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ESSAY

The Political Economy of Corporate Exit

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Corporate political activity is understood to include financial contributions, lobbying efforts, participation in trade groups, and political advertising, all of which give corporations a "voice" in public decisionmaking. This Essay contends that the accepted definition of corporate political activity overlooks the importance of "exit." Corporations do not need to spend money to exert political influence; when faced with objectionable laws, they can threaten to take their business elsewhere. From the "grab your wallet" campaign to the fight for LGBT rights in states such as Georgia, Indiana, and North Carolina, corporate exit has played a significant role in recent political controversies.

This Essay offers the first account of corporate exit as a form of political activity and identifies two basic rationales: (1) attaching economic consequences to public choices, and (2) avoiding complicity with laws that violate a corporation's values. This Essay also shows how citizens can harness corporate economic power when conventional political channels are inaccessible. In an era of hashtag activism and boycotts sustained via social media, corporations cannot afford to ignore consumers, employees, investors, and other stakeholders.

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INTRODUCTION

Critics contend that corporations subvert democracy by using their economic resources to lobby for corporate-friendly policies and to elect accommodating politicians.[1] Those who take a more sanguine view—notably, a majority of the Supreme Court—reject the claim that corporate dollars corrupt the political process.[2] Yet, there is general agreement that corporate political activity includes financial contributions, lobbying efforts, participation in trade groups, and political advertising, all of which give corporations a "voice" in public decisionmaking.[3]

1. *See* LEE DRUTMAN, THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE 3–4 (2015) (arguing that corporations invest the time and money necessary for lobbying success); Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235, 237 (1981) (arguing that corporate managers use the "wealth and power" of the corporation "to move government toward goals that management favors"); Leo E. Strine, Jr., *Corporate Power Ratchet: The Courts' Role in Eroding "We the People's" Ability to Constrain Our Corporate Creations*, 51 HARV. C.R.-C.L. L. REV. 423, 433 (2016) (arguing that the Supreme Court "gave corporations the ability to influence the political process more directly, which has therefore in turn made elected officials more responsive to moneyed interests, and therefore as a matter of logic, less responsive to less wealthy citizens").

2. Citizens United v. FEC, 558 U.S. 310, 314 (2010) (holding that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption"); Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 236 (1998) ("To exclude corporate expression from the scope of the free speech clause . . . would be unwisely to shut out from public debate a substantial amount of relevant, provocative, and potentially vital information and opinion on issues of fundamental importance to the polity.").

3. *See, e.g.*, David Min, *Corporate Political Activity and Non-shareholder Agency Costs*, 33 YALE J. ON REG. 423, 425 n.1 (2016) (stating that corporate political activity potentially "includes

This Essay contends that the accepted definition of corporate political activity is too narrow and overlooks the importance of "exit."[4] When faced with objectionable laws or regulations, corporations can take their business elsewhere.[5] Consequently, in order to preserve jobs and tax revenue, elected officials often cater to corporate interests.[6] Put differently, exit gives corporations, individually and collectively, the leverage to influence public choices.

The ongoing fight for LGBT civil rights provides a striking example of the power of corporate exit.[7] By making clear that they are unwilling to do business in places that deny equal treatment to LGBT people, corporations have been instrumental in defeating proposed state laws that would restrict transgender bathroom access or permit business owners to refuse services to gay, lesbian, or transgender people.[8] For example, after corporations signaled their intention to

direct contributions to political candidates . . ., independent political expenditures . . ., contributions to political parties, contributions to PACs, contributions to Super PACs, contributions to trade groups and advocacy groups, advertising meant to move public policy, the hiring of former political officials, as well as expenditures related to lobbying" (citing Jay B. Kesten, *Shareholder Political Primacy*, 10 VA. L. & BUS. REV. 161, 163 n.1 (2016))).

4. As discussed *infra* Section I.A, "exit" and "voice" represent alternative approaches to problem-solving in collective context. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

5. STAN LUGER, CORPORATE POWER, AMERICAN DEMOCRACY, AND THE AUTOMOBILE INDUSTRY 25 (2000) ("[I]n an era when capital has become increasingly mobile . . . the prospect of investment flight places government officials under constant pressure to maintain a positive business climate."). The availability of exit is subject largely to pragmatic constraints. If a jurisdiction has unique characteristics—for example, access to oil reserves—or if existing operations would be difficult to move, exit becomes more expensive. *See* Rachel I. Massey, *The Credibility of Exit Threats: Refining the "Race to the Bottom" Debate*, 10 J. PUB. & INT'L AFF. 47, 53–54 (1999) (identifying, inter alia, "[s]ize of required fixed investment" and "[r]eliance upon a local, exhaustible natural resource" as factors governing the availability of exit).

6. CHARLES E. LINDBLOM, POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS 172–73 (1977) (arguing that corporations enjoy unmatched influence in our political system because they make decisions that affect the creation and allocation of economic resources and "economic distress can bring down a government"). Although we follow standard usage in referring to corporate political activity, the concept should be understood to include other types of business associations, including partnerships and limited liability companies.

7. *See, e.g.*, Sandhya Somashekhar, *Georgia Governor Vetoes Religious Freedom Bill Criticized As Anti-gay*, WASH. POST (Mar. 28, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/03/28/georgia-governor-to-veto-religious-freedom-bill-criticized-as-anti-gay/?utm_term=.3c99f9837f07 [https://perma.cc/E8JY-VLRK] (recounting effect of corporate influence on veto of bill). The characterization "anti-gay" for provisions designed to stigmatize gay people and to license discrimination against them should not be taken as a more general critique of religious freedom laws, which "have been valuable for religious minorities who often have no other recourse when the law conflicts with their most basic religious obligations." CHRISTOPHER C. LUND, *Keeping* Hobby Lobby *in Perspective*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 285, 289 (Micah Schwartzman et al. eds., 2016).

8. *See infra* Section III.B.

remove business from the state, Georgia's governor vetoed a bill that would have legalized discrimination against same-sex couples.[9]

Although a question of democratic legitimacy arises when corporations stand between public officials and the will of the majority, we argue that corporate exit should be understood as a part of the democratic process. When conventional political channels are inaccessible,[10] citizens can harness corporate economic power instead. Corporations are not democratic institutions, but they answer to consumers, employees, investors, and other stakeholders.[11] Also, when corporations operate in national as well as local markets, they can accelerate progress toward the universalization of certain kinds of norms.[12] Thus, corporations can mediate between citizens and their elected representatives as well as between local, state, and national political communities.

To be clear, this Essay does not contend that corporations will reliably protect the powerless or guide politicians to a deeper appreciation of liberty, equality, or justice.[13] Corporations seek to maximize their profits and may threaten to exit jurisdictions in order to extract concessions that benefit their shareholders at the expense of other constituencies.[14] For this reason, corporations may take positions that are detrimental to economic, environmental, or social justice.[15]

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9. Somashekhar, *supra* note 7.

10. *See* CHRISTOPHER H. ACHEN & LARRY M. BARTELS, DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT 1–4 (2016) (arguing that citizens are disengaged from politics and therefore elections do not provide an opportunity to constrain public officials); K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 179 (2016) ("In a country that claims democracy as its birthright, it is remarkable how widespread and deep-seated a sense of democratic failure has become.").

11. *See infra* Section II.A.

12. *See infra* Section III.A. National standardization of norms may not always be desirable. *See, e.g.*, Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 30 (1983) (defending the "quasi-autonomous" character of insular religious communities such as the Amish and the Mennonites).

13. Even if corporations could be depended upon to advance public values of this kind, they would not agree about the content or relative priority of such values. For example, some corporations claim a religious identity and mission and seek to limit antidiscrimination rules; others emphasize secular values of equality and inclusion.

14. *See* Lloyd Hitoshi Mayer, *Breaching a Leaking Dam?: Corporate Money and Elections*, 4 CHARLESTON L. REV. 91 (2009); Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103 (2002). To the extent corporations are meant to focus on shareholder profits, such efforts are understandable. *See* Jill E. Fisch, *How Do Corporations Play Politics?: The FedEx Story*, 58 VAND. L. REV. 1495, 1501 (2005) (arguing that "political activity is not a dispersion of shareholder funds, but an integral and necessary part of a corporation's operating strategy").

15. *See* Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 127 (2010) ("The public choice accounts of recent political economy claim that the existence of public power is an occasion for motivated special interests to seek to capture the power of government . . . to realize private gains through subversion of state authority.").

More generally, there is reason to worry that the political power of corporations will entrench economic inequality.[16]

Nevertheless, we contend that corporations can exert their political influence for public good as well as private profit. Indeed, we argue that corporate social responsibility requires some level of political engagement. The normative argument rests upon two propositions. First, we contend that corporations should aspire to more than commercial integrity and compliance with existing laws.[17] In particular, we proceed on the assumption that corporations are capable of engaging socially divisive issues[18] and that corporations are permitted to consider stakeholder interests as well as profits.[19]

Second, we argue that economic markets facilitate democratic contestation. Citizens express ethical, moral, and political views not only in deciding how to vote and what groups to join but also in deciding what to buy and where to shop.[20] In this regard, individuals increasingly "participate in political action aimed at corporations rather

16. *See* Joseph Fishkin & William E. Forbath, *The Anti-oligarchy Constitution*, 94 B.U. L. REV. 669, 693 (2014) ("Extreme concentrations of economic and political power undermine equal citizenship and equal opportunity."); David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1370 (1994) (arguing that campaign finance reform efforts should focus on equality rather than corruption). However, the impact of corporate political activity on social inequality should not be considered in isolation. *See* Benjamin Means, *Wealth Inequality and Family Businesses*, 65 EMORY L.J. 937, 951–54 (2016) (criticizing piecemeal reform proposals that fail to consider the impact of incremental changes on existing systems).

17. Traditional definitions of corporate social responsibility envision a mix of compliance, general ethics, and philanthropy. *See* Dirk Matten & Andrew Crane, *Corporate Citizenship: Toward an Extended Theoretical Conceptualization*, 30 ACAD. MGMT. REV. 166, 167 (2005) (critiquing this definition as inadequate and arguing that corporate citizenship should include a commitment to protect fundamental rights, especially in a global context in which nation-states may lack the capacity to act alone).

18. Nested within this proposition are a number of further difficulties: How does an incorporated legal person form views of any kind? Who has the power to decide what views a corporation will espouse? *See, e.g.*, Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 84 (2010) ("As long as corporations are permitted to engage in political speech . . . decisional rules governing whether and how they decide to do so are inevitable."); Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1657 ("While the Court has significantly expanded corporate rights, it has not grounded these expansions in a coherent concept of corporate personhood.").

19. *See* Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps.*, 25 REGENT U. L. REV. 269, 271–72 (2013) ("[T]raditional for-profit corporations . . . are legally free to pursue social or environmental goals and, except in limited circumstances in Delaware most notably, are not required to maximize corporate profits and/or shareholder wealth."). For a contrary view focused on Delaware law, see Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 768 (2015), asserting that in Delaware, "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."

