealth.¹⁵ As a result, courts have unintentionally allowed the business judgment rule to cover more than just business decisions, but also political and social statements.¹⁶ Because the business judgment rule currently protects political statements,¹⁷ the ability for shareholders to police such C-Suite conduct is exponentially more difficult.

This Note argues that shareholders will be best enabled to police CEO activism if courts do not grant fiduciaries the presumption of the business judgment rule for actions involving public political or social statements. Instead, courts should review such statements using intermediate scrutiny, which gives the court leeway to examine the reasonableness of the board’s actions. Although generally limited to takeover jurisprudence,¹⁸ intermediate scrutiny presents a desirable level of review for CEO activism because it allows courts to smoke out mere pretextual justifications for improperly motivated decisions. In the context of CEO activism, an improperly motivated decision would be one where a C-Suite member chose to champion a political cause unrelated to the best interests of the company or the shareholders.

Understanding whether or not a political statement is unrelated to the best interest of the company requires a court to perform a nexus test.¹⁹ While performing the nexus test, the court determines how closely the political statement was connected to the company’s relevant industry or stated core values.²⁰ The more closely connected the political statement is to the company’s relevant industry or stated core values, the more likely it is that the statement was made to further the company’s best interests, rather than the CEO’s personal political agenda. By removing the business judgment rule and placing increased scrutiny on political or social state-

¹⁴ Lynn A. Stout, *The Problem of Corporate Purpose*, in 48 ISSUES IN GOVERNANCE STUDIES 5 (2012), https://www.brookings.edu/wp-content/uploads/2016/06/Stout_Corporate-Issues.pdf.

¹⁵ See D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 310 (1998).

¹⁶ Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 766 (2015).

¹⁷ *Id.*

¹⁸ *Chen v. Howard-Anderson*, 87 A.3d 648, 678 (Del. Ch. 2014).

¹⁹ *In re Dollar Thrifty S’holder Litig.*, 14 A.3d 573, 598 (Del. Ch. 2010).

²⁰ *Mercier v. Inter-Tel (Del.), Inc.*, 929 A.2d 786, 807 (Del. Ch. 2007).

ments, courts would signal to C-Suite members that shareholder wealth maximization is still the number one priority of a corporation. Shareholders are the best situated party to police C-Suite and director actions to ensure investor value is not eroded by political activism, and this scrutiny level places the policing power back into shareholders' hands.

Part I of this Note analyzes the background of CEO activism and how it developed in the United States. This Part finds that CEO activism is likely a side effect of increased pressure on companies to engage in the political arena, millennials placing increased value on activism, and the movement away from the corporate ideology that shareholder wealth maximization must be a corporation's sole priority. This, coupled with a shifting officer mentality that it is a corporation's responsibility to fix unrelated political and social issues, has created the ever-increasing rise of CEOs speaking out on topics ranging anywhere from immigration to race relations to gay marriage.

To demonstrate the frequency and increasing rate at which C-Suite members are sharing their political views, Part II compiles and analyzes various C-Suite responses to four controversial political events: (1) the 2016 Presidential election; (2) the Charlottesville Protests; (3) family separation at the U.S. southern border due to President Trump's zero tolerance policy; and (4) the U. S.'s withdrawal from the Paris Climate Agreement.

Part III analyzes the current state of U.S. corporate law. This Part begins with an explanation of the hurdles associated with a shareholder derivative suit. One of the largest hurdles in a derivative suit for an alleged breach of the duty of care is the business judgment rule. Shareholders are the best situated party to police CEO activism, but the business judgment rule prevents effective policing. This Part argues that the presumptions of the business judgment rule should not be granted to political or social statements. Instead, this Part concludes that courts should use the alternative scrutiny level of intermediate review combined with a nexus test to determine how related a statement is to the corporation's best interests.²¹

This scrutiny level for CEO activism rightfully places the policing power back with the shareholders. However, there is a distinct possibility that even if this power is restored, shareholders may choose not to police CEO activism themselves, but

²¹ The scope of this Note includes only the tests that courts should apply and actions that constitute a breach. To recover, shareholders would also have to demonstrate some type of harm that the corporation suffered. This harm can take many different forms such as boycotts, damaged stock prices, a lack of trust in the market, loss of key employees, and reputational harm. Each of these would result in a loss of shareholder value and damage to the corporation but must be evaluated on an ad hoc basis. Thus, harm beyond a theoretical level is outside the scope of this Note.

instead allow the market to do so. Thus, Part IV concludes with some of the market's best practices to date for CEO activism, which corporations should consider adopting when entering the political arena to better avoid eroding shareholder value.

I. BACKGROUND ON CEO ACTIVISM

It is not unheard of for businesses to have a hand in U.S. politics. For years, businesses have been quietly lobbying to secure their position in the marketplace and to shape policy to benefit the bottom line.²² For example, "military contractors lobbied for increased government spending on defense in order to increase demand for their services, farmers lobbied for biofuel subsidies that would favor or subsidize their products, and fossil fuel companies lobbied against climate change regulations that would make their products less competitive."²³ Occasionally, companies would lobby for issues that their employees were personally invested in or issues that could promote their own societal interests.²⁴

Additionally, corporations have been taking implicit social or political positions with their economic decisions for centuries.²⁵ Participating in the slave trade was an economic decision with a social and political impact.²⁶ Doing business with the Third Reich during the 20th century was a financial decision that communicated that "discrimination against Jewish people was morally and socially acceptable."²⁷ The choice between complying or not complying with the Civil Rights Act of 1964 when first enacted was a business decision in nature but one that also indicated a company's social position.²⁸ A more modern example is found in the refusal to create a wedding cake for a homosexual couple—a business choice that carried with it a large social statement.²⁹ These decisions were all directly related to the company's business but also incidentally happened to convey the company's political or social stances.

²² See Chaterji & Toffel, "Race Together," *supra* note 3.

²³ Toffel et al., *CEO Activism (A)*, HARV. BUS. SCH. 2 (2017).

²⁴ *Id.* (noting that Mary Kay lobbied for the renewal of the Violence Against Women Act and Cartoon Network lobbied for longer school recess to deflect criticism regarding childhood obesity).

²⁵ See Mayer, *supra* note 4, at 33.

²⁶ *Id.*; see also *15 Major Corporations You Never Knew Profited from Slavery*, ATLANTA BLACKSTAR, (Aug. 26, 2013), <https://atlantablackstar.com/2013/08/26/17-major-companies-never-knew-benefited-slavery/>.

²⁷ Mayer, *supra* note 4, at 33. See generally EDWIN BLACK, *IBM AND THE HOLOCAUST: THE STRATEGIC ALLIANCE BETWEEN NAZI GERMANY AND AMERICA'S MOST POWERFUL CORPORATION* (2001).

²⁸ Mayer, *supra* note 4, at 33.

²⁹ See Edelman, *supra* note 6.

Both lobbying agreements and business decisions that incidentally convey a political or social stance, however, are quite different from public comments on such issues. This Note analyzes these unrelated political comments made by CEOs and other members in the C-Suite.³⁰

Decades ago, CEOs rarely made explicit public comments on social and political issues:³¹

Corporate chieftains have historically adhered to a golden rule when it comes to Washington and the political world: It is better to be seen than heard.

. . . .

. . . Business leaders have historically remained tight-lipped when it comes to controversial or politically charged subject matter – preferring instead to keep business matters strictly professional. That way they don’t offend any employees or customers, and their business structure remains intact.³²

CEOs remaining tight-lipped on politically-charged subject matter now appears to be a phenomenon of the past. Weber Shandwick and KRC Research crowned Marilyn Carlson Nelson, CEO of a global travel and hospitality company, as one of the first CEOs to trigger this paradigm shift.³³ In 2004, Nelson spoke out against human trafficking and argued that the company’s resources should be used to fight against child sex trafficking.³⁴ Nelson went as far as to say that businesses have a responsibility to be conscientious of matters that do not directly affect the company’s line of work.³⁵ In the early 2000s, this activism was almost unheard of. Within the next decade, CEO activism exploded, with the most dramatic upticks happening just over the last few years. In 2014, 36% of global executives surveyed

³⁰ Corporate sanctioned political speech, such as Nike’s Colin Kaepernick ad, however, is outside the scope of this Note. See Amy B. Wang & Rachel Siegel, *Trump: Nike “Getting Absolutely Killed” with Boycotts over Colin Kaepernick’s “Just Do It” Campaign*, WASH. POST (Sept. 5, 2018), https://www.washingtonpost.com/business/2018/09/04/people-are-destroying-their-nike-gear-protest-colin-kaepernicks-just-do-it-campaign/?utm_term=.b6c18c6499d0.

³¹ Mayer, *supra* note 4, at 21; see also Gaines-Ross, *supra* note 7 (“Once upon a time, CEOs did not comment on governmental regulations or policies other than those that directly affected their industries or companies. The business of business was business, and commenting upon non-business-related issues was anathema.”).

³² Andrew Soergel, *Corporate Activism and the Rise of the Outspoken CEO*, U.S. NEWS & WORLD REP. (Apr. 8, 2016), <https://www.usnews.com/news/articles/2016-04-08/corporate-activism-and-the-rise-of-the-outspoken-ceo>.

³³ See KRC RES. & WEBER SHANDWICK, *THE DAWN OF CEO ACTIVISM 2* (2016), <https://www.webershandwick.com/uploads/news/files/the-dawn-of-ceo-activism.pdf>.

³⁴ *Id.*

³⁵ *Id.*

said it was important for CEOs to publicly take positions on policy issues. In 2017 that number rose to 46%.³⁶ But why the sudden change?

A. *Theories Behind the Sudden Change in CEO Activism*

1. *Increased Encouragement to Participate in Politics*

There are a few theories that attempt to answer this question.³⁷ First, as public trust in government remains near historic lows,³⁸ stakeholders are turning to business leaders to advance social and political causes.³⁹ Corporations are facing more and more pressure from consumers and other business leaders to take political stances.

In a survey conducted by Sprout Social, two-thirds of consumers agreed that it is important for brands to take public stands on social and political issues.⁴⁰ A prime example of consumers supporting CEO activism is when Indiana enacted the Religious Freedom Restoration Act (RFRA) in 2015.⁴¹ Proponents of the bill declared that it was designed to protect religious liberty, while opponents countered that the bill would legalize discrimination by allowing businesses to refuse service to LGBT customers.⁴² Before and immediately after the bill was signed into law, Apple CEO

³⁶ Leslie Gaines-Ross, *What CEOs Should Know About Speaking Up on Political Issues*, HARV. BUS. REV. (Feb. 17, 2017), <https://hbr.org/2017/02/what-ceos-should-know-about-speaking-up-on-political-issues>.

³⁷ See, e.g., *id.*; Marc Filippino, *Why CEOs Are Becoming Activists*, PUB. RADIO INT'L (Feb. 5, 2018), <https://www.pri.org/stories/2018-02-05/why-ceos-are-becoming-activists> (discussing why CEOs are becoming more socially active).

³⁸ *Public Trust in Government: 1958-2019*, PEW RES. CTR. (Apr. 11, 2019), <https://www.people-press.org/2019/04/11/public-trust-in-government-1958-2019/>.

³⁹ Gaines-Ross, *supra* note 36. Alan Fleischman, a contributor for Forbes, coined this phenomena the “Age of CEO Statesman,”—“an ongoing shift in American political culture in which corporate executives have the opportunity to leverage their impact to push for social change, and in which the American people will increasingly look to executives, rather than politicians, as change agents.” Alan Fleischman, *CEOs Should Not Run from the Gun Debate. They’re Already Part of It.*, FORBES (Mar. 20, 2018), <https://www.forbes.com/sites/alanfleischmann/2018/03/20/ceos-should-not-run-from-the-gun-debate-theyre-already-part-of-it/#575f95707e44>.

⁴⁰ *#BrandsGetReal: Championing Change in the Age of Social Media*, SPROUT SOC., <https://sproutsocial.com/insights/data/championing-change-in-the-age-of-social-media/> (last visited Oct. 19, 2019).

⁴¹ Ed Payne, *Indiana Religious Freedom Restoration Act: What You Need to Know*, CNN POL. (Mar. 31, 2015), <https://www.cnn.com/2015/03/31/politics/indiana-backlash-how-we-got-here/index.html>.

⁴² Aaron K. Chatterji & Michael W. Toffel, *Do CEO Activists Make a Difference? Evidence from a Field Experiment* 1, (Harvard Bus. Sch. Working Paper No. 16-100, 2016), <https://dash.harvard.edu/bitstream/handle/1/26274858/16-100.pdf?sequence=1> [hereinafter Chatterji & Toffel, *Field Experiment*].

Tim Cook openly criticized the bill.⁴³ Because CEO activism is “newer and less understood,” with “little, if any, research on it,” Professors Aaron K. Chatterji and Michael W. Toffel conducted a field experiment to find out if Cook’s statements on RFRA swayed public opinion.⁴⁴ Although conclusions based on inherently unreliable surveys may be misleading, the results of the survey may be somewhat illustrating. The results of the survey indicate that CEO activism has the ability to “sway public opinion — and also increase interest in buying the company’s products.”⁴⁵

To conduct the field experiment, the two professors “developed a survey to gather data on how CEO activism affects an individual’s (a) views on the relevant policy issue and (b) intention to purchase the company’s products.”⁴⁶ The treatment condition began with the following preamble: “Apple CEO Tim Cook recently expressed his concern about Indiana’s new law about religious freedom because he believes the law may allow discrimination against gays and lesbians in that state. Do you support this law?”⁴⁷

To determine the respondent’s public policy preferences, Chatterji and Toffel developed “six versions of a question that inquired about the respondent’s views on RFRA.”⁴⁸ To test the respondent’s intent to purchase Apple products after learning about Cook’s concern, the professors asked respondents how likely they were to buy Apple products in the near future.⁴⁹

The results of the survey are intriguing. When Cook expressed his opinion regarding RFRA, his views “decrease[d] public support for the law.”⁵⁰ These results potentially suggest that CEOs can shape public opinion about controversial social issues. As a result, “corporate leaders—whose CEO activism often attracts media

⁴³ *Id.*

⁴⁴ Aaron K. Chatterji & Michael W. Toffel, *The Power of C.E.O. Activism*, N.Y. TIMES (Apr. 1, 2016), <https://www.nytimes.com/2016/04/03/opinion/sunday/the-power-of-ceo-activism.html> [hereinafter Chatterji & Toffel, *Power of C.E.O. Activism*].

⁴⁵ *Id.*; Chatterji & Toffel, *Field Experiment*, *supra* note 42, at 13–14.

⁴⁶ Chatterji & Toffel, *Field Experiment*, *supra* note 42, at 7.

⁴⁷ *Id.* Not every respondent’s survey began with this preamble. Chatterji & Toffel, *Power of C.E.O. Activism*, *supra* note 44 (“We asked nearly 3,400 respondents across the country whether they supported Indiana’s ‘religious liberty’ law. For some respondents, the question was prefaced with an unattributed statement that some people worried that the law would allow discrimination against gay men and lesbians. For other respondents, that statement was attributed to Mr. Cook of Apple; or to William Oesterle, the C.E.O. at the time of the Indiana-based company Angie’s List; or to the mayor of Indianapolis.”).

⁴⁸ Chatterji & Toffel, *Field Experiment*, *supra* note 42, at 7.

⁴⁹ *Id.* at 8. To determine purchasing intent, the professors “asked another 2,176 respondents how likely they were to buy Apple products. [They] prefaced this question for some respondents with information about Mr. Cook’s discrimination concerns, for others with a description of Mr. Cook’s business philosophy and for the remainder without any preamble.” Chatterji & Toffel, *Power of C.E.O. Activism*, *supra* note 44.

⁵⁰ Chatterji & Toffel, *Field Experiment*, *supra* note 42, at 13.

attention—can use this power to their advantage when advocating in the public domain.”⁵¹

Not only did Cook make a political public statement unrelated to his business, but the results of the survey demonstrate that it worked out for him as well: “Respondents who were prompted by Mr. Cook’s opposition to the Indiana law — particularly those who supported same-sex marriage — expressed a greater intent to purchase Apple products than did the other two groups.”⁵² Consumers appeared to have responded favorably when they agreed with the CEO’s politics, producing a “net positive effect for customers, and presumably for shareholders as well.”⁵³

It is not just consumers pressuring CEOs, however, even other business leaders are encouraging their peers to speak up. Marc Benioff, for example, has been so active in advocating for other leaders to enter the political arena that some have dubbed him “the ringleader of CEO activists.”⁵⁴ He characterizes CEO activism as a duty: “Business is the greatest platform for change, and CEOs have an obligation to use their leadership to create that change of the world.”⁵⁵ Benioff has consistently pushed this mindset on other CEOs and has even made a call-to-action on employees of other companies to encourage their CEOs to speak out.⁵⁶ Benioff told the Harvard Business Review that his “number one goal is to help other CEOs recognize that they have permission to do this.”⁵⁷ To recruit even more CEOs take part in his idea of leadership, he attends “at least two dinners a month with 20 or more CEOs talking just about [CEO activism],” and he takes advantage of the opportunities

⁵¹ *Id.* at 13–14. This raises semi-related concerns that these unelected officials are dabbling with and affecting politics.

⁵² Chatterji & Toffel, *The Power of C.E.O. Activism*, *supra* note 44.

⁵³ Mayer, *supra* note 4, at 32 (discussing the results of Chatterji & Toffel’s field experiment). Of course, the decision to speak out against RFRA incited some criticism of Apple’s business practices. Some conservative websites criticized Cook for “denouncing religious freedom laws while [Apple] continue[d] to do business in countries that persecute LGBTQ individuals.” Aaron K. Chatterji & Michael W. Toffel, *The New CEO Activists*, HARV. BUS. REV., Jan.–Feb. 2018, at 78, 84 [hereinafter Chatterji & Toffel, *New CEO Activists*]; see also Rod Dreher, *The Hypocrisy of Marc Benioff & Co.*, AM. CONSERVATIVE (Mar. 30, 2015), <https://www.theamericanconservative.com/dreher/marc-benioff-tim-cook-hypocrisy/>. Appearing hypocritical is likely one of the last things a corporation wants to be called out for when trying to positively influence political and social issues.

⁵⁴ Monica Langley, *Salesforce’s Marc Benioff Has Kicked Off New Era of Corporate Social Activism*, WALL STREET J. (May 2, 2016), <https://www.wsj.com/articles/salesforces-marc-benioff-has-kicked-off-new-era-of-corporate-social-activism-1462201172>.

⁵⁵ Aaron K. Chatterji & Michael W. Toffel, *Divided We Lead*, HARV. BUS. REV., <https://web.archive.org/web/20180403192425/https://hbr.org/cover-story/2018/03/divided-we-lead> (last visited Oct. 17, 2019) [hereinafter Chatterji & Toffel, *Divided We Lead*].

⁵⁶ See *id.*; Marc Benioff (@Benioff), TWITTER (Apr. 17, 2016, 9:16 PM), <https://twitter.com/Benioff/status/721915166913224704>.

⁵⁷ Chatterji & Toffel, *Divided We Lead*, *supra* note 55.

afforded by the many CEO groups he participates in to encourage his peers to “act[] from their values, represent[] their company, [and] fight[] for what they believe in.”⁵⁸

2. Millennials

Another theory behind the rise of CEO activism is that speaking out on social or political issues is now required to attract the attention of the most elusive target market: millennials.⁵⁹ Many millennials believe that CEOs have a responsibility to use their platforms for good by speaking out on political and social issues and may even consider a company’s fulfillment of that responsibility when making purchasing decisions.⁶⁰ Not only does a company’s activism potentially affect a millennial’s buying behavior, but it can also influence a millennial’s employment decisions. A recent survey of 1,021 American adults found that “twice as many Millennials said they would feel increased loyalty (rather than decreased loyalty) toward their own CEO, if he or she took a stand on a hotly debated issue (44% vs. 19%, respectively).”⁶¹ Companies and CEOs may now feel obligated to engage in controversial activism in order to attract millennials’ dollars and talent.

3. Maximizing Shareholder Value Is No Longer Mutually Exclusive with Social Responsibility

Another potential culprit for this wave of CEO activists is a paradigm shift away from the ideology that maximizing shareholder profits excludes social responsibility. Professor Constance Bagley and coauthor Karen Page observed: “For the past several decades, we have been assailed by the mantra that the duty of corporate directors is to maximize shareholder value, even if doing so adversely affects others who have a stake in the enterprise.”⁶² While arguing there is a false dichotomy between social responsibility and shareholder value, the authors noted that people “assume that there is an inherent conflict between shareholder value and social responsibility,” when really, the two are not mutually exclusive.⁶³ This paradigm shift away from pure shareholder profit maximization may be what sparked the onslaught of CEOs speaking out on political and social issues.

Whatever the catalyst for CEO activism may be, these outspoken CEOs now believe it is their duty to use their official roles to change the world for the better, rather than solely focusing on their shareholders’ interests. Trying to change the world for the better, however, results in CEOs acting as unelected officials that wield

⁵⁸ *Id.*

⁵⁹ See Gaines-Ross, *supra* note 36.

⁶⁰ Aaron K. Chatterji & Michael W. Toffel, *New CEO Activists*, *supra* note 53, at 81.

⁶¹ Gaines-Ross, *supra* note 7.

⁶² Constance E. Bagley & Karen L. Page, *The Devil Made Me Do It: Replacing Corporate Directors’ Veil of Secrecy with the Mantle of Stewardship*, 36 SAN DIEGO L. REV. 897, 898 (1999).

⁶³ *Id.* at 912–13.

incredible power over the democratic process. Some commentators argue that “corporations already have too much influence on our political system, and that encouraging these unelected corporate titans to use their ever larger megaphones only further erodes our democracy.”⁶⁴ Others are concerned about the content of CEOs’ messages, noting that “successful CEO activism often advances left-leaning arguments on issues like gun control and diversity.”⁶⁵ The demands from stakeholders coupled with the changing political climate and divisive social issues have inspired many CEOs to now use their megaphones to attempt to elicit change.

B. CEO Mentality and the Resulting Response from the Community

With this shift in CEO mentality, today CEOs like Bank of America’s Brian Moynihan believe that their “jobs as CEOs now include driving what [they] think is right. . . . It’s not exactly political activism, but it is action on issues beyond business.”⁶⁶ Paul Polman of Unilever believes that it is not the fiduciary duty of a CEO to put shareholders first. Instead, he believes that “if we focus our company on improving the lives of the world’s citizens and come up with genuine sustainable solutions, we are more in synch with consumers and society and ultimately this will result in good shareholder returns.”⁶⁷ Marc Benioff, Salesforce’s CEO, stated: “Today CEOs need to stand up not just for their shareholders, but their employees, their customers, their partners, the community, the environment, schools, everybody.”⁶⁸

This mindset is shared by at least 181 CEOs today.⁶⁹ In August of 2019, the Business Roundtable released a new Statement on the Purpose of a Corporation which moves away from shareholder primacy to instead promote “an economy that serves all Americans.”⁷⁰ Under the Statement of Purpose, each of the 181 signatory CEOs commits to (1) delivering value to its customers, (2) investing in its employ-

⁶⁴ Chatterji & Toffel, “Race Together,” *supra* note 3.

⁶⁵ *Id.* For a discussion regarding how political polarization affects brands, see Vikas Mittal et al., *The Unequal Effects of Partisanship on Brands*, HARV. BUS. REV. (Mar. 26, 2018), <https://hbr.org/2018/03/the-unequal-effects-of-partisanship-on-brands>.

⁶⁶ Chatterji & Toffel, *New CEO Activists*, *supra* note 53, at 81.

⁶⁷ Jo Confino, *Unilever’s Paul Polman: Challenging the Corporate Status Quo*, GUARDIAN (Apr. 24, 2012), <https://www.theguardian.com/sustainable-business/paul-polman-unilever-sustainable-living-plan>.

⁶⁸ Chatterji & Toffel, *New CEO Activists*, *supra* note 53, at 81.

⁶⁹ Business Roundtable, *Business Roundtable Redefines the Purpose of a Corporation to Promote ‘An Economy that Serves All Americans’* (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>.