20. *See* Sarah C. Haan, *The CEO and the Hydraulics of Campaign Finance Deregulation*, 109 NW. U. L. REV. 269, 277 (2014) (suggesting that "the politicization of the retail marketplace encourages a rich form of civic participation").

than governments."[21] Hashtag activism gives consumers the ability to organize and to influence corporate decisions.[22] Whether by their own choice or because of outside pressure, corporations have become accountable for the political implications of their economic choices.[23]

The Essay proceeds as follows. Part I demonstrates that corporate political activity includes exit as well as voice. Part II contends that heightened public expectations regarding corporate citizenship make it more difficult for corporations to pretend that their economic choices are politically neutral. Part III argues that corporations can serve as mediating institutions and provide an alternative pathway for citizens to participate in democratic self-governance. Part IV identifies two basic rationales for using corporate exit to register political dissent: (1) attaching economic consequences to public choices, and (2) avoiding complicity with laws that violate a corporation's core values.

I. EXIT AS INFLUENCE

No one disputes that corporations spend money on lobbying and advertising in order to influence political decisions.[24] More controversial is whether these types of activities should be legally

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21. Matten & Crane, *supra* note 17, at 172 (arguing that citizens seek "to effect political change by leveraging the power (or vulnerability) of corporations"). Therefore, "corporations here could be said to have provided an additional conduit . . . through which citizens could exercise their political rights." *Id.*

22. For example, the "grab your wallet" campaign has spurred economic boycotts of businesses accused of supporting the Trump Administration. *See* #GRABYOURWALLET, grabyourwallet.org (last visited Mar. 1, 2018) [https://perma.cc/5JFP-XP87]; *see also* Michael M. Grynbaum & Sapna Maheshwari, *Kawasaki to Stop Sponsoring 'Apprentice' Because of Trump Involvement*, N.Y. TIMES (Jan. 18, 2017), https://www.nytimes.com/2017/01/18/business/kawasaki-to-stop-sponsoring-apprentice-because-of-trump-involvement.html [https://perma.cc/H2EE-T7ZM] (noting that the company's decision to withdraw its sponsorship "came after it was featured by #GrabYourWallet, a grass-roots online campaign to boycott companies with ties to Mr. Trump, his family and his political donors").

23. *See* David A. Fahrenthold & Sarah Halzack, *Nordstrom Drops Ivanka Trump-Branded Clothing and Shoes*, WASH. POST (Feb. 2, 2017), https://www.washingtonpost.com/politics/nordstrom-drops-ivanka-trump-branded-clothing-and-shoes/2017/02/02/3f395d10-e9b6-11e6-b82f-687d6e6a3e7c_story.html?tid=a_inl&utm_term=.2f44a30f7655 [https://perma.cc/5YMD-C6GX] (quoting one of the leaders of the "Grab Your Wallet" campaign: "The people who voted against Donald Trump may have lost at the ballot box, but they can win at the cash register[.]"); Henry Grabar, *The Corporate Reaction to the Muslim Ban Has Been Feeble. Here Are Four Companies That Did It Right*, SLATE (Jan. 31, 2017, 9:45 PM), http://www.slate.com/blogs/moneybox/2017/01/31/the_corporate_reaction_to_the_muslim_ban_has_been_feeble_here_are_four_companies.html [https://perma.cc/TJ2H-SHCG] ("It's a fine line between corporate politics for the bottom line and corporate politics for a higher ideal—especially with consumer brands whose success depends on popular opinion.").

24. *See* Issacharoff, *supra* note 15, at 126 ("Any system of privately financed campaigns invites strategic use of money to influence public officials.").

protected.[25] Some argue that money lacks expressive value and should not be equated with political voice.[26] Others accept that the market economy's metabolic system can convert money to speech but contend that corporate political activity is troubling for other reasons.[27] For example, some scholars argue that corporations lack cognizable free speech rights.[28]

This Essay does not seek to resolve long-standing controversies concerning the regulation of corporate expenditures.[29] Rather, what is significant for our purposes is the extent to which the question of corporate political activity has become coextensive with voice. In particular, First Amendment controversies have crowded out other ways of understanding political participation.[30] This Part argues that a more complete account of corporate political activity requires consideration of both exit and voice.

A. Redefining Corporate Political Activity

If members of an organization become dissatisfied, they have two basic options available: "voice" and "exit."[31] Voice includes "any attempt at all to change, rather than to escape from, an objectionable state of affairs."[32] Exit involves a withdrawal of investment and

25. *See, e.g.*, Richard L. Hasen, Buckley *Is Dead, Long Live* Buckley: *The New Campaign Finance Incoherence of* McConnell v. Federal Election Commission, 153 U. PA. L. REV. 31, 32 (2004) (arguing that the law's distinction between direct and indirect contributions is illogical); Burt Neuborne, *Is Money Different?*, 77 TEX. L. REV. 1609, 1612 (1999) ("Once money becomes crucial to effective political speech, disproportionate political power in the system inevitably gravitates to the people who control the money.").

26. *See, e.g.*, Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 398 (2000) (Stevens, J., concurring) ("Money is property; it is not speech.").

27. *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 94, 98 (1993) (noting the danger that some well-funded speech will drown out other perspectives). Sunstein concludes, however, that "speaker-based discrimination" would be improper and that any regulation of corporate expenditures should be "part of a general effort to reduce the effects of wealth." *Id.* at 239.

28. *See* C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's* The Value of Free Speech, 130 U. PA. L. REV. 646, 652 (1982) (arguing that corporate speech "do[es] not derive from the values or political commitments of any individuals"); Randall P. Bezanson, *Institutional Speech*, 80 IOWA L. REV. 735, 739 (1995) (contending that corporate speech "has no speaker—no point of human origin in the voluntary communicative intention of an individual").

29. For an overview and a general discussion of corporate personhood, see Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673 (2015).

30. *See* Daniel J.H. Greenwood, *First Amendment Imperialism*, 1999 UTAH L. REV. 659, 659 (observing tendency of First Amendment reasoning to displace alternative approaches).

31. *See* HIRSCHMAN, *supra* note 4, at 15.

32. *Id.* at 30.

participation.[33] Those options pertain to groups as small as a single family or as large as a multinational corporation or nation state.

In market settings, exit is the usual choice.[34] Thus, stockholders in publicly traded corporations typically register their disapproval of management's performance by selling their stock.[35] Likewise, if the quality of a business's goods and services wanes, customers will shift to competitors. The economic consequences of exit alert managers that there is a problem to address.[36]

When nonmarket concerns predominate, as when members of a group share ties of intimacy and loyalty, voice is a more common response.[37] Hirschman observes that "[i]n a whole gamut of human institutions, from the state to the family, voice, however 'cumbrous,' is all their members normally have to work with."[38] Although exit remains an option of last resort, individuals prefer not to leave communities defined by ties of affinity, kinship, or other forms of shared identity if it is possible to repair the situation.[39]

Crucially, exit and voice are interrelated mechanisms; one can affect the other. For example, minority shareholders typically lack exit rights in closely held corporations, and this diminishes their voice.[40]

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33. *See id.*

34. *See id.* at 15–16:

> This is the sort of mechanism economics thrives on. It is neat—one either exits or one does not; it is impersonal . . . and success and failure of the organization are communicated to it by a set of statistics; and it is indirect—any recovery on the part of the declining firm comes by courtesy of the Invisible Hand, as an unintended by-product of the customer's decision to shift.

35. *See id.* at 4 ("Some customers stop buying the firm's products or . . . leave the organization.").

36. *See id.* at 23 ("[U]pon finding out about customer desertion, management undertakes to repair its failings."); Susan S. Kuo & Benjamin Means, *Corporate Social Responsibility After Disaster*, 89 WASH. U. L. REV. 973, 987 (2012).

37. In family businesses, for example, voice is essential to the reconciliation of business and family expectations. *See* Benjamin Means, *Nonmarket Values in Family Businesses*, 54 WM. & MARY L. REV. 1185, 1189 (2013) (stating that "a successful family business must find ways to mediate the tension between expectations rooted in family life and expectations inherent to the marketplace").

38. HIRSCHMAN, *supra* note 4, at 17.

39. *See id.* at 16 ("[V]oice is just the opposite of exit. It is a far more 'messy' concept because it can be graduated, all the way from faint grumbling to violent protest; it implies articulation of one's critical opinions rather than a private, 'secret' vote in the anonymity of a supermarket. . . .").

40. *In re* Kemp & Beatley, Inc., 473 N.E.2d 1173, 1179 (N.Y. 1984) (noting that a minority investor "may be without either a voice in protecting his or her interests or any reasonable means of withdrawing his or her investment"); Benjamin Means, *A Voice-Based Framework for Evaluating Claims of Minority Shareholder Oppression in the Close Corporation*, 97 GEO. L.J. 1207, 1219 (2009) (stating that "the lack of a credible threat of exit may diminish the effectiveness of minority voice even as it increases its importance"). Unlike public corporation stock, which trades on national stock exchanges, the stock of closely held corporations does not change hands often, and there are usually share-transfer restrictions that limit the ability of investors to sell their shares to outsiders. *See* Means, *supra*, at 1218. Even if minority shareholders have a

Therefore, because their investment is locked in, minority shareholders that have not bargained for specific contractual exit rights must rely on voice to influence managerial decisionmaking.[41] Yet, without a credible ability to exit and force the majority to purchase their stock at fair value, minority shareholders may find that their voice is ignored and that they are vulnerable to oppression at the hands of the majority.[42]

Conversely, exit rights can strengthen voice. For example, NFL teams have been known to threaten to leave their home city in order to renegotiate an even more attractive package of taxpayer-funded subsidies.[43] In one case, after suggesting the possibility of a move to Los Angeles, the Indianapolis Colts were able to obtain $620 million in state funding for a new football stadium.[44] According to the *Los Angeles Times*, since 1994 over "half of the NFL's 32 teams have used moving to L.A. as leverage."[45] When one NFL team finally accepted an offer from Los Angeles, a commentator opined that the jilted city was lucky to have lost.[46]

As NFL negotiating tactics illustrate, corporations in a free-market economy have the inherent power to decide where to do business.[47] Unlike minority shareholders, therefore, corporations are

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theoretical right to sell their shares, the obstacles to arranging for a sale of illiquid minority stock at fair value are formidable. *See* Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 515 (Mass. 1975) ("No outsider would knowingly assume the position of the disadvantaged minority. The outsider would have the same difficulties.").

41. *See* Means, *supra* note 40, at 1218–19 (arguing that minority shareholder voice is especially important because minority shareholders lack default exit rights).

42. *See id.* at 1218 ("[S]hareholder oppression stems from lack of exit."); Douglas K. Moll, *Shareholder Oppression and "Fair Value": Of Discounts, Dates, and Dastardly Deeds in the Close Corporation*, 54 DUKE L.J. 293 (2004).

43. *See* Nathan Fenno & Sam Farmer, *NFL Teams Often Use L.A. to Get Better Deals to Stay Where They Are*, L.A. TIMES (Jan. 6, 2015, 8:34 PM), http://www.latimes.com/sports/nfl/la-sp-la-leverage-city-20150107-story.html [https://perma.cc/TUL4-5CJP] ("[O]wners have used the threat of moving here to improve aging stadiums and bolster bottom lines.").

44. *See id.*

45. *Id.*

46. Joe Nocera, *In Losing Rams, St. Louis Wins*, N.Y. TIMES (Jan. 15, 2016), https://www.nytimes.com/2016/01/16/sports/football/st-louis-should-be-glad-it-lost-the-rams.html?_r=0 [https://perma.cc/JNA2-8SWM] (contending that "the economics underpinning the recent deal St. Louis and the State of Missouri tried to put together to keep the Rams would have been financially ruinous").