⁷⁰ *Id.*

ees, (3) dealing fairly and ethically with its suppliers, (4) supporting the communities in which it works, and (5) generating long-term shareholder value.⁷¹ Until now, each version of the Statement on the Purpose of a Corporation since 1997 has endorsed the view that the paramount duty of management and of boards of directors, above all else, is to the corporation's shareholders.⁷²

Within hours of the Business Roundtable Statement, the Council of Institutional Investors released a response expressing concern.⁷³ Among the concerns of the Council is the fear that the Statement "undercuts notions of managerial accountability to shareholders" and diminishes shareholder rights.⁷⁴ The Council further reprimanded the Business Roundtable by suggesting it overstepped because the government, not companies, "should shoulder the responsibility of defining and addressing societal objectives with limited or no connection to long-term shareholder value."⁷⁵

Others in the business community have also voiced their concern with the shifting CEO mentality. Warren Buffet, when refusing to speak out on hot-button political issues, declared that engaging in CEO activism would be mistakenly placing his views on "370,000 employees and a million shareholders."⁷⁶ Other commentators have condescendingly scolded CEOs:

Dust off your notes, open your textbooks, and reread the basics of corporate finance taught at every credible university. The fiduciary responsibility of a CEO is to safeguard the company's assets and acknowledge this overriding principle: "It's not our money but that of the shareholders."⁷⁷

Even the Chief Justice of the Delaware Supreme Court has chimed in to remind CEOs of their first and foremost duty as officers of for-profit corporations: the shareholders' best interests.⁷⁸ Justice Strine, criticizing the modern ideology that CEOs may put the interests of other stakeholders before those of shareholders, argued that "advocates for corporate social responsibility pretend that directors do not have to make stockholder welfare the sole end of corporate governance, within the

⁷¹ *Id.*

⁷² *Id.*

⁷³ Council of Institutional Investors, *Council of Institutional Investors Responds to Business Roundtable Statement on Corporate Purpose* (Aug. 19, 2019), https://www.cii.org/aug19_brt_response.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* (quoting *Full Transcript: Billionaire Investor Warren Buffett Speaks with CNBC's Becky Quick On "Squawk Box" Today*, CNBC (Feb. 26, 2018), <https://www.cnbc.com/2018/02/26/full-transcript-billionaire-investor-warren-buffett-speaks-with-cnbc-becky-quick-on-squawk-box-today.html>).

⁷⁷ Jon L. Pritchett & Ed Tiryakian, *When CEOs Play Politics, Shareholders Can Take Them to Court*, WALL STREET J. (Aug. 17, 2017), <https://www.wsj.com/articles/when-ceos-play-politics-shareholders-can-take-them-to-court-1503011944>.

⁷⁸ Strine, *supra* note 16, at 761.

limits of their legal discretion, under the law of the most important American jurisdiction—Delaware.”⁷⁹ Additionally, “[i]t is not only hollow but also injurious to social welfare to declare that directors can and should do the right thing by promoting interests other than stockholder interests.”⁸⁰ He adds that “within the limits of their discretion, directors must make stockholder welfare their sole end, and that other interests may be taken into consideration only as a means of promoting stockholder welfare.”⁸¹ Instead, when CEOs make these public statements, they are generally promoting their political agendas as their sole end, rather than making shareholder welfare their sole end.

II. EXAMPLES OF CEO ACTIVISM

Whatever the catalyst behind CEO activism may be, the U.S. is experiencing more and more CEOs and other C-Suite members trying to influence the world through their ever-increasing social media megaphones. Most CEO activism is seen during controversial political events; this is when CEOs and other C-Suite members take to their social media pages by storm to express their opinions on a situation. Over the last few years, the U.S. has seen many controversial political events, where CEOs’ personal political viewpoints flooded social media and news headlines. Although there are several events to choose from, the 2016 presidential election, the Charlottesville protests, family separation at the border, and the U.S. withdrawal from the Paris Climate Agreement offer prime examples of the range of responses of CEO activism.

A. 2016 Presidential Election

During the 2016 presidential election and the months following, CEOs from every industry stepped forward to voice their support for their preferred candidate.⁸² Many CEOs were not shy about voicing support for Hillary Clinton or distaste for Donald Trump. For example, Netflix CEO Reed Hastings voiced his support by stating: “Trump would destroy much of what is great about America. Hillary Clinton is the strong leader we need, and it’s important that Trump lose by a landslide to reject what he stands for.”⁸³

⁷⁹ *Id.* at 763 (citations omitted).

⁸⁰ *Id.* at 767.

⁸¹ *Id.* at 768.

⁸² See Emily Stewart, *Most CEOs Pick Clinton, Plead the Fifth over Backing Trump*, THE STREET (Nov. 7, 2016), <https://www.thestreet.com/story/13883778/1/most-ceos-pick-clinton-plead-the-fifth-over-backing-trump.html>.

⁸³ Christine Wang, *Netflix CEO Says “Trump Would Destroy Much of What Is Great About America,”* CNBC (June 23, 2016), <https://www.cnbc.com/2016/06/23/netflix-ceo-says-trump-would-destroy-much-of-what-is-great-about-america.html>.

Zynga co-founder, Mark Pincus, declared: “Donald Trump has failed to put forth concrete and realistic policies to help the American people and grow the economy. Our president must care about the success of the country as a whole — not just himself.”⁸⁴

Box CEO, Aaron Levie, stated: “The decision we make in this election will impact America’s economic competitiveness for decades to come. I’ll be voting for Hillary this fall, because America needs a leader who will foster an economy built on innovation, diversity, intelligent immigration policy, and a progressive way of thinking.”⁸⁵

Warren Buffet, CEO of Berkshire Hathaway, also endorsed Hillary Clinton and even hit the campaign trail with her. When explaining why he was supporting Clinton, Buffet stated that she “will make sure that those people who are having to work two jobs to barely get by will not have that kind of world for themselves and their children moving forward.”⁸⁶

On the other side of the political aisle, several CEOs voiced their support for Donald Trump and received varying degrees of backlash. For example, Under Armour CEO Kevin Plank declared President Trump “a real asset for the country” and praised the President’s bold decision-making.⁸⁷ Three popular public figures who endorse the brand took to their social media pages to criticize the CEO’s statements. Stephen Curry, a Golden State Warriors NBA player with his own line of Under Armour sneakers, said he agreed with the CEO’s “asset” comment “if you remove the ‘et’.”⁸⁸ On Twitter, actor Dwayne Johnson responded to Plank’s CEO activism, arguing: “Personal political opinions of Under Armour’s partners and it’s [sic] employees were overshadowed by the comments of its CEO.”⁸⁹ The rest of

⁸⁴ *Id.*

⁸⁵ Emily Stewart, *Warren Buffett Joined by Netflix, Airbnb, Salesforce Execs in Supporting Hillary Clinton*, THESTREET (June 23, 2016), <https://www.thestreet.com/story/13617543/1/netflix-airbnb-salesforce-execs-join-hillary-clinton-rsquo-s-growing-army-of-business-endorsers.html>.

⁸⁶ Amy Chozick, *Warren Buffett Endorses Hillary Clinton and Calls for Higher Taxes on Wealthy*, N.Y. TIMES (Dec. 16, 2015), <https://www.nytimes.com/politics/first-draft/2015/12/16/warren-buffett-endorses-hillary-clinton-and-calls-for-higher-taxes-on-wealthy/>.

⁸⁷ *CNBC Exclusive: CNBC Excerpts: Under Armour CEO Kevin Plank on CNBC’s “Fast Money Halftime Report” Today*, CNBC (Feb. 7, 2017), <https://www.cnbc.com/2017/02/07/cnbc-exclusive-cnbc-excerpts-under-armour-ceo-kevin-plank-on-cnbc-fast-money-halftime-report-today.html>.

⁸⁸ Jerry Barca, *Backlash for Trump Comments, the Problem Under Armour Didn’t Need*, FORBES (Feb. 12, 2017), <https://www.forbes.com/sites/jerrybarca/2017/02/12/backlash-for-trump-comments-the-problem-under-armour-didnt-need/#4d7156826c98>.

⁸⁹ Dwayne Johnson (@TheRock), TWITTER (Feb. 9, 2017, 10:35 AM), <https://twitter.com/TheRock/status/829760529296027650>; see also Barca, *supra* note 88.

Dwayne Johnson's message criticized Plank's comments as divisive and lacking perspective.⁹⁰ Misty Copeland, a principal dancer with the American Ballet Theatre who has her own line of Under Armour gear, took to Instagram to voice her disagreement:

I strongly disagree with Kevin Plank's recent comments in support of Trump [I]t is important to me that he, and UA, take public action to clearly communicate and reflect our common values in order for us to effectively continue to work towards our shared goal of trying to motivate ALL people to be their best selves.⁹¹

That is exactly what Under Armour did the very next day. Under Armour released a statement that distanced the company from Trump's politics and the CEO's comments.⁹² The company went so far as to say "[w]e engage in policy, not politics" and highlighted its policies for diversity.⁹³

Under Armour was not the only company to face backlash for its CEO publicly supporting Trump. Other companies including Virgin America, Home Depot, and Hobby Lobby, were put on the #Grabyourwallet boycott list for their CEOs' statements.⁹⁴ Virgin America CEO David Cush pledged his support to Trump in an interview. Explaining that he had become disenchanted with career politicians, Cush stated: "It's less about Donald, although I think that would be tremendously entertaining, and more about the fact that we need a little bit of a different mindset."⁹⁵

Home Depot co-founder, Bernie Marcus, wrote a public letter explaining why he supports Trump in the election. Marcus believed Trump would "begin on Day

⁹⁰ Barca, *supra* note 88.

⁹¹ *Id.*; Misty Copeland (@mistonpointe), INSTAGRAM (Feb. 9, 2017), <https://www.instagram.com/p/BQTO6yuDvft/>.

⁹² Press Release, Under Armour (Feb. 10, 2017), <http://www.uabiz.com/news-releases/news-release-details/under-armour-statement?ReleaseID=1011024>. The corporation's response is exactly why companies should be aware of their CEOs' plans to speak out before they do so. See Chatterji & Toffel, *Divided We Lead*, *supra* note 55. Marc Benioff encourages CEOs to engage the board of directors before making these statements. *Id.* ("Your position can't be a surprise in a board meeting. You have to bring them into the conversation." [Benioff] added that it's extremely difficult to sell directors on an idea – especially a controversial one – if you restrict your interactions with them to the boardroom. 'I bring my board members to my offsites, my key management meetings, my operation reviews, customer dinners, customer events,' he said. 'I know that's scary for some CEOs, but for me, making sure your board is on your team is the most effective thing.'" (quoting Marc Benioff's interview with the authors)).

⁹³ Press Release, Under Armour, *supra* note 92.

⁹⁴ See #GRABYOURWALLET, <https://grabyourwallet.org/> (last visited Oct. 19, 2019).

⁹⁵ Mark Calvey, *Trump Finds Voice of Support in Unexpected Place: San Francisco's C-suite*, S.F. BUS. TIMES (Jan. 28, 2016), https://www.bizjournals.com/sanfrancisco/morning_call/2016/01/donald-trump-super-bowl-virgin-america-va-politics.html.

One undoing the damage done by President Barack Obama.”⁹⁶ Marcus even pledged his support by “stand[ing] ready to help him at every turn.”⁹⁷

Hobby Lobby founder and CEO, David Green, wrote an op-ed during the 2016 election season titled, “One Judge away from losing Religious Liberty: Hobby Lobby CEO.”⁹⁸ After discussing his fear that Clinton’s pick for a Supreme Court justice would sacrifice religious liberty, Green concluded his letter with an endorsement for Trump: “For Americans who value freedom of religion, we must elect a president who will support a Supreme Court that upholds not only this freedom, but all that have emanated from it. That president is Donald Trump.”⁹⁹

B. Charlottesville Protests

On Saturday, August 12, 2017, a “Unite the Right” rally was scheduled in Charlottesville, Virginia.¹⁰⁰ White nationalists and supremacists coming to town for the rally, however, had planned a surprise for the night before.¹⁰¹ The surprise consisted of about 250 mostly young white males marching with torches.¹⁰² As they marched, they chanted: “Blood and soil!” “You will not replace us!” “Jews will not replace us!” and “White lives matter!”¹⁰³ This march was the catalyst for the fateful events that followed the next day.

On Saturday, rallygoers, white nationalists, and counter-protesters gathered in Charlottesville, with violence quickly exploding.¹⁰⁴ Both sides were swinging sticks, throwing rocks, punching, and spraying chemicals at the other.¹⁰⁵ The violence, however, came to a head when a rallygoer plowed his Dodge Challenger into the crowd of counter-protesters, killing one and injuring 19 others.¹⁰⁶

⁹⁶ Bernie Marcus, *Why I Stand with Donald Trump*, REALCLEAR POL. (June 1, 2016), https://www.realclearpolitics.com/articles/2016/06/01/why_i_stand_with_donald_trump_130727.html.

⁹⁷ *Id.*

⁹⁸ David Green, *One Judge Away from Losing Religious Liberty: Hobby Lobby CEO*, USA TODAY (Sept. 1, 2016), <https://www.usatoday.com/story/opinion/2016/09/01/hobby-lobby-religious-freedom-liberty-obamacare-christian-david-green/89597214/>.