47. President Trump, however, has sought to influence corporations by threatening to impose economic consequences on those who outsource production. *See* Mayumi Negishi & Chieko Tsuneoka, *Trump Tweets Threats, Testing Toyota*, WALL ST. J. (Jan. 6, 2017, 7:48 AM), https://www.wsj.com/articles/trump-tweets-threats-testing-toyota-1483706884 [https://perma.cc/8Z2A-7LPS] ("After Mr. Trump said 'No way!' to Toyota's plans to build a factory in Mexico and threatened to slap a tariff on imported cars, shares in the world's largest car maker by market capitalization fell 1.7% in Tokyo on Friday."). Antitrust law might also supply a constraint if corporations sought to allocate markets in ways that reduce competition. *See generally* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE (5th ed. 2015).

not forced to rely on their voice. The flexibility to use exit or voice gives corporations significant political power, especially since exit can damage a host jurisdiction's economy—indeed, some commentators assert that business interests in society enjoy a uniquely "privileged position."[48]

What is true of businesses in general may not apply in a particular case. Therefore, an assessment of any single corporation's political influence should include consideration of its practical ability to exit. In the language of economics, the cost of exit can be described in terms of the "asset-specific" investment involved. For example, a locally owned business that caters its services to a particular community would likely find it more expensive to leave than a national corporation that handles certain "back office" functions in a region but could relocate anywhere with an office park, college-educated workers, and access to the internet.

Even if all that is involved is training employees, obtaining a lease, and the usual transaction costs of opening a business location, it will be easier for a company to decide not to locate in a community in the first place than to move existing operations. Thus, businesses considering whether to make an initial investment in a jurisdiction are likely to have the maximum leverage and can set conditions for their investment. On the other hand, elected officials may worry more about losing existing business revenue than about foregone opportunities to attract new businesses.[49]

In sum, critics of corporate political activity who argue that the economic power of corporations gives them an outsized political voice are not wrong, but the analysis is incomplete. What matters is not just a corporation's willingness to spend money on politics but its ability to provide jobs and tax revenue, as well as its exit costs. When a corporation that supports a local economy can relocate easily—or choose not to make further investments—its political preferences will carry significant weight.

B. Why Exit Has Been Overlooked

If exit is an integral aspect of corporate political activity—indeed, an obvious aspect—it seems anomalous that scholars have devoted their attention almost entirely to voice-related issues. Apart

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48. LINDBLOM, *supra* note 6, at 175.

49. *See* Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 199–203 (1991) (describing the phenomenon of loss aversion).

from the gravitational pull of First Amendment analysis,[50] two explanations for this oversight seem plausible. First, exit provides an economic signal that may affect the political process, but it is not itself a reasoned contribution to deliberation regarding matters of law or policy. Second, exit can benefit corporations at the expense of other constituencies and might therefore be considered a cautionary tale about unchecked capitalism rather than a tool for political participation. As discussed below, however, neither of these rationales justifies the exclusion of corporate exit from analyses of corporate political activity.

1. Input Versus Deliberation

Arguably, exit is an economic and not a political mechanism and therefore properly excluded from analyses of corporate political activity.[51] Strictly speaking, exit represents a refusal to engage in politics. By exiting, an individual or entity withdraws from the relevant community of interest and leaves behind whatever citizenship or participation rights that might otherwise have existed. From Pericles on, political participation and citizenship have been intertwined.[52] Someone who is not a stakeholder fully invested in the life of the community may not deserve to have a prominent role in shaping outcomes.[53]

The objection that politics requires dialogue misses the interrelationship of exit and voice. Exit is not a standalone mechanism but exists on a spectrum—as a practical matter, the threat of exit will often suffice. So long as corporations have the power to leave, they may never need to exercise it. Corporations can simply explain why, if certain changes are not made, they will exit. In South Carolina, for example, business executives concerned about the decrepit state of roads and other infrastructure recently lobbied for a gas tax to cover

50. *See* Greenwood, *supra* note 30 and accompanying text.

51. *See* HIRSCHMAN, *supra* note 4, at 15 (noting that exit and voice "faithfully reflect a more fundamental schism: that between economics and politics. Exit belongs to the former realm, voice to the latter").

52. *See* Pericles, *Funeral Oration*, *in* THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR (Rex Warner trans., Penguin Group 1954) (c. 431 B.C.E.), *reprinted in* POLITICAL PHILOSOPHY: THE ESSENTIAL TEXTS 1087, 1089 (Steven M. Cahn ed., 3d ed. 2014) ("[W]e do not say that a man who takes no interest in politics is a man who minds his own business; we say that he has no business here at all.").

53. According to Hirschman, it is the most loyal customers who are likely to take the trouble to use voice rather than simply voting with their feet. HIRSCHMAN, *supra* note 4, at 79–80.

badly needed repairs.[54] They cautioned that jobs might be lost if the legislature failed to act.[55]

Even if corporations resort to exit without first attempting to change their situation through the voice mechanism, exit has an important signaling effect and can set the agenda for future legislative action.[56] In this regard, the distinction between economic and political processes is somewhat artificial. At least in societies characterized by free markets and democracy, public preferences can be aggregated in either domain, and the consensus in one domain can affect the other.

Moreover, it would be a mistake to characterize large-scale, modern democracies in terms of an idealized notion of rational deliberation. Unlike the direct democracies of ancient Athens or present-day New England town halls, most existing democracies employ a system of representation: voters elect legislators to represent their interests and, where necessary, to make trade-offs among competing goods.[57] Also, in an era characterized by heightened political polarization and party-line votes, the deliberative nature of representative politics should not be overstated.[58] In sum, corporate exit may not represent a contribution to political dialogue, but it can be used in conjunction with corporate voice. And when exercised, it sends a signal that change is needed.

2. The Race to the Bottom

Scholars may also miss the political salience of exit if they assume that corporations use their economic leverage solely for their own benefit. Perhaps for this reason, academic discussions of the leveraging power of corporations do not connect to broader analyses of

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54. Avery G. Wilks, *Business Leaders: Raise Gas Tax or Risk Jobs, Development*, STATE (Feb. 21, 2017, 12:38 PM), http://www.thestate.com/news/politics-government/ article134016734.html [https://perma.cc/K5Y7-HNCL].

55. *See id.* The gas tax passed with margins sufficient to override the governor's veto. *See* Cassie Cope, *How, After 3 Years, the SC Senate Passed a Gas Tax Increase*, STATE (Apr. 29, 2017, 11:40 AM), http://www.thestate.com/news/politics-government/article147588844.html (last updated Apr. 29, 2017, 1:08 PM) [https://perma.cc/V5JB-GAGD].

56. *See infra* Section III.A.

57. Representatives do not take direct instruction from their constituents and are authorized to act independently based on dialogue and their own conception of the public interest. *See* JOHN RAWLS, A THEORY OF JUSTICE 358–59 (1971):

> The benefits from discussion lie in the fact that even representative legislators are limited in knowledge and the ability to reason. No one of them knows everything the others know, or can make all the same inferences that they can draw in concert. Discussion is a way of combining information and enlarging the range of arguments.

58. *See, e.g.*, Delia Baldassarri & Andrew Gelman, *Partisans Without Constraint: Political Polarization and Trends in American Public Opinion*, 114 AM. J. SOC. 408 (2008).

corporate political activity and tend to be restricted to areas in which corporate self-interest may damage other constituencies.

In the corporate law literature, for example, scholars have debated whether corporations' ability to choose where to legally incorporate will force states into a "race to the bottom."[59] States have reason to compete for corporate charters and the revenue they can bring in via filing fees and legal work. Delaware has long dominated the market for corporate charters, and some allege that its legal rules privilege corporate interests at the expense of other values. After decades of empirical work, scholars remain divided about whether the race to the bottom is a genuine phenomenon.[60]

There is no question, however, that individual corporations use their economic leverage to obtain advantages in negotiations with public officials concerning specific projects.[61] For example, Tesla recently "landed a stunning $1.4 billion in tax breaks, free land, and other beneficence from Nevada to build the factory outside Reno."[62] To achieve that result, Tesla set up a bidding war among seven states.[63]

Tesla announced its intention to build a "gigafactory" that would involve thousands of jobs and billions of dollars in investment, then gave the states three weeks to assemble proposals including "details on what enticements the state would offer: tax breaks, free land, infrastructure improvements, job training, and cash."[64] Ultimately, after acceding to Tesla's shifting demands, Nevada agreed to pay Tesla "more than $200,000 for each of the 6,500 direct jobs the gigafactory is supposed to create."[65]

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59. *See* Michal Barzuza & David C. Smith, *What Happens in Nevada? Self-Selecting into Lax Law*, 27 REV. FIN. STUD. 3593, 3593 (2014); William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 666 (1974); Mark J. Roe, *Delaware's Politics*, 118 HARV. L. REV. 2491, 2495–96 (2005).

60. To the extent federal law sets uniform standards across states, then a race to the bottom, if one exists, depends on corporations moving operations to other nations. *See* Massey, *supra* note 5 (identifying factors relevant to a corporation's decision whether to relocate when a nation imposes new environmental regulations—in theory, the same analysis applies to intrastate moves).

61. Corporations may also use their economic leverage to avoid environmental regulations. *See* CIARA TORRES-SPELLISCY, CORPORATE CITIZEN? AN ARGUMENT FOR THE SEPARATION OF CORPORATION AND STATE 200–01 (2016).

62. Peter Elkind, *Inside Elon Musk's $1.4 Billion Score*, FORTUNE (Nov. 14, 2014, 7:00 AM), http://fortune.com/inside-elon-musks-billion-dollar-gigafactory/ [https://perma.cc/8EJW-QTBH].

63. *Id.* New Mexico won an earlier contest for a Tesla factory with an offer worth $20 million only to have Tesla move when California came in late with a better offer. *Id.* ("Tesla promptly abandoned New Mexico. (The company now says it shifted its site because the New Mexico plan was unworkable.) In California, Tesla has received sales-tax exemptions, which it expects will save the company $90 million over a decade.").

64. *Id.*

65. *Id.*

Despite the unprecedented sticker price, it is not clear that Nevada's elected officials were goaded into making an irrational decision.[66] Although empirical studies of sports stadium deals suggest that they rarely deliver the economic benefits cities envision,[67] an investment of taxpayer resources to attract businesses or retain them may sometimes be worthwhile. Also, some business projects may not be sustainable without significant public investment at the front end.[68]

To the extent corporations use their economic leverage to demand private benefits, however, it is understandable that commentators would fail to appreciate the potential value of corporate exit for democracy. As one journalist summarizes these types of negotiations, "companies routinely use the cudgel of jobs to extract huge offers from desperate states—a process that can resemble a shakedown."[69] Whether or not a "shakedown" should be considered political might seem to be a debater's point.

In the remainder of this Essay, however, we argue that threats of corporate exit should not be dismissed as a self-interested tactic for maximizing profitability. Corporations may also consult internal principles of social responsibility that guide their activities in ways intended to produce value for society as well as profits for shareholders. In this regard, "some firms have, in recent times, engaged in sociopolitical issues that are divisive, unsettled, emotionally charged, or contested."[70] The ongoing struggle for LGBT rights is an important case in point.[71]

Also, as discussed in the next Part, corporations offer a channel through which consumers or other constituencies can influence politics. A group that is powerless in majoritarian terms within individual states may have the savvy to activate corporate power in order to have a greater impact on democratic discourse. Precisely because they can

66. Nevada made sure that Tesla's subsidies were tied to "targets for job creation and investment." *Id.*

67. *See* Nocera, *supra* note 46 (arguing that aside from nonpecuniary justifications such as civic pride, "there is little evidence that professional sports franchises offer lasting economic benefits").