⁹⁹ *Id.*

¹⁰⁰ Meghan Keneally, *What to Know About the Violent Charlottesville Protests and Anniversary Rallies*, ABC NEWS (Aug. 8, 2018), <https://abcnews.go.com/US/happen-charlottesville-protest-anniversary-weekend/story?id=57107500>.

¹⁰¹ See Joe Heim, *Recounting a Day of Rage, Hate, Violence and Death*, WASH. POST (Aug. 14, 2017), https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/?utm_term=.cd8045acaca2.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ See *id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

After the rally, President Trump released the statement: “We condemn in the strongest possible terms this egregious display of hatred, bigotry, and violence on many sides — on many sides.”¹⁰⁷ President Trump’s statement condemned the violence but did not admonish the white nationalist or neo-Nazi groups. Later remarks by Trump indicated what he thought: “I think there is blame on both sides. You look at both sides. I think there is blame on both sides” and there were “some very bad people in that group. You also had some very fine people on both sides.”¹⁰⁸

CEOs were anything but quiet in the aftermath of the Charlottesville protests and Trump’s responses. Within seven days of the protests, 64 companies spoke out.¹⁰⁹ Of the 64 responses issued, “77% came from CEOs, former CEOs, company founders, or managing partners” with “the most common means of response through Twitter (47%), statements to the news media (39%), employee memos (17%), Facebook posts (8%), and media interviews (5%).”¹¹⁰

Tim Cook, Apple’s CEO, took to Twitter on the day of the protests and stated: “Heartbreaking scenes in #Charlottesville. Violence and racism have no place in America.”¹¹¹ Two days later, Cook added: “We’ve seen the terror of white supremacy & racist violence before. It’s a moral issue - an affront to America. We must all stand against it.”¹¹² Cook also sent an internal email to all of Apple’s employees criticizing Trump’s response and pledging to donate \$2 million to organizations battling hate groups.¹¹³

Goldman Sachs CEO, Lloyd Blankfein, also took to Twitter days after the protest to quote President Abraham Lincoln: “Lincoln: ‘A house divided against itself cannot stand.’ Isolate those who try to separate us. No equivalence w/ those who bring us together.”¹¹⁴

¹⁰⁷ Keneally, *supra* note 100 (quoting Donald Trump).

¹⁰⁸ *Id.* (quoting Donald Trump).

¹⁰⁹ *Business Response to the Charlottesville Protests*, WEBER SHANDWICK (Sept. 6, 2017), <https://www.webershandwick.com/news/business-response-to-the-charlottesville-protests/>.

¹¹⁰ *Id.*

¹¹¹ Tim Cook (@tim_cook), TWITTER (Aug. 12, 2017, 3:59 PM), https://twitter.com/tim_cook/status/896506383968870400?lang=en.

¹¹² Tim Cook (@tim_cook), TWITTER (Aug. 14, 2017, 9:11 AM), https://twitter.com/tim_cook/status/897128485843382277?lang=en.

¹¹³ See Susan Hogan, *Apple CEO Tim Cook Blasts Trump’s Response to Charlottesville, Pledges \$2 Million to Anti-Hate Organizations*, WASH. POST (Aug. 17, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/08/17/apple-ceo-tim-cook-blasts-trumps-response-to-charlottesville-donates-2-million-to-anti-hate-organizations/?utm_term=.26610dcdfab&tid=sm_tw.

¹¹⁴ Lloyd Blankfein (@lloydblankfein), TWITTER (Aug. 14, 2017, 6:35 AM), <https://twitter.com/lloydblankfein/status/897089317457321984>.

Kevin Plank, Under Armour's CEO, used the company's Twitter handle, rather than his personal Twitter account, to share: "We are saddened by #Charlottesville. There is no place for racism or discrimination in this world. We choose love & unity. - CEO Kevin Plank."¹¹⁵

Brian Krzanich, Intel's CEO, tweeted from his personal Twitter account: "There should be no hesitation in condemning hate speech or white supremacy by name. #Intel asks all our countries [sic] leadership to do the same."¹¹⁶

Pepsi Co.'s CEO, Indra Nooyi, responded on Twitter: "Heartbroken by the violence in #Charlottesville. Hate and intolerance are a betrayal of what we stand for as Americans."¹¹⁷

On Facebook, Sheryl Sandberg, Facebook's Chief Operating Officer, was the first to respond to the protests. She wrote:

Every generation has to be vigilant in fighting against the type of bigotry and hatred that was displayed by the white supremacists in Charlottesville. Along with millions of others, I was so heartbroken this weekend. The brave Heather Heyer's mother Susan Bro said she wanted her daughter's "death to be a rallying cry for justice and equality and fairness and compassion." Let's honor her by teaching all of our children how to honor and respect those values.¹¹⁸

Mark Zuckerberg, the CEO of Facebook, responded two days after Sandberg to add that Facebook would be taking down any post that "promotes or celebrates hate crimes or acts of terrorism," and that: "It's a disgrace that we still need to say that neo-Nazis and white supremacists are wrong -- as if this is somehow not obvious. My thoughts are with the victims of hate around the world, and everyone who has the courage to stand up to it every day."¹¹⁹

Google's CEO, Sundar Pichai, wrote a letter to the company's employees, that he later shared on Twitter, expressing that "[t]here is simply no place for this type of extremism in America. As a company, we stand united in condemnation."¹²⁰ The

¹¹⁵ Under Armour (@UnderArmour), TWITTER (Aug. 14, 2017, 7:34 AM), <https://twitter.com/UnderArmour/status/897104140010221568>.

¹¹⁶ Brian Krzanich (@brunner), TWITTER (Aug. 14, 2017, 9:38 AM), <https://twitter.com/bkranner/status/897135418621124608?lang=en>.

¹¹⁷ Indra Nooyi (@IndraNooyi), TWITTER (Aug. 12, 2017, 9:00 PM), <https://twitter.com/indranooyi/status/896582278637170688?lang=en>.

¹¹⁸ Sheryl Sandberg, FACEBOOK (Aug. 14, 2017), <https://www.facebook.com/sheryl/posts/10159091256940177>.

¹¹⁹ Mark Zuckerberg, FACEBOOK (Aug. 16, 2017), https://www.facebook.com/zuck/posts/10103969849282011?notif_t=notify_me¬if_id=1502916232429795

¹²⁰ Sundar Pichai (@sundarpichai), TWITTER (Aug. 17, 2017, 1:47 PM), <https://twitter.com/sundarpichai/status/898285094569353216>.

company followed up and canceled the registration with Google Domains for a neo-Nazi, white supremacist website, The Daily Stormer.¹²¹

JPMorgan Chase CEO, Jamie Dimon, and Joshua Bolten, the President and CEO of the Business Roundtable issued a joint statement:

America's business leaders are shocked at the violence that took place in Charlottesville, and we mourn the unnecessary loss of life. Racism has no place in our businesses, our communities, or our country.

The CEOs of Business Roundtable will never accept such intolerance and hate. We will continue to build our companies around the principles of respect, trust and equal opportunity to all our employees.

The business community will build on our strong record of leadership to stand against racism to promote equality and acceptance.¹²²

Merck Pharma's CEO, Kenneth Frazier, released a statement resigning from the President's Manufacturing Counsel and stating: "America's leaders must honor our fundamental values by clearly rejecting expressions of hatred, bigotry, and group supremacy, which run counter to the American ideal that all people are created equal."¹²³

C. *Families Separated at the U.S. Border*

On May 7, 2018, Attorney General Jeff Sessions ordered the Justice Department to adopt a "zero-tolerance policy" for illegal border crossings.¹²⁴ By the end of that month, the "zero-tolerance policy" resulted in the separation of 2,000 minors from adults.¹²⁵ By June 28, 98 companies publicly responded.¹²⁶ Of the 98 responders, 77% were either a CEO, chairman, founder, or president of the company.¹²⁷ Fifty-two percent of companies responded through Twitter, 26% of companies were

¹²¹ Anita Balakrishnan et al., *Here's How Silicon Valley Is Responding to the Charlottesville Rally, and Trump's Comments on It*, CNBC (Aug. 17, 2017), <https://www.cnbc.com/2017/08/17/tim-cook-mark-zuckerberg-google-tech-ceos-respond-to-charlottesville-rally.html>. Dreamhost, GoDaddy, and Cloudflare also canceled Daily Stormer's domain. *Id.*

¹²² *Business Roundtable: CEOs Call for Equality and Tolerance*, BUS. ROUNDTABLE (Aug. 14, 2017), <https://www.businessroundtable.org/business-roundtable-ceos-call-for-equality-and-tolerance>.

¹²³ Dominic Rushe, *African American CEO Kenneth Frazier Quits Trump Panel After Charlottesville*, GUARDIAN (Aug. 14, 2017), <https://www.theguardian.com/us-news/2017/aug/14/kenneth-frazier-quits-trump-business-panel>.

¹²⁴ *Business Response to Family Separation at the Border*, WEBER SHANDWICK, <https://www.webershandwick.com/wp-content/uploads/2018/08/Business-Response-to-Family-Separation-at-the-Border.pdf> (last visited Oct. 19, 2019).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

part of a joint statement or letter with other business leaders, 17% issued statements to the media, and 15% posted something to their company website.¹²⁸

Chobani CEO, Hamdi Ulukaya, responded: “Separating a child from a mother or father is not political. It is inhumane. It is against everything this country stands for. I have seen it in other parts of the world but never thought I’d see it in the land of the free.”¹²⁹

Airbnb’s co-founders, Brian Chesky, Joe Gebbia, and Nathan Blecharczyk, released a joint statement on Twitter: “Ripping children from the arms of their parents is heartless, cruel, immoral and counter to the American values of belonging. The U.S. government needs to stop this injustice and reunite these families. We are a better country than this.”¹³⁰

Youtube CEO, Susan Wojcicki, tweeted from her personal page: “Regardless of your politics, it’s heartbreaking to see what’s happening to families at the border” and included a link on ways to support families at the border.¹³¹

Uber’s CEO, Dara Khosrowshahi, shared: “As a father, a citizen and an immigrant myself, the stories coming from our border break my heart. Families are the backbone of society. A policy that pulls them apart rather than building them up is immoral and just plain wrong. #KeepFamiliesTogether.”¹³²

Johnson & Johnson CEO, Alex Gorsky, used the company’s Twitter account to share his personal message expressing concern about the immigration policy: “We stand with the industry calling for a legislative solution and an immediate end to the policy that separates accompanied minors from their parents.”¹³³ Gorsky’s personal message was shared along with a message from the company, stating: “As a company that puts families first, Johnson & Johnson has a special responsibility to help people and communities in times of need—especially our smallest and most vulnerable.”¹³⁴

Google’s CEO, Sundar Pichai, tweeted: “The stories and images of families being separated at the border are gut-wrenching. Urging our government to work

¹²⁸ *Id.*

¹²⁹ Hamdi Ulukaya (@hamdiulukaya), TWITTER (June 19, 2018, 8:54 AM), <https://twitter.com/hamdiulukaya/status/1009102087349731328>.

¹³⁰ Brian Chesky (@bchesky), TWITTER (June 18, 2018, 3:06 PM), <https://twitter.com/bchesky/status/1008833422301671424/photo/1>.

¹³¹ Susan Wojcicki (@SusanWojcicki), TWITTER (June 19, 2018, 7:19 AM), <https://twitter.com/SusanWojcicki/status/1009078194769661953>.

¹³² Dara Khosrowshahi (@dkhos), TWITTER (June 19, 2018, 11:08 AM), <https://twitter.com/dkhos/status/1009135743195799552>.

¹³³ Johnson & Johnson (@JNJNews), TWITTER (June 19, 2018, 2:19 PM), <https://twitter.com/JNJNews/status/1009183870158286848>.

¹³⁴ *Id.*

together to find a better, more humane way that is reflective of our values as a nation. #keepfamiliesaltogether.”¹³⁵

The Business Roundtable released a statement from the CEO of Cisco Systems, Chuck Robbins, calling the zero-tolerance policy cruel and contrary to American values and urging the Administration “to end immediately the policy of separating accompanied minors from their parents.”¹³⁶

Tesla’s CEO, Elon Musk, tweeted a link to the song “Shelter” by The xx and then followed up with a simple, “I hope the kids are ok.”¹³⁷ One Twitter user called Musk out by asking: “Could you just make a more powerful statement? It’s a heart-breaking issue and your words and actions could matter more than a tweet.”¹³⁸ Musk responded by saying, “I couldn’t even keep the US in the Paris Accord, but if there is some way for me to help these kids I will do so”¹³⁹ and then mentioned his status as one of the “top donors” to the ACLU.¹⁴⁰

Most CEOs condemned the zero-tolerance policy and the cruelty of separating families, but one CEO stepped up to express his sympathy for those doing the decision making. Goldman Sachs’ CEO, Lloyd Blankfein, stated:

I wouldn’t want to be in the position we find our government in now, in respect to the tragedy that’s going on at the border.