68. *See* LINDBLOM, *supra* note 6, at 173 ("One of the great misconceptions of conventional economic theory is that businessmen are induced to perform their functions by purchases of their goods and services, as though the vast productive tasks performed in market-oriented systems could be motivated solely by exchange relations between buyers and sellers.").

69. Elkind, *supra* note 62.

70. Michael Nalick et al., *Corporate Sociopolitical Involvement: A Reflection of Whose Preferences?*, 30 ACAD. MGMT. PERSP. 384, 384 (2016). Examples include "same-sex marriage, gun control, immigration, transgender rights, legalization of marijuana, and the size or role of the government." *Id.* at 385. Given a lack of societal consensus, "corporate engagement in these debates risks alienating certain groups of stakeholders." *Id.*

71. *See infra* Section III.B.

move from one jurisdiction to another, taking substantial economic value with them, corporations are capable of influencing the spread of democratic norms.

II. THE POLITICIZATION OF ECONOMIC CHOICES

Many citizens have concluded that their views do not matter and that their vote does not count.[72] Election statistics bear this out: for example, only 60.2% of eligible voters participated in the 2016 presidential election.[73] The reasons for cynicism are several: access to politicians is often conditioned on wealth; political districts are drawn to create as many "safe" districts as possible for the party in charge of the redistricting process;[74] and elections may be too temporally remote to provide a satisfactory check on elected officials. Also, because few points are awarded for political bravery, elected officials may shy away from taking a clear position on contested sociopolitical issues.[75]

At the same time, individuals are increasingly likely to consider a corporation's political positions when deciding whether to buy its products.[76] According to a recent survey, most Americans believe that corporations should "take action to address important issues facing society."[77] By creating additional opportunities for participation, corporations can help to inform public debate and circumvent democratic bottlenecks that insulate existing views from serious

72. Well-functioning democracies are characterized by "the continuing responsiveness of the government to the preferences of its citizens, considered as political equals." *See* ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 1 (1971).

73. *See* Michael P. McDonald, *2016 November General Election Turnout Rates*, U.S. ELECTIONS PROJECT, http://www.electproject.org/2016g (last visited Feb. 28, 2018) [https://perma.cc/44GV-HKPV]. Considerably fewer eligible voters take part in non–presidential year elections. *See* Michael P. McDonald, *National General Election VEP Turnout Rates, 1789–Present*, U.S. ELECTIONS PROJECT, http://www.electproject.org/national-1789-present (last updated June 11, 2014) [https://perma.cc/6C68-DS7G].

74. *See* Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 786 (2004).

75. *See* Nalick et al., *supra* note 70, at 393 ("Pressure groups can target a firm because of government inaction on given issues.").

76. CONE COMMC'NS, 2013 CONE COMMUNICATIONS SOCIAL IMPACT STUDY: THE NEXT CAUSE EVOLUTION 18 (2013) ("When companies support social and environmental issues, Millennials, like the general population, respond with increased trust (91%) and loyalty (89%), as well as a stronger likelihood to buy those companies' products and services (89%).").

77. GLOB. STRATEGY GRP., BUSINESS AND POLITICS: DO THEY MIX? 2 (2016), http://www.globalstrategygroup.com/wp-content/uploads/2016/01/GSG-2016-Business-and-Politics-Study_1-27-16-002.pdf [https://perma.cc/2SWW-NTMF] ("Today, Americans are overwhelmingly supportive of corporate political engagement—88 percent of respondents agree that corporations have the power to influence social change, and 78 percent agree that companies should take action to address important issues facing society.").

challenge. Accordingly, corporations provide an imperfect but genuine avenue for "representation, accountability, and inclusion."[78]

The concept of corporate social responsibility is not new,[79] and, subject to legal and practical limits, corporations have always had the ability to operate where and how they please. It may seem odd, therefore, that corporations have not employed their economic leverage in connection with principles of social responsibility—at least not systematically. Corporations mostly stayed on the sidelines of some of the most important social movements in the nation's history, including the fight against Jim Crow laws in the 1960s.[80]

What has changed? Consumer boycotts in America can be traced back to the Boston Tea Party, and consumer activism has been a persistent phenomenon ever since.[81] More recently, however, consumer activists have adopted a strategy of channeling political preferences through corporations, which are better positioned to affect societal norms.[82] When appeals to corporate citizenship alone are not enough, social activists have used the threat of boycotts to enlist corporations in their efforts.[83]

The argument that corporations should be prepared to engage socially divisive issues has several parts: (1) social media empowers

78. RAHMAN, *supra* note 10, at 105 (describing ways in which democratic politics should be improved). Rahman, like many other commentators, assumes that economically powerful corporations are an impediment to a well-functioning democracy. *Id.* at 4. We argue that corporations can be part of the solution. A corporation's threat to exit a jurisdiction creates pressure for change and, if deployed as part of a concerted strategy aligned with advocacy groups, can make public officials accountable to those whose interests they represent.

79. *See generally* C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77 (2002).

80. During the civil rights era, activists used sit-ins and other pressure tactics to galvanize businesses into playing a more constructive role. *See* Karen Miller Russell & Margot Opdycke Lamme, *Public Relations and Business Responses to the Civil Rights Movement*, 39 PUB. REL. REV. 63 (2013). Although some businesses tried to integrate their workforces and others invested in public education and job training programs, the overall business reaction was mixed and, at best, mildly supportive. *Id.* at 71. Despite the protests, for example, Northern businesses continued to move to the segregated South. *Id.* at 65 (citing *Southward Ho!*, WALL ST. J., Sept. 9, 1958, at 1).

81. *See* LAWRENCE B. GLICKMAN, BUYING POWER: A HISTORY OF CONSUMER ACTIVISM IN AMERICA (2009).

82. *See, e.g.*, Lynda V. Mapes, *'Divestment Is Our Goal': Seattle City Council to Vote on Pulling $3 Billion from Wells Fargo over Dakota Access Pipeline*, SEATTLE TIMES (Feb. 1, 2017, 8:47 AM), http://www.seattletimes.com/seattle-news/environment/protesters-call-for-seattles-billions-to-be-pulled-from-wells-fargo-over-dakota-access-pipeline/ [https://perma.cc/EU4N-UV5P] ("The proposal is intended to be a blow against construction of the controversial Dakota Access Pipeline.").

83. *See* Nalick et al., *supra* note 70, at 393:

> Groups that target firms and activate stakeholder pressure to take a stance on an issue are often part of social movements, and frequently comprise large, sometimes informal, groups of individuals or organizations that focus on specific political or social issues to mobilize and actively contest particular values and beliefs.

consumer advocates and makes corporate political neutrality increasingly untenable, (2) the Supreme Court's recent jurisprudence undercuts the traditional defense that corporations should focus only on shareholder profits, and (3) in the context of global supply-chain management, corporations have already shown that they can extend principles of social responsibility to suppliers, industries, and even to other nations.

A. Social Media

Corporations have no place to hide. For better or worse, a statement attributed to a corporation or one of its controlling owners can become global news within hours, and consumers can use social media to organize boycotts.[84] In today's "hyper-politicized" atmosphere,[85] corporations must consider the potential political implications of their economic decisions.[86]

A few recent examples illustrate the point. New Balance faced outraged consumers after a spokesperson opined that the election of Donald Trump would improve the prospects for domestic manufacturing.[87] L.L. Bean has been barraged by negative press

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84. Rachel Abrams, *Early Signs Suggest Trump's Actions Are Taking a Toll on Trump Brand*, N.Y. TIMES (Feb. 4, 2017, 5:30 AM), https://www.nytimes.com/2017/02/04/business/the-trump-brand.html [https://perma.cc/LXC4-T5HF] ("At a time when protests and boycotts can easily be organized online, brands face more pressure to respond to consumer demands."). According to one scholar, consumer boycotts should be afforded First Amendment protections because they constitute political expression. *See* Theresa J. Lee, *Democratizing the Economic Sphere: A Case for the Political Boycott*, 115 W. VA. L. REV. 531, 535 (2012) (defining a political consumer boycott "as a refusal to buy goods or patronize certain business undertaken by individuals in their role as consumers and citizens in order to effect political or social change").

85. *See* Monica Hesse, *When Even Frosted Flakes Are Political, Where Does That Leave Us as a Country?*, WASH. POST (Dec. 12, 2016), https://www.washingtonpost.com/lifestyle/style/ when-even-frosted-flakes-are-political-where-does-that-leave-us-as-a-country/2016/12/12/ 07594c60-b8b1-11e6-b994-f45a208f7a73_story.html?utm_term=.82480c821fd8 [https://perma.cc/ G78Q-X7UR] ("Everything is political these days. Every single decision."); Aamer Madhani, *From Boeing and Nordstrom to Uber and Starbucks: What Company Is Next to Feel a Trump-Era Hit?*, USA TODAY (Feb. 11, 2017, 6:01 AM), http://www.usatoday.com/story/news/2017/02/11/ corporate-america-faces-tough-balancing-act-age-trump/97765250/ [https://perma.cc/479R-J4TF] ("[C]orporate America is trying to adapt to an increasingly unpredictable and hyper-politicized business climate."); Helaine Olen, *So Do We Have to Boycott Everything Now?*, SLATE (Feb. 1, 2017, 3:04 PM), http://www.slate.com/articles/business/the_bills/2017/02/the_trump_inspired _boycotts_are_starting_to_go_too_far.html [https://perma.cc/K64C-NYS7] ("Even the activities of a sandwich chain are political now.").

86. *See* James Surowiecki, *The Trump-Era Corporate Boycott*, NEW YORKER (Jan. 9, 2017), http://www.newyorker.com/magazine/2017/01/09/the-trump-era-corporate-boycott [https://perma.cc/HQP8-3RAZ] (observing that "the Trump boycotts, from both the left and the right, have been driven by issues extraneous to the targets' core business practices").

87. *See* Ahiza Garcia, *Customers Burn New Balance Shoes over Trump Comments*, CNN MONEY (Nov. 10, 2016, 7:31 PM), http://money.cnn.com/2016/11/10/news/companies/trump-new-balance-burning-shoes/ [https://perma.cc/YT8F-FHGX].

coverage, not because of any direct involvement in politics, but because one of its family owners contributed money to a PAC supporting the election of Donald Trump.[88] Stores that sell Ivanka Trump's brand of clothing, shoes, or jewelry have faced severe pressure from all sides.[89] When Target announced a policy of permitting individuals to use "whichever bathroom corresponds with their gender identity," conservative activists banded together to boycott the chain.[90]

The prominence of the "grab your wallet" website highlights how social media can create new opportunities for consumer activism. The founder of the website, Shannon Coulter, had little previous experience in politics but has become an "unlikely general of the digital army now supporting her campaign."[91] Her boycott movement started with a single tweet and soon evolved into a juggernaut.[92] Several businesses targeted for boycotts have subsequently dropped Trump-branded products, though they claim to have done so based solely on sales figures.[93]

B. Citizens United *and* Hobby Lobby

Social media facilitates the rapid spread of information, but that alone cannot account for the expectation that corporations will further political interests in what they choose to sell, how they operate, and where they operate. The blurring of the line between economic and

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88. *See* Daniel Victor, *Trump Tweet About L.L. Bean Underscores Potential Danger for Brands*, N.Y. TIMES (Jan. 12, 2017), https://www.nytimes.com/2017/01/12/us/politics/linda-bean-ll-bean-boycott.html?_r=0 [https://perma.cc/N3TF-XRK8] ("Mr. Gorman [L.L. Bean's CEO] had responded to the recent calls for a boycott by saying that L.L. Bean does not endorse political candidates, make political contributions or support any political agenda, and he described Ms. Bean's contributions as her personal decision.").