. . . .

It’s easy to criticize and it’s easy to say what you would do if you didn’t have to bear the consequences for what you decided. But when you have to bear the consequences . . . that’s what’s really tough and I have a lot of sympathy . . . for the decision making, and when something doesn’t quite work out I right I don’t want to go out and kill the person that made the decision.¹⁴¹

¹³⁵ Sundar Pichai (@sundarpichai), TWITTER (June 19, 2018, 1:16 PM), <https://twitter.com/sundarpichai/status/1009168033976279040>.

¹³⁶ *Business Roundtable Statement on Immigration*, BUS. ROUNDTABLE (June 19, 2018), <https://www.businessroundtable.org/business-roundtable-statement-on-immigration>.

¹³⁷ Elon Musk (@elonmusk), TWITTER (June 18, 2018, 11:31 PM), <https://twitter.com/elonmusk/status/1008960448681660417>.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Elon Musk (@elonmusk), TWITTER (June 18, 2018, 11:45 PM), <https://twitter.com/elonmusk/status/1008963854624350210?lang=en>.

¹⁴¹ *Lloyd Blankfein Interview at Economic Club*, GOLDMAN SACHS (June 19, 2018), <https://www.goldmansachs.com/media-relations/in-the-news/archive/lloyd-blankfein-at-economic-club-of-ny.pdf>.

The very next day, however, Blankfein appeared to take a step back and tweeted: “It’s a moral imperative to stop separating families. Also, must legislate/compromise on broader immigration. Failure to deal w/ complexities has led to instability in Europe, e.g. #Brexit; elections in Italy, Germany.”¹⁴²

D. U.S. Withdrawal from the Paris Climate Agreement

The previous three events—the 2016 Presidential Election, the Charlottesville Protests, and family separation at the border—generally saw responses focused on the CEO’s opinion of the event or relevant people. During those events, CEOs rarely made an effort to link an event or their opinion back to their company. Occasionally, however, CEOs do make efforts to relate their opinions back to the core values of the company or even speak on behalf of the company on their personal social media pages. A prime example of this is when President Trump backed the U.S. out of the Paris Climate Agreement.

The Paris Climate Agreement is an agreement within the United Nations Framework Convention on Climate Change, which was signed by all nations except for two.¹⁴³ The agreement was slotted to begin in the year 2020 and covered greenhouse gas emission mitigation, adaptation, and finance between the nations that signed the agreement.¹⁴⁴ On June 1, 2017, however, President Trump announced that the U.S. would withdraw from the Paris Climate Agreement.¹⁴⁵ The withdrawal sparked reactions from not only political leaders, but also 118 businesses.¹⁴⁶ Of the 118 business responses, 66% were issued by CEOs, primarily on the company or the CEO’s social media pages.¹⁴⁷

Many responded with their general disappointment about the withdrawal. For example, Goldman Sachs CEO, Lloyd Blankfein, said: “Today’s decision is a setback for the environment and for the U.S.’s leadership position in the world.”¹⁴⁸ Twitter’s CEO, Jack Dorsey, said: “This is an incredibly shortsighted move backwards by the federal government. We’re all on this planet together and we need to

¹⁴² Lloyd Blankfein (@lloydblankfein), TWITTER (June 20, 2018, 7:43 AM), <https://twitter.com/lloydblankfein/status/1009446742331404294>.

¹⁴³ *Business Response to the U.S. Withdrawal from the Paris Climate Agreement*, WEBER SHANDWICK, https://www.webershandwick.com/wp-content/uploads/2018/04/Business_Response_to_the_US_Withdrawal_from_the_Paris_Climate_Agreement-1.pdf (last visited Oct. 20, 2019); Kevin Liptak & Jim Acosta, *Trump on Paris Accord: “We’re Getting Out,”* CNN (June 2, 2017), <https://www.cnn.com/2017/06/01/politics/trump-paris-climate-decision/index.html>.

¹⁴⁴ *Business Response*, *supra* note 143.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Lloyd Blankfein (@lloydblankfein), TWITTER (June 1, 2017, 2:20 PM), <https://twitter.com/lloydblankfein/status/870389673193082880>.

work together.”¹⁴⁹ Tesla’s CEO, Elon Musk, said: “Am departing presidential councils. Climate change is real. Leaving Paris is not good for America or the world.”¹⁵⁰

Some CEOs went even further. Apple’s CEO, Tim Cook, tweeted: “Decision to withdraw from the #ParisAgreement was wrong for our planet. Apple is committed to fight climate change and we will never waver.”¹⁵¹ Cook also reassured his employees in a memo that “today’s developments will have no impact on Apple’s efforts to protect the environment.”¹⁵²

Salesforce CEO, Marc Benioff, tweeted a personal message along with the “Salesforce Statement on U.S. Withdrawal from Paris Agreement.” The Salesforce statement explained that the company was “committed to reducing the impact of climate change.”¹⁵³ Benioff’s personal message read: “Deeply disappointed by President’s decision to withdraw from Paris Agreement. We will double our efforts to fight climate change.”¹⁵⁴

Microsoft President Brad Smith tweeted: “We’re disappointed with the decision to exit the Paris Agreement. Microsoft remains committed to doing our part to achieve its goals.”¹⁵⁵

Google CEO Sundar Pichai weighed in: “Disappointed with today’s decision. Google will keep working hard for a cleaner, more prosperous future for all.”¹⁵⁶

At Facebook, Mark Zuckerberg shared his thoughts: “Withdrawing from the Paris climate agreement is bad for the environment, bad for the economy, and it puts our children’s future at risk. For our part, we’ve committed that every new data center we build will be powered by 100% renewable energy.”¹⁵⁷

Uber’s head of Transportation Policy and Research, Andrew Salzberg, expressed his disappointment about the withdrawal and wrote: “Uber will continue to

¹⁴⁹ Jack Dorsey (@jack), TWITTER (June 1, 2017, 4:02 PM), <https://twitter.com/jack/status/870415162590625792>.

¹⁵⁰ Elon Musk (@elonmusk), TWITTER (June 1, 2017, 1:02 PM), <https://twitter.com/elonmusk/status/870369915894546432?lang=en>.

¹⁵¹ Tim Cook (@tim_cook), TWITTER (June 1, 2017, 5:36 PM), https://twitter.com/tim_cook/status/870439008316276736.

¹⁵² Selena Larson & Seth Fiegerman, *Tim Cook: I Asked Trump to Stick with Paris Climate Deal “But it Wasn’t Enough,”* CNN (June 1, 2017), <https://money.cnn.com/2017/06/01/technology/tim-cook-trump-paris-climate-accord-letter/?iid=EL>.

¹⁵³ Marc Benioff (@Benioff), TWITTER (June 1, 2017, 1:34 PM), <https://twitter.com/Benioff/status/870378084779794432>.

¹⁵⁴ *Id.*

¹⁵⁵ Brad Smith (@BradSmi), TWITTER (June 1, 2017, 12:58 PM), <https://twitter.com/BradSmi/status/870369044351795200>.

¹⁵⁶ Sundar Pichai (@sundarpichai), TWITTER (June 1, 2017, 2:08 PM), <https://twitter.com/sundarpichai/status/870386661321986048>.

¹⁵⁷ Mark Zuckerberg, FACEBOOK (June 1, 2017), <https://www.facebook.com/zuck/posts/10103765754210171>.

do our part and we implore the President of the United States to not work against us, but rather join us. Let's drive change."¹⁵⁸

Notice the statements made by the representatives from Apple, Salesforce, Microsoft, Facebook, and Uber were all made on each representative's personal social media account. Each of these statements, however, contained elements of a company-sponsored message and were shared on the exact same social media pages on which the representatives share their personal political views. As a result, these representatives are mixing their political speech with their corporation's speech, potentially without the approval of others within the company. Did the representatives discuss the post with anyone? Did anyone have to sign off on the post? The processes or safeguards for corporate political speech, if any, likely vary between each company, but it is noteworthy that many CEOs are mixing corporate political speech with their own.

III. CURRENT STATE OF U.S. CORPORATE LAW

It is a hallmark of U.S. corporate law that directors must maximize shareholder profit.¹⁵⁹ In the classic case of *Dodge v. Ford Motor Co.*, the Michigan Supreme Court noted that "[a] business corporation is organized and carried on primarily for the profit of the stockholders" and "[t]he powers of the directors are to be employed for that end."¹⁶⁰ In *Dodge*, Henry Ford declared his plan to retain earnings, lower prices, employ more men, improve the quality and production of his vehicles, and "to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes."¹⁶¹ The court strongly rebuked Ford's altruism: "it is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefiting others."¹⁶²

Again, the idea that shareholder profit maximization should rule a director's decision-making process prevailed in *eBay Domestic Holdings, Inc. v. Newmark*.¹⁶³ There, directors admitted to being more concerned with Craigslist's community of consumers than with stockholder welfare.¹⁶⁴ Because the directors admitted to favoring the interests of another constituency over the stockholders, the court held

¹⁵⁸ Andrew Salzberg, *American Leadership on Climate Is Vital*, MEDIUM (June 1, 2017), <https://medium.com/uber-under-the-hood/american-leadership-on-climate-is-vital-ae2d6bf6a497>.

¹⁵⁹ See STEPHEN M. BAINBRIDGE, *THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE* 53 (2008) ("[T]he shareholder wealth maximization norm . . . indisputably is the law in the United States.").

¹⁶⁰ *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919).

¹⁶¹ *Id.* at 683.

¹⁶² *Id.* at 684.

¹⁶³ *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 7 (Del. Ch. 2010).

¹⁶⁴ *Id.* at 8.

that the directors breached their fiduciary duties.¹⁶⁵ *Dodge* and *eBay* have become landmark cases in establishing “within the limits of their discretion, directors must make stockholder welfare their sole end, and that other interests may be taken into consideration only as a means of promoting stockholder welfare.”¹⁶⁶

The duty to prioritize shareholder welfare is embodied in both a director’s duty of care and duty of loyalty. The duty of care requires “the exercise of reasonable skill, diligence, and care in taking (or refraining to take) board action.”¹⁶⁷ The duty of loyalty requires directors to act in good faith and in a manner they reasonably believe to be in the best interests of the corporation and its stockholders.¹⁶⁸ Suits involving CEO activism, depending on the facts, could likely raise claims alleging a breach of both the duty of loyalty and the duty of care. When a CEO champions a political cause, he or she could potentially be attempting to further an interest unrelated to the shareholders’ or corporation’s best interests (breach of the duty of loyalty) and may not have exercised reasonable diligence when making the decision to engage (breach of the duty of care), thus risking a shareholder lawsuit.

There are two types of shareholder lawsuits: direct and derivative.¹⁶⁹ Standing for direct actions requires shareholders to have suffered a specific, individual injury from the actions of directors or officers.¹⁷⁰ It is unlikely in the CEO activism scenario that a shareholder would pursue a direct action because it is difficult for a shareholder to demonstrate a specific, individual injury.¹⁷¹ Thus, actions for CEO activism will likely be brought as derivative suits.

¹⁶⁵ *Id.* at 34–35.

¹⁶⁶ Strine, *supra* note 16, at 768; *see also* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962) (“Few trends could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their stockholders as possible.”); Milton Friedman, *The Social Responsibility of Business Is to Increase Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32.

¹⁶⁷ Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 J.L. ECON. & ORG. 55, 56 (1991).

¹⁶⁸ *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1345 (Del. 1987) (holding that the duty of loyalty “embodies not only an affirmative duty to protect the interests of the corporation, but also an obligation to refrain from conduct which would injure the corporation and its stockholders or deprive them of profit or advantage”).

¹⁶⁹ Daniel S. Kleinberger & Imanta Bergmanis, *Direct vs. Derivative, or “What’s a Lawsuit Between Friends in an Incorporated Partnership,”* 22 WM. MITCHELL L. REV. 1203, 1204 (1996).

¹⁷⁰ *See, e.g., Kaplan v. First Options of Chi., Inc.*, 143 F.3d 807, 812 (3d Cir. 1998) (holding that a stockholder of a closely held corporation could sue for injuries inflicted upon him distinct from injuries suffered by the corporation).