89. *See* Abha Bhattarai, *A Trump Voter's Message to Retailers: 'Keep Your Mouths Shut About Our President*, WASH. POST (Feb. 25, 2017), https://www.washingtonpost.com/business/capitalbusiness/a-trump-voters-message-to-retailers-keep-your-mouths-shut-about-our-president/ [https://perma.cc/48HU-AGDZ] (finding that both left- and right-leaning groups have made threats and boycotted retailers for their views on the Trump family).

90. *See* Travis M. Andrews, *Target CEO Responds to Nationwide Boycott of the Store over Transgender Bathroom Policy*, WASH. POST (May 13, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/05/13/target-ceo-responds-to-nationwide-boycott-of-the-store-over-transgender-bathroom-policy/?utm_term=.341e342bd948 [https://perma.cc/4LMC-DWFS] ("We took a stance, and we're going to continue to embrace our belief of diversity and inclusion. . . ." (quoting Target CEO Brian Cornell)).

91. Rachel Abrams, *The Anti-Trump Activist Taking on Retailers*, N.Y. TIMES (Feb. 25, 2017), https://www.nytimes.com/2017/02/25/business/the-unlikely-general-behind-an-anti-trump-boycott.html [https://perma.cc/J7YX-DVQ3].

92. *Id.* ("Grab Your Wallet now includes a list of places to shop and not shop, and a short script for people who want to call companies to complain. As many as 32,000 people visit her site in an hour, Ms. Coulter said.").

93. *Id.*

political activity may be attributable in part to the Supreme Court's recent jurisprudence concerning the constitutional and statutory rights of for-profit corporations.[94] By insulating corporations from external regulation concerning a wide swathe of political and religious activity, the Supreme Court destabilized the corporation's traditional role in society.

According to a conservative view of the corporation, "for-profit corporations should be governed with one end in mind: the generation of the most profit for their stockholders."[95] Scholars who endorse this position do not ignore the social costs of corporate activity but argue that external regulation rather than the idiosyncratic choices of corporate managers provides the only legitimate basis for aligning corporate activity with public good.[96]

However, now that corporations have carte blanche permission to marshal their economic resources to achieve political ends, a theory of corporate governance that sets profits as the only objective faces a serious problem: rational corporations focused solely on shareholder profits will work for the election of officials who agree to allow corporations to impose the costs of doing business on others.[97] Consequently, *Citizens United v. Federal Election Commission*[98] "undermines conservative corporate theory's reliance upon the regulatory process as an adequate safeguard against corporate overreaching for non-stockholder constituencies and society generally."[99]

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94. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775 (2014) (extending Religious Freedom Restoration Act free exercise rights to for-profit corporations); Citizens United v. FEC, 558 U.S. 310, 365 (2010) (holding that limitations on independent political expenditures made by corporations violate the First Amendment).

95. Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and* Citizens United, 100 CORNELL L. REV. 335, 338 (2015); *see also* STEPHEN M. BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE 53 (2008) (stating that "despite occasional academic arguments to the contrary, the shareholder wealth maximization norm . . . indisputably is the law in the United States").

96. Nalick et al., *supra* note 70, at 391 ("Managers tend to wield enormous power in firm decision making, and their decisions can be influenced by their personal biases."); Strine & Walter, *supra* note 95, at 339 (noting that legislators must establish appropriate rules to prevent rational corporate actors from externalizing their costs onto society "while internalizing the resulting excess profits reaped from those shortcuts").

97. *See generally* Elizabeth Pollman, *Citizens Not United: The Lack of Stockholder Voluntariness in Corporate Political Speech*, 119 YALE L.J. FORUM 53 (2009); David G. Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social Responsibility After* Citizens United, 89 N.C. L. REV. 1197, 1198 (2011).

98. 558 U.S. 310.

99. Strine & Walter, *supra* note 95, at 342. Specifically, *Citizens United* disallows "greater regulation of corporate political activity in order to insulate the political process from corporate influence." Yosifon, *supra* note 97, at 1199 (noting that *Citizens United*'s holding "makes clear that the First Amendment precludes such a response"). In *Hobby Lobby*, the Court betrayed its

If external regulation can no longer guarantee responsible corporate conduct, then reluctant corporate law theorists may be compelled to revisit the rival position, which holds that "corporate law should empower corporate managers to conduct the affairs of the corporation in a manner that gives weight to the best interests of the corporation's employees, consumers, the communities it affects, and society as a whole."[100] Advocates of corporate social responsibility argue that corporations "are too powerful and have been accorded too many rights similar to those given to actual humans for them not to behave in a socially responsible manner that reflects the full range of concerns that actual humans consider important."[101] In the wake of *Citizens United* and *Burwell v. Hobby Lobby Stores, Inc.*,[102] these arguments have gained new force.[103]

C. Supply Chains

Nor can corporations disclaim responsibility for shaping the legal environment in which they operate. Recent trends in global supply-chain management show that corporations can use their economic leverage to uphold ethical standards across supply chains, and they have begun to embrace this obligation. For example, one commentator asserts that "Walmart has done more than the Oslo Accords to improve environmental conditions in China by saying to their manufacturers to up their game or else we won't buy from you anymore."[104]

Notably, the emphasis on maintaining high standards across supply chains represents a significant change in attitudes and

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ignorance of corporate law when it stated that employees are one of the groups covered by corporate law rules. *See* Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV. 639, 688 (2016) (noting that "corporate law does not specify the rights and obligations of employees"). Rather, employment and labor laws external to the corporation govern employees' rights. *Id.*

100. Strine & Walter, *supra* note 95, at 339; *see also* David Millon, *Redefining Corporate Law*, 24 IND. L. REV. 223, 225–26 (1991) (explaining that corporate management's responsibilities reflect that corporations are more than just investment vehicles for owners of capital).

101. Strine & Walter, *supra* note 95, at 339. For an elaboration of different theories of corporate social responsibility, see Kuo & Means, *supra* note 36, at 994–1000.

102. 134 S. Ct. 2751 (2014).

103. *See* Pollman, *supra* note 99, at 690 (arguing that the Court in *Hobby Lobby* placed the "interests of five shareholders above those of over 13,000 employees" and thereby "upset the implicit agreement that allows corporate law to serve as enabling rules for shareholders and directors because of the assurance that external legal regimes would address the interests of others"); Yosifon, *supra* note 97, at 1199 (arguing that the solution "is to alter corporate governance law so that firms are not managed in the exclusive interests of shareholders, but instead operate under a multi-stakeholder regime which requires directors to attend directly to the interests of multiple stakeholders at the level of firm governance").

104. TORRES-SPELLISCY, *supra* note 61, at 211 (citation and internal quotation marks omitted).

practice.[105] Corporations once replaced vertically integrated structures for sourcing materials with independent supply chains in order to limit the scope of their legal responsibilities.[106] By removing themselves from direct involvement in decisions regarding labor and environmental practices, businesses could focus on the bottom line without much concern for how it was achieved.

In a remarkable shift, many of the corporations that control global supply chains have now acknowledged that their social responsibilities do not end at the water's edge of the corporate form and that they are obliged to ensure that their suppliers meet appropriate standards.[107] No doubt social media has something to do with changing attitudes; even when corporations are free from the threat of legal liability, they may face reputational consequences for abusive labor practices and environmental harms.[108]

When motivated to provide oversight over supply chains, corporations have shown that they have the capacity to do so. Because large retailers and manufacturers have economic leverage, "even when supply chains exist in a formally free market economy, firms at the apex of those chains retain enormous power amounting to de facto operational control."[109] For instance, McDonald's commitment to buy sustainably sourced cattle has the potential to reshape the cattle

105. Nelson Lichtenstein, *Two Cheers for Vertical Integration: Corporate Governance in a World of Global Supply Chains*, *in* CORPORATIONS AND AMERICAN DEMOCRACY 329, 351 (Naomi R. Lamoreaux & William J. Novak eds., 2017) ("Every supply chain consists of a series of subordinate entities whose prices, production schedules, and labor costs are put under relentless pressure by the firm or institution that is the ultimate buyer of the product.").

106. *See id.* at 330 (arguing that global supply chains typically involve tight economic integration but "combined with a legal regime that absolves those who command the various links in the supply chain of the kind of responsibility—moral, economic, and legal—attached to those in formal leadership of the vertically structured corporation that once seemed so central to the American polity").

107. *See, e.g.*, *CSR Environmental Sustainability*, CISCO, https://www.cisco.com/c/en/us/about/csr/impact/environmental-sustainability.html [https://perma.cc/AG7S-7KGC] (last visited Feb. 28, 2018) ("We multiply our positive impact on people, communities, and the planet by requiring suppliers to meet the high business standards that we practice every day."). In the context of global supply chains, the most difficult task may be to ascertain whether suppliers are complying. *See* Kishanthi Parella, *Outsourcing Corporate Accountability*, 89 WASH. L. REV. 747, 753–54 (2014) (describing tactics suppliers may use to conceal their activities).

108. *See, e.g.*, Richard Bilton, *Apple 'Failing to Protect Chinese Factory Workers,'* BBC NEWS (Dec. 18, 2014), http://www.bbc.com/news/business-30532463 [https://perma.cc/X35G-FLL8] (describing how investigative reporters uncovered unethical practices throughout Apple's supply chain).

109. Lichtenstein, *supra* note 105, at 340. Large retailers and manufacturers can easily switch suppliers if they are dissatisfied. *Id.* at 347 ("Just as nineteenth-century cotton houses could switch their source of supply from Mississippi to India or Egypt, so too can cell phones, sweatshirts, and tennis shoes find their manufacturing home in Honduras, the Pearl River Delta, Ho Chi Minh City, or Bangladesh.").

industry.[110] In order to compete for McDonald's business, cattle raisers must meet McDonald's standards.[111] Noncompliant businesses can be cut out of the supply chain.[112]

For another example of how corporate exit can be used to reform supply chains, consider the efforts of Unilever to achieve environmental goals. In particular, Unilever has listed "eliminating deforestation" as one of its key social responsibility initiatives and has stated that the initiative is meant to apply to the company's supply chains.[113] Although Unilever states that it is "committed to achieving zero net deforestation associated with four commodities," it has concentrated its attention on one of those commodities, palm oil, because Unilever recognizes that it has "the scale to make a difference."[114] In fact, Unilever is "the world's largest single buyer of palm oil."[115]

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110. *See* Alla Katsnelson, *Will McDonald's 'Sustainable Beef' Burgers Really Be Any Better?*, GUARDIAN (Jan. 13, 2015, 7:00 AM), https://www.theguardian.com/sustainable-business/2015/jan/13/sustainable-beef-mcdonalds-meat-environment [https://perma.cc/3VBJ-659Y] (reporting criticism that the new standards are not enough but noting widespread agreement that they are a step in the right direction); Burt Rutherford, *McDonald's & Walmart Demand Sustainable Beef—What Does That Really Mean?*, BEEF MAG. (Jan. 16, 2014), http://www.beefmagazine.com/cattle-industry-structure/mcdonald-s-walmart-demand-sustainable-beef-what-does-really-mean [https://perma.cc/6NV3-NVSJ] (stating that the "program will include guidelines on land stewardship, water quality and reduced feed and manure emissions"); *Helping Lead a Global Movement for Beef Sustainability*, MCDONALD'S, http://corporate.mcdonalds.com/corpmcd/scale-for-good/beef-sustainability.html (last visited Feb. 28, 2018) [https://perma.cc/WQQ6-KY8D] (reaffirming commitment and describing progress toward stated goals).