¹⁷¹ *See* Urska Velikonja, *The Political Economy of Board Independence*, 92 N.C. L. REV. 855, 882 (2014); *see also* Tim Oliver Brandi, *The Strike Suit: A Common Problem of the Derivative Suit and the Shareholder Class Action*, 98 DICK. L. REV. 355, 359 (1994) (“Courts and commentators employ a variety of rubrics in determining whether a particular action should be brought as a direct or as a derivative action. The most commonly used approach is to determine the impact of

A. *Derivative Suits*

A derivative action serves two primary functions. First, “it tells the board of directors of a company that shareholders consider some action (or inaction) to have harmed the corporation, affording the board the opportunity to respond and take corrective or remedial steps.”¹⁷² Second, “if no corrective action is possible or is not taken, it provides a means for pursuing a shareholder-directed suit to remedy conduct believed to be harmful to the corporation.”¹⁷³

In a derivative lawsuit, shareholders face daunting hurdles. In addition to the extensive director and officer protections under the deferential business judgment rule discussed in Part 3.C., these hurdles include:

- (1) determining if the claim is direct or derivative;
- (2) being a “record owner” of shares of the company;
- (3) having been an owner of the shares at the time of the wrongdoing;
- (4) maintaining share ownership throughout the litigation;
- (5) being an “adequate representative” as the derivative plaintiff;
- (6) providing a bond or security for expenses incurred by the company;
- (7) providing specific verification of the pleadings;
- (8) swearing that the derivative plaintiff will not accept any compensation for acting as a representative;
- (9) making a demand on the board of directors;
- (10) ceding the suit to a [Special Litigation Committee] formed by the board; and
- (11) being required to pay for the defendants’ litigation and attorneys’ fees if the suit is unsuccessful.¹⁷⁴

These requirements for a shareholder derivative action act as roadblocks in the shareholder’s path to the inside of a courtroom. This looming list can have a deterrent effect on shareholders and does not offer a chilling enough effect to deter CEO activists from taking political stances that have the potential to erode investor value.

Despite these significant hurdles, the United States Supreme Court has endorsed derivative actions as a means of challenging executive decisions regarding corporate political speech and expenditures. In *Citizens United v. Federal Election Commission*, Justice Kennedy wrote that “[s]hareholders can determine whether their corporation’s political speech advances the corporation’s interest in making

the monetary injury alleged in the complaint by asking whether the injury was suffered directly by the corporation, and thus by the stockowners only through the diminution of the value of their shares [which leads to a derivative suit], or whether the injury was done primarily to the shareholders as such [which leads to a direct suit].” (footnotes omitted).

¹⁷² John Matheson, *Restoring the Promise of the Shareholder Derivative Suit*, 50 GA. L. REV. 327, 330–31 (2016).

¹⁷³ *Id.* at 331.

¹⁷⁴ *Id.* at 353–55 (footnotes omitted).

profits.”¹⁷⁵ He added that shareholders who oppose the political expenditures are able to correct through the procedures of “corporate democracy.”¹⁷⁶

In *First National Bank of Boston v. Bellotti*, Justice Powell wrote, “[i]n addition to intracorporate remedies, minority shareholders generally have access to the judicial remedy of a derivative suit to challenge corporate disbursements alleged to have been made for improper corporate purposes or merely to further the personal interests of management.”¹⁷⁷ Again, in *Austin v. Michigan Chamber of Commerce*, Justice Scalia endorsed derivative litigation and stated that a corporation “will risk a stockholder suit if it makes a political endorsement that is not plausibly tied to its ability to make money for its shareholders.”¹⁷⁸

What Justices Kennedy, Powell, and Scalia do not appear to take into account, however, is how limited the remedy of a derivative suit is due to these massive hurdles. Some members of the Court have recognized this. For example, in his dissenting opinion in *Citizens United*, Justice Stevens argued that shareholder rights were currently “‘so limited as to be almost nonexistent,’ given the internal authority wielded by boards and managers and the expansive protections afforded by the business judgment rule.”¹⁷⁹

When directors and officers do not conduct themselves with the aim to “enhance the profitability of the company,”¹⁸⁰ shareholders should be able to police that conduct, but the “internal authority wielded by boards and managers and the expansive protections afforded by the business judgment rule”¹⁸¹ prevent that. To enable shareholders to police political statements, C-Suite members should not be granted the presumption of the business judgment rule.

B. *The Business Judgment Rule*

The business judgment rule is “a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.”¹⁸²

¹⁷⁵ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 370 (2010).

¹⁷⁶ *Id.*

¹⁷⁷ *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 795 (1978).

¹⁷⁸ *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 691 (1990) (Scalia, J., dissenting).

¹⁷⁹ *Citizens United*, 558 U.S. at 477 (Stevens, J., concurring in part and dissenting in part) (quoting Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 320 (1999)).

¹⁸⁰ *Id.* at 469.

¹⁸¹ *Id.* at 477 (Stevens, J., concurring in part and dissenting in part) (quoting Margaret M. Blair & Lynn A. Stout, *supra* note 179, at 320).

¹⁸² *Parnes v. Bally Entm’t Corp.*, 722 A.2d 1243, 1246 (Del. 1999) (citation omitted). Currently, it is not clear whether the business judgment rule applies to officers in Delaware.

The presumption can only be invoked for breaches of the duty of care, and only when the fiduciary has “acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.”¹⁸³

As the Delaware Supreme Court has explained:

Under Delaware law, the business judgment rule is the offspring of the fundamental principle . . . that the business and affairs of a Delaware corporation are managed by or under its board of directors. . . . The business judgment rule exists to protect and promote the full and free exercise of the managerial power granted to Delaware directors.¹⁸⁴

The contours of the rule have shifted over time, but it still stands for the same principle: director decisions are shielded from judicial review regarding potential breaches of the duty of care if directors “acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.”¹⁸⁵

These protections of the business judgment rule are grounded on the premise of directors making business decisions that are aligned with shareholder interests.¹⁸⁶ Such a premise inherently depends on directors’ interests being pure.¹⁸⁷

Currently, the rule is applied to an over-inclusive range of fiduciary actions and decisions. The presumption that a fiduciary has acted in good faith and in the best interests of the company allows fiduciaries to enjoy “virtually unfettered discretion to set corporate policy.”¹⁸⁸ The rule provides that “top executives and directors are free to do virtually anything they want with and to shareholders’ money” without facing any consequences.¹⁸⁹ Several scholars argue that the business judgment rule

Lyman Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405, 413 (2013) (“Surprisingly, given Delaware’s extensive corporate law jurisprudence, it is not settled today whether in cases involving corporate officers, judges will doctrinally deploy the business judgment rule in the same all-encompassing manner that it has been used for corporate directors. Delaware courts have stated in dicta that the rule covers officers, but they have not held it to be so applicable.” (footnotes omitted)). This Note argues that even if Delaware does apply the business judgment rule equally to officers, officers should nevertheless not be entitled to its protections for political statements.

¹⁸³ *Parnes*, 722 A.2d at 1246.

¹⁸⁴ *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) (footnote and citations omitted).

¹⁸⁵ See Johnson, *supra* note 182, at 411 (discussing the three different strands of the business judgment rule based on cases arising from the Delaware Supreme Court).

¹⁸⁶ See Strine, *supra* note 16, at 778.

¹⁸⁷ See *id.*

¹⁸⁸ LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* 110 (2012).

¹⁸⁹ Jonathan Macey, *Sublime Myths: An Essay in Honor of the Shareholder Value Myth and the Tooth Fairy*, 91 TEX. L. REV. 920, 921 (2013) (footnote omitted).

effectively allows directors to escape liability for failing to fulfill their most important statutory requirement: maximize shareholder wealth.¹⁹⁰

One such distinguished scholar, Professor Bainbridge, argues that the business judgment rule improperly gives directors a cover to put nonshareholder interests first:

Despite the powerful rhetoric of cases like *Dodge*, of course, current law in fact allows boards of directors substantial discretion to consider the impact of their decisions on interests other than shareholder wealth maximization. This discretion, however, exists not as the outcome of conscious social policy but rather as an unintended consequence of the business judgment rule.¹⁹¹

Professor Bainbridge found that although most courts strongly encourage directors to maximize shareholder wealth, some courts encourage directors to also consider social responsibility. Under either approach, he argues, “directors who consider nonshareholder interests in making corporate decisions, like directors who do not, will be insulated from liability by the business judgment rule.”¹⁹² As a result, courts have unintentionally allowed the business judgment rule to cover not only business decisions but also political and social decisions as well.¹⁹³ Due to the political protections now afforded by the business judgment rule, the ability for shareholders to police such C-Suite conduct is exponentially more difficult.

¹⁹⁰ See Blair & Lynn A. Stout, *supra* note 179, at 303 (arguing that the business judgment rule authorizes directors to make tradeoffs between shareholder and nonshareholder interests); see also Kent Greenfield & John E. Nilsson, *Gradgrind's Education: Using Dickens and Aristotle to Understand (and Replace?) the Business Judgment Rule*, 63 BROOK. L. REV. 799, 831 (1997) (arguing that the business judgment rule reflects “an underlying distrust of the strict fiduciary duty to maximize shareholder returns”); Smith, *supra* note 15, at 286–87 (arguing that the business judgment rule precludes liability where directors fail to maximize shareholder wealth).

¹⁹¹ Steven Bainbridge, *The Relationship Between the Shareholder Wealth Maximization Norm and the Business Judgment Rule*, PROFESSORBAINBRIDGE.COM (May 5, 2012) (footnotes omitted), <https://www.professorbainbridge.com/professorbainbridgecom/2012/05/the-relationship-between-the-shareholder-wealth-maximization-norm-and-the-business-judgment-rule.html>.

¹⁹² Steven Bainbridge, *Case Law on the Fiduciary Duty of Directors to Maximize the Wealth of Corporate Shareholders*, PROFESSORBAINBRIDGE.COM (May 5, 2012), <https://www.professorbainbridge.com/professorbainbridgecom/2012/05/case-law-on-the-fiduciary-duty-of-directors-to-maximize-the-wealth-of-corporate-shareholders.html>.

¹⁹³ See Strine, *supra* note 16, at 776 (“Of course, it is true that the business judgment rule provides directors with wide discretion, and thus enables directors to justify—by reference to long-run stockholder interests—a number of decisions that may in fact be motivated more by a concern for a charity the CEO cares about, the community in which the corporate headquarters is located, or once in a while, even the company’s ordinary workers, rather than long-run stockholder wealth.”). These pretexts, however, do not “alter the reality of what the law is.” *Id.*

In response to this phenomenon, the Chief Justice of the Delaware Supreme Court argued: “When a fiduciary confesses that he in fact harbors the personal motive to put another interest, of whatever kind, ahead of the stockholders, the foundational premise of the business judgment rule is absent.”¹⁹⁴ The business judgment rule should have no application when directors are disabled by conflicted interests such as social or current political issues.¹⁹⁵

This conclusion makes sense. As Justice Stevens argued in *Citizens United*:

The structure of a business corporation . . . draws a line between the corporation’s economic interests and the political preferences of the individuals associated with the corporation; the corporation must engage the electoral process with the aim “to enhance the profitability of the company, no matter how persuasive the arguments for a broader or conflicting set of priorities.”¹⁹⁶

If the directors of a corporation do not draw a line between “the corporation’s economic interests” and “the political preferences of the individuals associated with the corporation,” those individuals should not be able to claim the broad protections granted to business decisions. Such protections should not be available “to a fiduciary who could be shown to have caused a transaction to be effectuated (even one in which he had no financial interest) for a reason unrelated to a pursuit of the corporation’s best interests.”¹⁹⁷ When an officer takes a political stance on a controversial issue, the officer is not always in pursuit of the corporation’s best interests, but is instead promoting a personal interest.¹⁹⁸ Using their platform to promote personal interests, over business interests, is not the type of decisions the business judgment rule was designed to protect.

The Chief Justice of the Delaware Supreme Court indicated that an officer or director would have to admit that he or she was favoring another interest over shareholders’ interests to be found in violation of his or her duties: “*Dodge v. Ford* and *eBay* are hornbook law because they make clear that if a fiduciary admits that he is treating an interest other than stockholder wealth as an end in itself, rather than an instrument to stockholder wealth, he is committing a breach of fiduciary duty.”¹⁹⁹

¹⁹⁴ *Id.* at 778–79.

¹⁹⁵ Bainbridge, *supra* note 191.

¹⁹⁶ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 469–70 (Stevens, J., concurring in part and dissenting in part) (quoting Brief of Amicus Curiae American Independent Business Alliance in Support of Appellee on Supplemental Question, 11, *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010)); see also PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01(a) (AM. LAW INST. 1992) (“[A] corporation . . . should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain.”).

¹⁹⁷ *In re RJR Nabisco, Inc. S’holders Lit.*, 1989 WL 7036, at *15 (Del. Ch. Jan. 31, 1989).

¹⁹⁸ See *supra* Part II.

¹⁹⁹ Strine, *supra* note 16, at 776–77.

If a CEO does not admit to favoring another interest,²⁰⁰ however, a court may be able to presume one—after all, corporations do not have political stances, but its officers and directors do.

Generally, a court will not have to look far to find that fiduciaries are favoring other interests—the outspoken officers of these corporations are not hiding behind any pretexts with their political statements. Many make no illusions about the fact that they are considering more than just shareholder wealth. Bank of America’s CEO, Brian Moynihan, stated: “Our jobs as CEOs now include driving what we think is right. . . . It’s not exactly political activism, but it is action on issues beyond business.”²⁰¹ Marc Benioff of Salesforce has made it clear that a CEO’s role as an advocate should extend beyond the interests of shareholders.²⁰² It would not be improper for a court to presume that these outspoken officers, who favor another interest over their shareholders’ interests, are in violation of their duties.

Thus, courts should not allow such officers to benefit from the protections of the business judgment rule for decisions regarding politics. The Delaware Supreme Court once noted, “our corporate law is not static. It must grow and develop in response to, indeed in anticipation of, evolving concepts and needs.”²⁰³ CEO activism is accelerating at unprecedented rates, resulting in an erosion of investor value. Such blatant disregard for shareholders’ best interests is ripe ground for derivative actions. Although derivative actions still face massive procedural hurdles, by adapting to the “evolving concepts and needs” and eliminating the protections of the business judgment rule for political speech, shareholders would be that much closer to policing these rogue C-Suite statements.

C. *Alternative Scrutiny Levels*

CEOs may choose to be active in the political arena in a variety of ways. For example, some may make rogue political statements on their Twitter accounts without consulting anyone within the company. Others may only consult another officer or potentially even the whole board before posting. Some companies may not have speech safeguards and therefore allow the CEO to speak for the company via social media. Some statements may be so connected to the company’s core business that it makes sense for the company to speak out. Tackling the variety of ways CEOs may engage in the political arena would require removing the business judgment rule, and may not be sufficient for all cases. Instead, courts should add a layer of scrutiny to their review. Besides the deferential business judgment rule, courts have

²⁰⁰ Some CEOs do not hide behind any pretexts. See Chatterji & Toffel, *Field Experiment*, *supra* note 42, at 1.

²⁰¹ Chatterji & Toffel, *New CEO Activists*, *supra* note 53, at 81.

²⁰² *Id.* (“Today CEOs need to stand up not just for their shareholders, but their employees, their customers, their partners, the community, the environment, schools, everybody.”) *Id.*

²⁰³ *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 957 (Del. 1985).

two other scrutiny levels available for analyzing business decisions in their toolboxes: the enhanced scrutiny of entire fairness review and intermediate scrutiny.²⁰⁴

1. *Entire Fairness Review*

Courts use entire fairness review when “director conduct implicates the duty of loyalty, as in self-dealing or corporate opportunity situations.”²⁰⁵ Under the strict scrutiny of entire fairness review:

[T]he self-dealing director would have breached his duty of loyalty if the transaction was unfair, regardless of whether he acted in subjective good faith. After all, that is the central insight of the entire fairness test, which is that when a fiduciary self-deals he might unfairly advantage himself even if he is subjectively attempting to avoid doing so.²⁰⁶

The entire fairness standard is the most exacting scrutiny a court will utilize when reviewing the actions of fiduciaries.²⁰⁷ This level of scrutiny is reserved for breaches of the duty of loyalty, but CEO activism often may not rise to such a breach. Although CEOs may consider other interests besides those of their shareholders, that does not necessarily implicate a self-dealing or corporate opportunity transgression. A breach of the duty of loyalty for CEO activism would depend heavily on the facts. For example, would a court find Under Armour CEO Kevin Plank’s comment about President Trump being “a real asset to the country” to be an instance where the CEO “unfairly advantage[d] himself”?²⁰⁸ Likely not.

A court may find, however, that a director or officer did not act with complete faith to his or her corporation if the director or officer considered other interests besides those of his or her shareholders. Putting the fiduciary’s political agenda before the interests of their shareholders may not rise to the level of self-dealing requiring courts to do an entire fairness review, but the fiduciary’s actions may still be a breach of loyalty on some level. That is where intermediate scrutiny comes in.

2. *Intermediate Scrutiny*

Because entire fairness review does not quite fit in all scenarios potentially involving a breach of the duty of loyalty, intermediate scrutiny was conceived. For CEO activism, intermediate scrutiny would make a more applicable reviewing standard than entire fairness review or the presumptions of the business judgment

²⁰⁴ *Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442, 457 (Del. Ch. 2011) (“Delaware has three tiers of review for evaluating director decision-making: the business judgment rule, enhanced scrutiny, and entire fairness.”).

²⁰⁵ Matheson, *supra* note 172, at 337–40.

²⁰⁶ *Venhill Ltd. P’ship ex rel. Stallkamp*, No. 1866-VCS, 2008 WL 2270488, at *22 (Del. Ch. June 3, 2008) (citing *In re PNB Holding Co. S’holders Litig.*, No. Civ.A. 28-N., 2006 WL 2403999, at *12 (Del. Ch. Aug. 18, 2006)).

²⁰⁷ *In re PNB Holding Co. S’holders Litig.*, 2006 WL 2403999, at *9.

²⁰⁸ See *CNBC Exclusive*, *supra* note 87.

rule. Intermediate scrutiny covers situations where “the strong deference of the business judgment rule is not justified and the strict scrutiny of the entire fairness standard is not necessary.”²⁰⁹

Intermediate scrutiny developed in Delaware’s takeover jurisprudence and generally applies “in situations where ‘there is a basis for concern that directors without a pure self-dealing motive might be influenced by considerations other than the best interests of the corporation and other stockholders.’”²¹⁰ This standard of review was created in the Delaware Supreme Court’s iconic *Unocal* decision, which declined to use either the business judgment rule or the entire fairness test, but instead adopted a middle ground.²¹¹ The court recognized that in some corporate decisions, there may be an “‘omnipresent specter’ that even nominally disinterested and independent directors may be influenced by and act to further their own interests . . . ‘rather than those of the corporation and its shareholders.’”²¹² Intermediate scrutiny gives the reviewing court “leeway to examine the reasonableness of the board’s actions under a standard that is more stringent than business judgment review and yet less severe than the entire fairness standard.”²¹³ Although generally limited to takeover jurisprudence,²¹⁴ this intermediate scrutiny level presents a desirable level of review for cases involving CEO activism.

Claims that are subject to intermediate scrutiny, however, “do not admit of easy categorization as duties of care or loyalty.”²¹⁵ Intermediate scrutiny “applies to specific, recurring, and readily identifiable situations involving potential conflicts of interest where the realities of the decision making context can subtly undermine the decisions of even independent and disinterested directors.”²¹⁶ Because this standard of review lies “somewhere between the duty of care and the duty of loyalty,”²¹⁷ it is perfect for use in CEO activism cases that have the potential to implicate both.

The hallmark of intermediate scrutiny is the reasonableness of the board’s actions. The “metric of reasonableness employed in the intermediate standard of review enables a reviewing court to ‘smoke out mere pretextual justifications for improperly motivated decisions.’”²¹⁸ When a party must identify its objectives behind

²⁰⁹ Matheson, *supra* note 172, at 340.

²¹⁰ *Chen v. Howard-Anderson*, 87 A.3d 648, 677 (Del. Ch. 2014) (quoting *In re Dollar Thrifty S’holder Litig.*, 14 A.3d 573, 599 n.181 (Del. Ch. 2010)).

²¹¹ *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985).

²¹² *Chen*, 87 A.3d at 678 (quoting *Unocal*, 493 A.2d at 954).

²¹³ *In re Dollar Thrifty S’holder Litig.*, 14 A.3d at 598.

²¹⁴ *See Chen*, 87 A.3d at 678; *In re Dollar Thrifty S’holder Litig.*, 14 A.3d at 597.

²¹⁵ *In re Santa Fe Pac. Corp. S’holder Litig.*, 669 A.2d 59, 67 (Del. 1995).

²¹⁶ *In re Trados Inc. S’holder Litig.*, 73 A.3d 17, 43 (Del. Ch. 2013).

²¹⁷ Ronald J. Gilson, *Unocal Fifteen Years Later (and What We Can Do About It)*, 26 DEL. J. CORP. L. 491, 496 (2001).

²¹⁸ *Chen*, 87 A.3d at 679 (footnote omitted) (quoting *In re Dollar Thrifty S’holder Litig.*, 14 A.3d at 598–99).

decisions, it becomes easier to spot flimsy pretenses²¹⁹ because “the predicate question of what the board’s true motivation was comes into play.”²²⁰ By taking a closer look at the board’s true motivation behind decisions, a court could discover that “personal interests short of pure self-dealing have influenced the board.”²²¹

In the context of CEO activism, an improperly motivated decision would be one where a C-Suite member chose to champion a political cause unrelated to the best interests of the company or the shareholders. The decision to make the statement, while potentially related to the business, was likely made under the pretext of advancing the political and social interests of the directors and officers, and not to further shareholders’ best interests. When CEOs take a political stance, they generally do so to put the spotlight on political ideas they determine to be important, which raises awareness and encourages support for such causes. Although this is not pure self-dealing, CEOs receive some benefit when they share their political agendas with millions of people. If a CEO champions these causes for any reason other than maximizing shareholder wealth, that is an improper motivation. Intermediate scrutiny will allow a court to “smoke out” the true motivation behind the fiduciary’s political statement because there “is a burden on the party in power to identify its legitimate objectives and to explain its actions as necessary to advance those objections.”²²² If the court finds that furthering shareholders’ interests were not the primary motivating factor, the fiduciary may be held responsible.

Understanding whether or not a political statement is unrelated to the best interest of the company requires a court to perform a nexus test.²²³ In performing the test, courts would look for connection or a link—a nexus—between the political statement and the company’s business interests to determine whether the CEO has abandoned his or her fiduciary duties. To measure the business’s interest in the statement, courts could consider a company’s industry or stated core values.²²⁴ The stronger the connection between the political statement and the company’s relevant industry or values, the stronger the showing of a fulfillment of those duties.

A prime example of a nexus between the political statement and the company’s interests is when gun manufacturers respond to mass shootings. In the aftermath of the Parkland, Florida mass shooting that killed 17 people, American Outdoor Brands, the parent company of gun maker Smith & Wesson, issued a statement

²¹⁹ *Mercier v. Inter-Tel (Del.), Inc.*, 929 A.2d 786, 807 (Del. Ch. 2007) (footnotes omitted).

²²⁰ *In re Dollar Thrifty S’holder Litig.*, 14 A.3d at 598.

²²¹ *Id.*

²²² *Mercier v. Inter-Tel (Del.), Inc.*, 929 A.2d 786, 807 (Del. Ch. 2007).

²²³ *See id.* Interestingly enough, the late Justice Scalia despised the word “nexus.” *See* Josh Blackman, *Justice Scalia Really Doesn’t Like the Word Nexus!*, JOSH BLACKMAN’S BLOG (Nov. 28, 2011), <http://joshblackman.com/blog/2011/11/28/justice-scalia-really-doesnt-like-the-word-nexus/>.

²²⁴ *Mercier*, 929A.2d at 807.

through its CEO, James Debney, who expressed the company's sorrow regarding the shooting: "We share the nation's grief over this incomprehensible and senseless loss of life and we share the desire to make our community safer."²²⁵ He added, however, that "[t]hrough our membership and work with the National Shooting Sports Foundation, we will continue to support the development of effective solutions that accomplish that objective, while protecting the rights of the law-abiding firearm owner."²²⁶ Debney made a controversial political statement, but the statement is so closely related to the company's industry that the statement was likely not made to further the political agenda of Debney, but instead was made with the best interests of the company in mind. Such statements fall under the umbrella of CEO activism but are not automatically a breach of the fiduciary's duty.²²⁷

Although not as strong of a connection as the gun manufacturer above, other nexus examples can be found in many of the CEO responses to President Trump's announcement of the U.S.'s withdrawal from the Paris Climate Agreement.²²⁸ C-Suite members from Apple, Salesforce, Microsoft, Google, Facebook, and Uber all expressed their personal disappointment regarding the withdrawal and simultaneously pledged their companies' commitments to helping fight climate change.²²⁹ Although none of these companies were in the energy or environmental sectors,²³⁰ by linking the statements back to the companies directly, a court could find a close connection between the statements and the arguable best interests of the companies.