111. Our argument that retailers at the top of global supply chains can use their economic leverage to advance principles of social responsibility is not an assertion that indirect mechanisms of control are equivalent to actual ownership. *See* Lichtenstein, *supra* note 105, at 348 ("Most firms have established 'corporate social responsibility' staffs, but such initiatives are but a pale substitute for the absolute legal and administrative responsibility that reformers once thought a core function of management."). For our purposes, what is significant is that corporations can use the power of exit to influence decisions made by legally separate organizations.

112. Bilton, *supra* note 108 (noting that Apple could respond to the problem of unsafe mining operations in Indonesia by sourcing tin from another location). Apple stated that while exit would be easier, "that would also be the lazy and cowardly path, since it would do nothing to improve the situation." *Id.* (internal quotation marks omitted). Instead, Apple argued that it has "chosen to stay engaged and attempt to drive changes on the ground." *Id.* (internal quotation marks omitted). Whether exit or voice is preferable in this particular instance, Apple's leverage to demand changes to mining operations in Indonesia is ultimately preferable to its ability to exit. If the tin Apple needs is not readily available elsewhere, perhaps limitations on its exit power also explain why Apple has struggled to enforce its policies regarding working conditions.

113. *Eliminating Deforestation Through Advocacy & Partnership*, UNILEVER, https://www.unilever.com/sustainable-living/transformational-change/eliminating-deforestation-through-advocacy-and-partnership/index.html (last visited Feb. 28, 2018) [https://perma.cc/B325-7JKP] (explaining their goal of eliminating deforestation through advocacy and partnership).

114. *Id.*

115. *Id.* ("We purchase nearly 3% of the world's palm oil production and 1% of its soy. This gives us significant influence. . . .").

To achieve its objective, Unilever has adopted a three-pronged strategy: (1) instituting supply-chain standards to require that all "purchases are fully traceable and certified sustainable," (2) working with "the whole industry to set and meet high standards, extending beyond current certification schemes and involving growers, traders, manufacturers and retailers," and (3) asking "governments and other partners to embed no-deforestation pledges into national and international policies."[116] Thus, just as McDonald's can change cattle raising practices, the standards Unilever sets for the responsible sourcing of palm oil are designed to affect the industry as a whole.

In short, the evolving ethics of global supply-chain management offer corporations a proven model capable of being extended to the public realm. As illustrated by Unilever's efforts to bring together industry, nation states, and other stakeholders to create sustainable palm oil, corporate experience with supply chains already encompasses direct political activity.[117] The logic for applying supply-chain management concepts to politics is straightforward—just as corporations set standards for their suppliers, they can clarify and dramatize policy issues both for citizens and elected officials.

III. CORPORATIONS AS MEDIATING INSTITUTIONS

Between the individual and the state, mediating institutions such as families, religious organizations, and voluntary associations "are the value-generating and value-maintaining agencies in society."[118] Corporations are an important mediating institution and, according to Jonathan Macey, can "play a transformative role in people's lives, shaping their preferences in important ways."[119]

116. *Id.*

117. *See* Andreas Georg Scherer & Guido Palazzo, *The New Political Role of Business in a Globalized World: A Review of a New Perspective on CSR and Its Implications for the Firm, Governance, and Democracy*, 48 J. MGMT. STUD. 899, 899 (2011) ("We suggest that, under the conditions of globalization, the strict division of labour between private business and nation-state governance does not hold any more. Many business firms have started to assume social and political responsibilities that go beyond legal requirements and fill the regulatory vacuum in global governance.").

118. PETER L. BERGER & RICHARD JOHN NEUHAUS, TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY 163 (Michael Novak ed., 2d ed. 1996).

119. Jonathan R. Macey, *Packaged Preferences and the Institutional Transformation of Interests*, 61 U. CHI. L. REV. 1443, 1443 (1994) (arguing that "individuals trust their mediating institutions to act as professional decision makers to relieve themselves of the responsibility of making certain decisions").

Specifically, those who work for corporations often accept the values of the workplace as their own out of loyalty to the institution.[120]

However, corporate values are not a pre-political fact. As a mediating institution, the corporation can act on behalf of relatively less-empowered constituencies, becoming a channel through which consumers, employees, or other stakeholders influence politics. For example, as we discuss below, the leveraging power of corporations can interact with democratic discourse to accelerate the adoption of a norm, namely the acceptance of LGBT people as full and equal members of the community.[121]

In this regard, it is important to clarify that our argument does not assume that corporations are themselves democracies. In fact, the shareholder franchise is quite limited, and those who hold more stock have more votes.[122] In many respects, corporations rely on authority rather than consensus. To conflate corporate governance with democratic self-government is to invite confusion.[123]

Nevertheless, corporations are embedded in markets and must attract and retain employees. Opportunities for internal dissent reinforce the multiplicity of ties between economic choices and moral and political values, and the ways that markets shape and reflect those

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120. *See id.* at 1444 (citing Roger Rosenblatt, *How Do Tobacco Executives Live with Themselves?*, N.Y. TIMES MAG. (Mar. 20, 1994), http://www.nytimes.com/1994/03/20/magazine/how-do-tobacco-executives-live-with-themselves.html?pagewanted=all [https://perma.cc/L2EC-D5EN]).

121. It might be objected that the corporation's political activity will be insincere if driven by market forces. *See, e.g.*, Haan, *supra* note 20, at 276 ("If the company is taking a political position for marketing purposes, it is not advancing a policy preference relevant to the company's operations, but rather pandering to the political views of the majority of its consumer base."); Nalick et al., *supra* note 70, at 393 (noting that a company might seek to appease a vocal, politically engaged minority). However, even if corporations are somehow less sincere than politicians, there is no a priori reason to reject a role for corporations in the process of deliberation on matters of public import.

122. A more complete account of corporate governance would need to account for a variety of institutions that provide direct or indirect oversight:

> [M]ajor corporate governance institutions include the accounting firms that audit public companies, the credit rating agencies that determine whether their debt is "investment grade" or not, the market for corporate control that disciplines management of poorly run companies, the organized stock exchange that promulgates corporate governance rules, the market for initial public offerings of company shares, and the Securities and Exchange Commission itself, which regulates markets, oversees corporate disclosure, and, increasingly, formulates corporate governance policies for public companies.

Jonathan R. Macey, *The Politicization of American Corporate Governance*, 1 VA. L. & BUS. REV. 10, 12 (2006).

123. *See* Usha Rodrigues, *The Seductive Comparison of Shareholder and Civic Democracy*, 63 WASH. & LEE L. REV. 1389, 1398 (2006) ("In most instances, investors are not looking for a democratic experience."). One commentator, however, argues that minority shareholders and political minorities share features in common. *See generally* Anupam Chander, *Minorities, Shareholder and Otherwise*, 113 YALE L.J. 119 (2003).

values.[124] For example, employees in technology firms have demanded that their employers cut ties with the Trump Administration.[125] If a corporation's stakeholders reject its message, they can sell stock, resign employment,[126] withdraw from sponsorship arrangements,[127] or acquire goods and services from its competitors.[128]

A. Signaling Effects

As mediating institutions, corporations can amplify the political views of their constituencies. In particular, corporate exit can have a reverberating effect on democratic deliberation and political agenda setting. Exit presents evidence of perceived deficiencies that a community can either work to correct or decide to accept despite the economic consequences.

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124. *See* Nalick et al., *supra* note 70, at 392 ("Notably, companies may intervene in controversial social issues as a mechanism for building trust, legitimacy, and rapport with key stakeholders such as employees, customers, and activist investors.").

125. *See* David Streitfeld, *Activism Hits Even the Less Flashy Tech Companies*, N.Y. TIMES (Feb. 12, 2017), https://www.nytimes.com/2017/02/12/technology/trump-tech-company-employees.html?_r=0 [https://perma.cc/5UW9-ZTZ7] (reporting that employees are "agitating for an explicit corporate morality even as Mr. Trump considers a new executive order on immigration").

126. The employment market is not as liquid as the stock market, though, and some employees may not be able to shift jobs without incurring significant costs. *See* Leo E. Strine, Jr., *A Job Is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematic Implications*, 41 J. CORP. L. 71, 101–02 (2015).

127. *See, e.g.*, Tom Kludt, *21 Companies Pull Ads from 'The O'Reilly Factor' in Growing Backlash*, CNN MONEY (Apr. 4, 2017, 11:12 PM), http://money.cnn.com/2017/04/03/media/mercedes-ads-bill-oreilly/index.html [https://perma.cc/LG6D-JG9R] (noting that the sponsorships were withdrawn after reports that O'Reilly had sexually harassed several women). Soon thereafter, Fox News terminated its relationship with O'Reilly. *See* Michael M. Grynbaum & Sapna Maheshwari, *Fears of Revolt by Consumers Felled O'Reilly*, N.Y. TIMES (Apr. 20, 2017, 5:30 AM), https://www.nytimes.com/2017/04/20/business/media/fears-of-revolt-by-consumers-felled-bill-oreilly.html?_r=0 [https://perma.cc/43QY-NM9B]:

> In an era when outrage can be easily channeled online, major brands are well aware of the risk of revolts from consumers who are increasingly savvy about hitting companies where it hurts. Brands are not waiting to dissociate themselves from thorny issues that might alienate their customers, be it Mr. O'Reilly's behavior or a North Carolina law against transgender bathrooms.

128. These informal control mechanisms work better for publicly traded corporations and for "consumer-facing" corporations. Businesses that are privately held and that deal mostly with other businesses rather than with the general public are less accountable. For example, the Koch brothers invest heavily in conservative and libertarian political causes and face few, if any, internal constraints. *See* JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT 146–47 (2016). The business is privately owned and not subject to investor pressure. To the extent consumers might be inclined to use economic leverage to resist those efforts, Koch Industries does not have many consumer-facing facets.