On the other hand, the responses to the family separation at the border are largely not connected to the companies of the CEOs that made the statements. With a few exceptions,²³¹ immigration policy is not a core value of the companies whose activist CEOs responded to the family separation. These CEOs likely did not make these statements with the sole end of promoting shareholder welfare, and as a result, would largely fail the nexus test.

Thus, by removing the business judgment rule, placing increased scrutiny on political or social statements, and requiring a close fit between the statement and the company's best interests, courts would signal to C-Suite members that shareholder wealth maximization remains the number one priority of a corporation.

²²⁵ Helen Zhao, *Gunmaker American Outdoor Brands Says It "Shares the Nation's Grief" over Florida Massacre*, CNBC (Mar. 1, 2018), <https://www.cnbc.com/2018/03/01/gunmaker-american-outdoor-brands-responds-to-florida-mass-shooting.html>.

²²⁶ *Id.*

²²⁷ Of course, during intermediate scrutiny review, a court could "smoke out" other pretexts for Debney's statements that have the potential to make this statement a breach of his duties.

²²⁸ *See supra* notes 147–58.

²²⁹ *See supra* notes 152–58.

²³⁰ *See supra* notes 152–58.

²³¹ Johnson & Johnson's CEO related its statement back to the company's values of putting families first. *See supra* notes 133–34.

Shareholders are the best situated party to police C-Suite and director actions to ensure investor value is not eroded by CEO activism, and this scrutiny level places the policing power back in shareholders' hands.

IV. BEST PRACTICES FOR ENGAGING IN CORPORATE ACTIVISM

Despite the risk of eroding investor value, the market and shareholders may determine that CEO activism has the potential to be more value-creating than value-decreasing. If shareholders decide not to police their company's activism, the company should tread carefully into the political arena to ensure that this activist value is maximized. Unfortunately, the novelty of CEO activism lends itself to few frameworks that help guide companies once they decide they want to enter the fray. There are, however, a few methods that have proven successful thus far.

The most critical piece of political outreach, according to Marc Benioff, the "ringleader" of CEO activism,²³² is full board support. To that end, Benioff stated: "When leaders speak out, it's essential that their companies stand behind them."²³³

To engage the board of directors in the CEO's political speech before it occurs, corporations could form a political speech director committee. CEOs should sit down with this team and decide what issues matter most to the corporation and why.²³⁴ This committee should vet all desired political speech to make sure it aligns with the corporation's mission. Additionally, the committee "could be required to include in each year's proxy statement a discussion of its work and an explanation of the choices it made during the preceding year."²³⁵ Commentators have indicated approval for such a method: "Accordingly, we support rules requiring corporate speech decisions to be approved, or at least overseen, by a committee of independent directors."²³⁶

Other best practices for engaging in corporate political and social speech include:

- (1) engage politically where a solid majority of employees, directors, managers, and customers are likely to be sympathetic to the company's position, (2)

²³² Langley, *supra* note 54.

²³³ Chatterji & Toffel, *Divided We Lead*, *supra* note 55.

²³⁴ Chatterji & Toffel, *New CEO Activists*, *supra* note 53, at 86. ("This discussion should include reflection on why championing the selected causes would have greater social impact than championing other causes.")

²³⁵ Bebchuck & Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 102 (2010).

²³⁶ *Id.*

align political efforts with the core values of the company, and (3) avoid morally offending a large portion of the populace — especially customers — with the company’s position.²³⁷

Corporations’ goals should include, at the very least, the desire to not offend the vast majority of people in a particular place.²³⁸ Creating meaningful dialogue around certain political or social issues, without simultaneously offending a majority of stakeholders, requires a significant amount of research and work.

Sprout Social, a business social media consulting firm, laid out some of its advice on how corporations can better engage in the political arena. Sprout found that corporations should attempt to foster a direct and relevant link to their consumers and various stakeholders.²³⁹ To do so, brands should “weigh[] in on issues most important to their businesses and customer communities,” which may require in-depth research into the corporation’s target communities.²⁴⁰ It elaborated, “[s]mart CEO activists typically choose their issues; the issues do not choose them.”²⁴¹ For example, if a large portion of a company’s employees are immigrants, if the CEO is an immigrant, or if the company has employees stuck overseas, then speaking out on immigration issues would be closely tied to the company’s core business—but the statement should also make the connection clear.²⁴² Properly choosing which issues to weigh in on gives corporations a vital air of credibility with consumers.²⁴³

A. *Employees*

Corporations should also consider their employees before treading into the political arena. Political stances can cost companies’ valuable employees when not done carefully or thoughtfully.²⁴⁴ Employees who are more compatible with an organization’s culture and political identity are more likely to be satisfied in their jobs and

²³⁷ Mayer, *supra* note 4, at 43.

²³⁸ One of the quickest ways to do so is to mention the president’s name when making public comments. Jena McGregor, *Survey: There Is Generally No Upside for Companies to Talk About Trump*, WASH. POST (Aug. 8, 2018), https://www.washingtonpost.com/business/2018/08/08/survey-there-is-generally-no-upside-companies-talk-about-trump/?noredirect=on&utm_term=.d4732647cdd4 (quoting the following statement made by Leslie Gaines-Ross: “It’s risky and it’s politicizing an issue where it’s an opportunity to talk about what you stand for . . . what you think is right, what your corporate values are, your moral values.”).

²³⁹ #BrandsGetReal, *supra* note 40.

²⁴⁰ *Id.*

²⁴¹ Chatterji & Toffel, *New CEO Activists*, *supra* note 53.

²⁴² See McGregor, *supra* note 238.

²⁴³ #BrandsGetReal, *supra* note 40.

²⁴⁴ For example, when IBM CEO Ginni Rometty wrote a public letter in support of then president-elect Donald Trump, an IBM senior content strategist published a letter of her own that included her resignation and her reasons for resigning. The former senior consultant wrote that “the president-elect has demonstrated contempt for immigrants, veterans, people with disabilities,

perform better than, conversely, those who feel they don't "fit" and who experience negative responses to their work environments.²⁴⁵

Employees may also feel coerced into promoting the CEO's position if a CEO is constantly bombarding the employees with the CEO's political opinions. CEOs should not require their employees to "espouse particular social or political views or threaten[] retaliation for not following the company line in these controversial debates."²⁴⁶ Even making employee participation voluntary risks employees fearing pressured to participate for fear of sanctions.²⁴⁷ An empirical study done by the Harvard Business Review found that "about half of all workers contacted by their bosses were untroubled by their employers' political efforts, but an important subset — perhaps 20% of those contacted — felt that they were pressured into action with which they disagreed."²⁴⁸ The study found that corporations should steer clear of messages on issues that "may divide worker and corporate interests (such as the minimum wage or unions), requests for political action during elections, and partisan messaging can be particularly unwelcome."²⁴⁹

To foster more positive responses regarding politics in the workplace, corporations can attempt employee political engagement, which can take many forms:

Bosses may communicate to employees which political candidates they believe would be best for the business. They may ask workers to write to Congress to express support for (or opposition to) certain legislation. They may even encourage people to attend rallies, fundraisers, or town halls held by politicians endorsed by management.²⁵⁰

Employee political recruitment and engagement can be an important strategy that companies use to influence public policy and elections, but it should not come at the cost of key employees.²⁵¹

Black, Latinx, Jewish, Muslim and LGBTQ communities. These groups comprise a growing portion of the company you lead." Jena McGregor, *This IBM Employee Quit over Her CEO's Letter to Donald Trump*, WASH. POST (Nov. 29, 2016), https://www.washingtonpost.com/news/on-leadership/wp/2016/11/29/this-ibm-employee-quit-over-her-ceos-letter-to-donald-trump-2/?utm_term=.0fbf6296f03d. *But see* Mayer, *supra* note 4, at 27–28 (arguing that the fear of offending stakeholders or employees should not hinder CEOs from making public political stances because "offending employees and other stakeholders is, at times, an inevitable feature of doing business, especially in a globalized economy").

²⁴⁵ Y. SEKOU BERMISS & RORY McDONALD, HARV. BUS. REV., *MANAGING POLITICAL MISFITS* 2–3 (2018).

²⁴⁶ Chatterji & Toffel, "Race Together," *supra* note 3.

²⁴⁷ *See id.*

²⁴⁸ Alexander Hertel-Fernandez, *A Different Kind of Corporate Activism*, HARV. BUS. REV. (Mar. 27, 2018), <https://hbr.org/2018/03/a-different-kind-of-corporate-activism>.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

B. *Benefit Corporations*

Careful and methodical activism, however, can quickly lose its appeal to CEOs who want to jump on hot-button controversies. Companies could consider an alternative method that would allow for more flexibility while minimizing the risk of upsetting shareholders with a certain political view—transform into a benefit corporation.²⁵² Benefit corporation statutes were specifically adopted to provide such flexibility to business leaders; such flexibility to put nonstockholder interests on equal footing with stockholder ends.²⁵³

Benefit corporation statutes offer so much flexibility that the fiduciaries can include the very political or social issues they wish to pursue in the purpose statement. Including a mission statement that indicates the company's desire to actively participate in the political realm can operate to put potential investors on notice of what the corporation intended. Such notice may lower the chances of derivative litigation because shareholders would not be so surprised that the corporation has stepped into the political arena in one way or another.

That is exactly what Patagonia did. Patagonia is a certified B Lab, which requires a company to have an “explicit social or environmental mission, and a legally binding fiduciary responsibility to take into account the interests of workers, the community and the environment as well as its shareholders.”²⁵⁴ Additionally, “[a] company must . . . amend its articles of incorporation to adopt B Lab’s commitment to sustainability and treating workers well.”²⁵⁵ Patagonia made the switch because “[c]urrent law requires corporations to favor the financial interests of shareholders over the interests of workers, communities and the environment,” and it wanted the ability to make businesses decisions with its other “values, culture, [and] processes” in mind.²⁵⁶

²⁵² See DEL. CODE ANN. tit. 8, § 362 (2019); see also Frederick H. Alexander et al., *M&A Under Delaware’s Public Benefit Corporation Statute: A Hypothetical Tour*, 4 HARV. BUS. L. REV. 255, 255–56 (2014); Dana Brakman Reiser & Steven A. Dean, *Hunting Stag with Fly Paper: A Hybrid Financial Instrument for Social Enterprise*, 54 B.C. L. REV. 1495, 1510 (2013) (“Benefit corporation statutes . . . explicitly reject shareholder wealth maximization.”); Jonathan Brown, *When Social Enterprises Fail*, 62 VILL. L. REV. 27, 51 (2017) (“[T]he passage of benefit corporation legislation transformed the shareholder wealth maximization norm from a mandatory rule to a default rule that parties may contract out of by electing a social enterprise legal form.”); Bart Houlahan et al., *Berle VIII: Benefit Corporations and the Firm Commitment Universe*, 40 SEATTLE U. L. REV. 299, 300 (2017) (“[A]ll jurisdictions adopting benefit corporation legislation, whatever model they use, allow corporations to reject shareholder primacy, and to place the interests of stakeholders (including employees, the community, and the environment) on par with the interests of shareholders.”).

²⁵³ Strine, *supra* note 16, at 785 (footnote omitted).

²⁵⁴ *B Lab*, PATAGONIA, <https://www.patagonia.com/b-lab.html> (last visited Oct. 20, 2019).

²⁵⁵ *Id.*

²⁵⁶ *Id.*

Whether it's as a benefit corporation or any other corporate structure, many consumers want to see corporations "impact[ing] social and political change through significant donations, or [using] their substantial platforms to encourage others to do the same."²⁵⁷ But to do so successfully, without staggering backlash, requires careful decision-making or a dramatic change in corporate structure.

CONCLUSION

Corporations do not have political views but their officers and directors do. These fiduciaries have never before been so vocal about their political ideology, and now more than ever shareholders are forced to sit passively and watch as their C-Suite members charge into the political arena. In this new age of CEO activism, shareholders are left only with the inadequate remedy of derivative litigation. To help mold this remedy into something more effective, courts should do away with the business judgment rule for political statements. In its place, courts should place increased scrutiny on political or social statements and require a close fit between the statement and the company's best interests. This enhanced review would signal to C-Suite members that shareholder wealth maximization remains the number one priority of a corporation, rather than the personal crusades of the corporation's leaders. Shareholders are the best situated party to police C-Suite and director actions to ensure investor value is not eroded by CEO activism, and this scrutiny level places the policing power back in shareholders' hands.

²⁵⁷ #BrandsGetReal, *supra* note 40.