For example, General Electric ("GE") recently announced that it would be leaving its headquarters in Fairfield for Boston.[129] GE had maintained the Fairfield headquarters since 1974.[130] The decision to relocate appears to have been motivated in part by disputes over tax policy and financial incentives, but GE also felt that it "had outgrown its dated office campus in suburban Fairfield—a relic of a corporate era that no longer reflects the sort of environment in which the most promising talent want to work."[131] GE's CEO, Jeff Immelt, explained that Boston's high-technology infrastructure was a major attraction.[132] Although GE is not a start-up business, Immelt intends for his employees to operate in a more entrepreneurial environment.[133]

By leaving Fairfield, GE has helped to establish a marker for states and cities that want to compete for high-technology businesses in the future. No longer will it suffice to set aside room in a suburb for an office park.[134] Companies want to place their employees in a vibrant entrepreneurial environment, and that requires public investment in infrastructure.[135] Companies may also consider the strength of the local education system, both for employees and their children. In GE's case, for example, "Boston boasts several world-class universities, which could deliver GE a ready supply of employees to assist in its transition from an industrial-era firm to one that can compete in a knowledge economy."[136]

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129. Ted Mann & Jon Kamp, *General Electric to Move Headquarters to Boston*, WALL ST. J. (Jan. 13, 2016, 8:35 PM), https://www.wsj.com/articles/general-electric-plans-to-move-headquarters-to-boston-1452703676 [https://perma.cc/8UNK-G473].

130. *Id.*

131. *Id.*

132. *See* Jon Chesto, *GE CEO Explains Why He's Moving Headquarters to Boston*, BOS. GLOBE (Mar. 24, 2016), https://www.bostonglobe.com/business/2016/03/24/ceo-tells-boston-business-leaders-why-moving-boston/1j6TiNUnzrnb3QWkEa5ZuM/story.html [https://perma.cc/ PVV2-72WL] (reporting that GE's CEO anticipates Boston "playing a pivotal role in the next wave of technology innovation, one that uses data and analytics to connect machines for big businesses").

133. *Id.* ("The move . . . plays a key role, placing his leadership team in a vibrant city with a world-renowned innovation scene, instead of in a wooded Connecticut suburb.").

134. *See* Lauren Weber, *GE Among Dozens of Corporate Giants Fleeing Suburbs for Urban Centers*, WALL ST. J. (Jan. 13, 2016, 8:07 PM), https://www.wsj.com/articles/ge-among-dozens-of-corporate-giants-fleeing-suburbs-for-urban-centers-1452733627 [https://perma.cc/3NK3-4EUV] (noting that suburban office parks are "falling out of favor" with corporations).

135. *See, e.g.*, Henry Grabar, *Trouble in America's Country Club*, SLATE (June 2, 2017, 11:31 AM), http://www.slate.com/articles/business/metropolis/2017/06/something_is_wrong_with_connecticut.html [https://perma.cc/GE66-FW2E] ("Aetna is expected to announce a move this summer to pull high-level executives out of Hartford and put them in some creative-class downtown.").

136. Weber, *supra* note 134. Moreover, as discussed in the next Section, states that tolerate discrimination against LGBT people may take themselves out of the running for new business opportunities.

Arguably, even when corporations use economic leverage to serve their own interests, they can promote norms that offer wider benefits. Depending on the context, corporate exit may serve to reinforce existing norms or to reveal new norms. If governments anticipate that they are in the running for economic opportunities, it creates an incentive to adjust the legislative agenda accordingly. In the aftermath of any particular competition, a jurisdiction will either have specific obligations or an incentive to make changes for the next opportunity. Thus, corporate decisions regarding where to locate operations can affect public policy in all jurisdictions that compete for corporate business.[137]

Although there is an obvious danger that corporations will push jurisdictions to relax environmental standards and worker protections, corporations can also create incentives that benefit society. For example, in order to compete for knowledge workers, a number of cities have made aggressive moves to become attractive places to live and work—and this has spillover benefits for all members of the community.[138] The recipe for attracting cutting-edge businesses is, not surprisingly, a recipe for creating a vibrant community—in particular, researchers have found that the quality of educational opportunities matters a great deal.[139]

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137. As one commentator observed regarding high-profile defections from Connecticut to other jurisdictions, "[t]he deeper, more daunting question is what *besides* a tax break will make Connecticut a place people want to live and work. The state still hasn't found the answer." Grabar, *supra* note 135.

138. *See, e.g.*, Linda Musthaler, *Pittsburgh Is a Vibrant Ecosystem for High Tech Companies*, NETWORK WORLD (Sept. 25, 2014, 12:37 PM), http://www.networkworld.com/article/2687961/careers/pittsburgh-is-a-vibrant-ecosystem-for-high-tech-companies.html [https://perma.cc/7G7V-3PZR] ("What was old and obsolete has been reborn to support a thriving and mutually supportive tech community. In short, Pittsburgh has become the cool place to launch and grow a high tech company."); Vauhini Vara, *How Utah Became the Next Silicon Valley*, NEW YORKER (Feb. 3, 2015), http://www.newyorker.com/business/currency/utah-became-next-silicon-valley [https://perma.cc/YKP6-F5HE]:

> Utah turns out to . . . have features in common with other places involved in the super-sector: local universities that graduate a lot of S.T.E.M. students (most notably, Brigham Young University); policies and infrastructure that attract businesses (for instance, tax breaks and a light-rail system that connects the state's biggest cities); and strong relationships among local companies.

139. *See* Vara, *supra* note 138:

> Brookings researchers argue that Utah's cities, and other places like them, offer a number of crucial lessons, if governments and businesses elsewhere are willing to heed them: expand government- and corporate-funded R. &. D.; nurture startups by getting them capital and other help; improve the pipeline of S.T.E.M. workers through schools, universities, and corporate-funded training programs; and collaborate to create local 'ecosystems' that encourage super-sector companies to cluster together.

B. Supporting LGBT Rights

Corporate support for LGBT rights—partly motivated by the desire to provide safe, desirable working locations for LGBT employees and allies—demonstrates the power of corporate exit to influence policy and norms. In recent years, several states have taken steps to enact or revise religious freedom laws in order to authorize discrimination against LGBT individuals.[140] Some of these laws permit individuals and faith based organizations to refuse to provide services to gay people.[141] Other laws target the use of public restrooms by transgender people, purporting to restrict an individual's access to the bathroom that corresponds with their gender identity at birth. Finally, some state laws prohibit local governments from enacting antidiscrimination measures.[142]

The business community has in large part lined up against these measures.[143] Through public statements, advertising, product offerings, and special events, corporations have supported gay and transgender rights. Taking a particularly strong stand, Starbucks' CEO, Howard Schultz, encouraged those who disagreed with the company's position to invest their money elsewhere.[144] Other businesses that have publicly

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140. Many states had previously enacted religious freedom laws modeled on the federal Religious Freedom Restoration Act after the Supreme Court held that the federal law did not apply to the states. *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (holding that application of the Religious Freedom Restoration Act to the states exceeded congressional enforcement power under the Fourteenth Amendment).

141. *See, e.g.*, H.B. 757, 161st Gen. Assemb., Reg. Sess. (Ga. 2016).

142. *See, e.g.*, Camila Domonoske, *North Carolina Passes Law Blocking Measures to Protect LGBT People*, NPR (Mar. 24, 2016, 11:29 AM), http://www.npr.org/sections/thetwo-way/2016/03/24/471700323/north-carolina-passes-law-blocking-measures-to-protect-lgbt-people [https://perma.cc/53E6-7N22] (reporting on legislation in North Carolina preventing local governments from enacting antidiscrimination rules to protect LGBT individuals).

143. Whatever personal beliefs the owners might have, local businesses have reason to discourage states from engaging in controversial and divisive policymaking that is likely to cause economic repercussions. *See* Kristina Torres, *Gay Marriage Opponents Win 'Religious Liberty' Vote in Georgia Senate*, ATLANTA J.-CONST. (Feb. 19, 2016, 6:36 PM), http://www.myajc.com/news/state—regional-govt—politics/gay-marriage-opponents-win-religious-liberty-vote-georgia-senate/d2D0zYRB9XOmdOkhfxniPO/ [https://perma.cc/P3U3-KD3F] (noting opposition of the Georgia business community to anti-LGBT law: "Studies by the Metro Atlanta Chamber and the Atlanta Convention and Visitors Bureau have suggested a negative economic impact of $1 billion to $2 billion if national groups began boycotting Georgia or canceling conventions and events based on perceived discriminatory efforts by the state.").

144. *See* Aaron Smith, *Starbucks CEO Holds His Ground on Gay Marriage*, CNN MONEY (Mar. 28, 2013, 11:36 AM), http://money.cnn.com/2013/03/26/news/companies/starbucks-gay-marriage/ [https://perma.cc/G7JU-JJLL] (noting that Nike and Microsoft had also supported passage of a law in the State of Washington authorizing same-sex marriage).

supported gay and transgender rights include Disney,[145] Ford,[146] Pepsi Co.,[147] Google,[148] Facebook,[149] Amazon,[150] and Apple.[151] In 2015, when the issue of same-sex marriage was before the Supreme Court, more than three hundred businesses signed an amicus brief in support.[152]

Not only have corporations voiced support for gay and transgender rights, they have made clear that oppressive laws will be met with economic consequences. By refusing to do business in places that relegate LGBT people to second-class citizenship, corporations demonstrate their commitment to LGBT rights and signal the importance of the norm of equality. In supporting LGBT rights, corporations channel the values of many of their stakeholders.[153]

Although it is difficult to say how political decisions are made in any particular instance,[154] the combination of corporate voice and exit appears to have blocked many such measures from taking effect. As the following sections illustrate, however, corporate political activity does not by itself determine outcomes—perhaps frustrating for those who

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145. *See* John Cloud, *How Gay Days Made a Home at Disney*, TIME (June 21, 2010), http://content.time.com/time/magazine/article/0,9171,1995839-1,00.html [https://perma.cc/T3V8-B8JC] (noting that the festival has run on an annual basis for more than twenty years and is "one of the largest gay-pride events in the world").

146. M. Alex Johnson, *Another Swing of the Pocketbook*, NBC (June 1, 2005, 4:36 PM), http://www.nbcnews.com/id/8047423/ns/business-us_business/t/another-swing-pocketbook/#.WH0VprYrI_P [https://perma.cc/4LZK-UFUW] (reporting that Ford has contributed money to gay rights organizations, "sponsored gay pride celebrations, [and] advertised in gay-oriented publications"). Ford has affirmed its support for those policies despite opposition from "a leading Christian activist group." *Id.*

147. *See* Lindsay Stein, *Doritos' Rainbow Makeover Is Pretty and Prolific*, PRWEEK (Sept. 18, 2015), http://www.prweek.com/article/1364692/doritos-rainbow-makeover-pretty-prolific [https://perma.cc/3STP-HY2Q] (reporting that Doritos, which is owned by Pepsi's Frito-Lay division, "partnered with the It Gets Better Project, a nonprofit that aims to provide support and hope for LGBT youth around the world").

148. Jennifer Swann, *Four of Tech's Biggest Names Are Driving the Next LGBT Rights Battle*, TAKEPART (Aug. 9, 2015), http://www.takepart.com/article/2015/08/09/equality-act [https://perma.cc/3G3U-WE2S] (describing the proposed Equality Act and noting that, tech companies aside, supporters also include "American Airlines, General Mills, Microsoft, IBM, Oracle, Orbitz, Levi Strauss & Co., Nike, and Hewlett-Packard").

149. *Id.*

150. *Id.*

151. *Id.*

152. Brief of 379 Employers & Organizations Representing Employers as Amici Curiae in Support of Petitioners at 2–13, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556); *see also* Nina Totenberg, *Record Number of Amicus Briefs Filed in Same-Sex-Marriage Cases*, NPR (Apr. 28, 2015, 5:00 AM), https://www.npr.org/sections/itsallpolitics/2015/04/28/402628280/record-number-of-amicus-briefs-filed-in-same-sex-marriage-cases [https://perma.cc/PMR3-XDRX].

153. *See* Nalick et al., *supra* note 70, at 393 (noting that "companies that recently took a position against the LGBT movement or have not joined the chorus of companies that have advocated in favor of the movement have at times been publicly vilified").

154. *See* Fisch, *supra* note 14, at 1569 ("The mixed, complex, and often opaque motives of political actors create substantial obstacles to studying the effects of corporate political activity.").

support the cause of equality for LGBT people, but also an encouraging indication that corporations can involve themselves in political causes without overwhelming the political process and silencing the will of the majority.

1. Georgia

In February 2016, the Georgia senate passed a bill, House Bill 757 ("HB 757"),[155] known as the "Free Exercise Protection Act," that would allow faith based organizations to deny services to gay persons.[156] The reaction from the business community was immediate.[157] Hundreds of businesses denounced the bill and some indicated that they would "reduce investment in Georgia" if the governor signed it into law.[158] For example, film and media companies including Disney, the Weinstein Company, and AMC made clear that the law would endanger Georgia's multibillion-dollar film industry.[159] Also, the NFL warned that it might pass over Georgia for the 2018 Super Bowl.[160]

The opposition to HB 757 included major corporations headquartered in Atlanta—Delta, Coke, Home Depot, UPS, and Cox Enterprises.[161] At least one business decided to relocate without waiting to see whether the bill would become law.[162] Georgia's governor

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155. H.B. 757, 161st Gen. Assemb., Reg. Sess. (Ga. 2016).

156. *See* Torres, *supra* note 143 ("Opponents of same-sex marriage won a major victory Friday when the Georgia Senate approved a measure allowing them to cite religious beliefs in denying services to gay couples.").

157. *See* Jackie Wattles, *Georgia's 'Anti-LGBT' Bill: These Companies Are Speaking Out the Loudest*, CNN MONEY (Mar. 25, 2016, 11:21 AM), http://money.cnn.com/2016/03/25/news/companies/georgia-religious-freedom-bill [https://perma.cc/X2XM-LPXF] (describing the coalition of more than 480 businesses opposing HB 757).

158. *See id.* ("'It is unacceptable to our employees and it is unacceptable to all of our stakeholders. We can't have a program—a major conference or a major employment surge—in Georgia when it becomes a discriminatory state,' [Salesforce] CEO Marc Benioff told CNN.").

159. *See id.* ("'Disney and Marvel are inclusive companies, and although we have had great experiences filming in Georgia, we will plan to take our business elsewhere should any legislation allowing discriminatory practices be signed into state law,' a Disney spokesperson said.").

160. *NFL Says Georgia Religious Exemptions Bill Might Cost Atlanta Super Bowl Bid*, FOX NEWS (Mar. 20, 2016), http://www.foxnews.com/politics/2016/03/20/nfl-says-georgia-religious-exemptions-bill-might-cost-atlanta-super-bowl-bid.html [https://perma.cc/5FTU-5F3X].

161. Sunnivie Brydum, *Georgia Businesses Rally Against 'Religious Freedom' Bill*, ADVOCATE (Mar. 2, 2016, 7:07 PM), http://www.advocate.com/politics/2016/3/02/georgia-businesses-rally-against-religious-freedom-bill (last updated Nov. 14, 2017, 6:51 AM) [https://perma.cc/CRE9-ARG9].

162. Mark Joseph Stern, *Georgia Is Poised to Pass a Vicious Anti-gay Law. So This Georgia Company Decided to Move*, SLATE (Feb. 22, 2016, 9:31 AM), http://www.slate.com/blogs/outward/2016/02/22/georgia_religious_liberty_bill_spurs_373k_company_to_move_to_nevada.html [https://perma.cc/Q7FZ-A768] ("373k, a Decatur-based telecom startup with about 20 employees, decided on Friday to relocate to Nevada—a direct response to the bill's looming passage.").

subsequently vetoed the bill and stated that he viewed it as unnecessary in light of existing protections for religion.[163]

2. Indiana

Indiana enacted a religious freedom law effectively authorizing discrimination against LGBT people but backtracked after a firestorm of protest threatened to undermine the state's economy.[164] The law was signed by then-Governor Mike Pence on March 26, 2015, and was scheduled to take effect on July 1, 2015.[165]

On March 30, 2015, nine CEOs representing Fortune 500 corporations sent a strongly worded letter to elected officials demanding "new legislation that makes it clear that neither the Religious Freedom Restoration Act nor any other Indiana law can be used to justify discrimination based upon sexual orientation or gender identity."[166]

Several corporations also took steps to apply economic pressure.[167] For example, Angie's List announced that it was canceling a $40 million headquarters expansion that was touted to add 1,000 jobs

163. *See* Somashekhar, *supra* note 7 (" 'I do not think we have to discriminate against anyone to protect the faith-based community in Georgia, which I and my family have been a part of for generations,' [Governor] Deal said at a news conference announcing his decision.").

164. Many prominent supporters of the law, including some present at the signing and involved in its drafting, made clear that its purpose was to allow business owners to discriminate against gay people. *See* Zack Ford, *The True Intent of Indiana's 'Religious Freedom' Bill, According to the People Who Helped Write It*, THINKPROGRESS (Mar. 31, 2015, 1:43 PM), https://thinkprogress.org/the-true-intent-of-indianas-religious-freedom-bill-according-to-the-people-who-helped-write-it-27ce5b1ccf2#.2emeku6ch [https://perma.cc/Z6U4-S57K] (recounting statements of the bill's drafters regarding their intent to discriminate). A satirical newspaper nicely captured the implausibility of characterizing the law any other way. *Indiana Governor Insists New Law Has Nothing to Do with Thing It Explicitly Intended to Do*, ONION (Mar. 30, 2015, 1:16 PM), http://www.theonion.com/article/indiana-governor-insists-new-law-has-nothing-to-do-38330 [https://perma.cc/28K9-LWMP].

165. The law stated, "[A] governmental entity may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability." IND. CODE ANN. § 34-13-9-8(a) (West 2015). It further stated that the government can only burden a person's free exercise of religion if it meets strict scrutiny. *See id.* § 34-13-9-8(b)(2) (requiring that the burden be "the least restrictive means of furthering [a] compelling governmental interest").

166. *Indiana's Corporate Leaders Call for Action on RFRA*, WTHR (Mar. 30, 2015, 4:50 PM), http://www.wthr.com/story/28653210/indianas-corporate-leaders-call-for-action-on-rfra [https://perma.cc/79XD-RC88]. For a copy of the letter, see Letters from William S. Oesterle et al., to Governor Mike Pence et al. (Mar. 30, 2015), http://ftpcontent2.worldnow.com/wthr/pdf/RFRA_Letters.pdf [https://perma.cc/JD9U-SP3A], which highlights, in open letters to lead state officials, the concerns of business owners regarding the Religious Freedom Restoration Act.

167. *See* Robert King, *RFRA: Boycotts, Bans, and a Growing Backlash*, INDY STAR (Apr. 2, 2015, 6:32 AM), http://www.indystar.com/story/news/politics/2015/04/01/rfra-boycotts-bans-growing-backlash/70810178/ [https://perma.cc/JT4W-NKMX] (detailing announcements by several corporations that they will no longer host conventions or other business opportunities in Indiana after the passage of the law).

over five years and to revitalize a struggling part of Indiana.[168] Salesforce, an Indiana-based company that employs thousands of people in Indiana immediately moved its annual, multimillion-dollar conference to New York and threatened to impose further economic sanctions unless the law was repealed.[169] Gen Con threatened to remove its annual convention, depriving Indiana of approximately $50 million a year.[170]

To avoid further fallout, the Indiana legislature prepared a new bill adding a section entitled "Antidiscrimination Safeguards" to clarify that the protection of religious freedom does not authorize discrimination based on sexual orientation or gender identity.[171] Then-Governor Pence signed the new bill and made clear that he wished to maintain Indiana's probusiness reputation.[172]

3. North Carolina

In March 2016, North Carolina's then-Governor Pat McCrory signed House Bill 2, a law that "requires transgender people to use public bathrooms that match the gender on their birth certificate and bars local governments from adopting LGBT protections and minimum

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168. *See* Nalick et al., *supra* note 70, at 390 (noting that a "firm may choose certain locations, operations, products or services, or expansions in given areas, all driven by its ideological bent on a given issue" and citing as an example "when Angie's List CEO Bill Oesterle reneged on a commitment to expand its Indianapolis headquarters because of a disagreement with Indiana's passage of a controversial religious freedom law, which critics argued discriminated against homosexuals"); Tim Evans, *Angie's List Canceling Eastside Expansion Over RFRA*, INDY STAR (Mar. 28, 2015, 11:47 AM), http://www.indystar.com/story/money/2015/03/28/angies-list-canceling-eastside-expansion-rfra/70590738/ [https://perma.cc/GC4W-DVES].

169. *See* Julie Bort, *Salesforce CEO Marc Benioff Makes Good on a Threat to Indiana over Controversial 'Anti-gay' Legislation*, BUS. INSIDER (Mar. 26, 2015, 2:33 PM), http://www.businessinsider.com/benioff-makes-good-on-threat-to-indiana-2015-3 [https://perma.cc/K8M4-423G] (reporting that, in response to the law, the Salesforce CEO canceled all programs that involve employee or customer travel to Indiana).

170. Tony Cook & Mark Alesia, *Gen Con Threatens to Move Convention if Gov. Mike Pence Signs Religious Freedom Bill*, INDY STAR (Mar. 24, 2015, 5:00 PM), http://www.indystar.com/story/news/politics/2015/03/24/gen-con-threatens-move-convention-gov-mike-pence-signs-religious-freedom-bill/70393474/ [https://perma.cc/TDF3-WVED].

171. IND. CODE ANN. § 34-13-9-0.7 (West 2015).

172. Tony Cook & Brian Eason, *Gov. Mike Pence Signs RFRA Fix*, INDY STAR (Apr. 1, 2015, 10:37 AM), http://www.indystar.com/story/news/politics/2015/04/01/indiana-rfra-deal-sets-limited-protections-for-lgbt/70766920/ (last updated Apr. 2, 2015, 8:08 PM) [https://perma.cc/3KBQ-LBYC] ("Our state is rightly celebrated for our pro-business environment, and we enjoy an international reputation for the hospitality, generosity, tolerance and kindness of our people. . . . Now that this is behind us, let's move forward together with a renewed commitment to the civility and respect that make this state great." (quoting then-Governor Mike Pence)); Monica Davey et al., *Indiana and Arkansas Revise Rights Bills, Seeking to Remove Divisive Parts*, N.Y. TIMES (Apr. 2, 2015), https://www.nytimes.com/2015/04/03/us/indiana-arkansas-religious-freedom-bill.html [https://perma.cc/K4W9-RWL6].

wage laws."[173] Within six months, the law had cost North Carolina approximately $200 million in lost business with no end in sight.[174]

For example, "PayPal canceled its planned global operations center in Charlotte, a $3.6 million investment that would have created 400 jobs with an annual payroll of $20.4 million."[175] Also, a number of film companies have refused to shoot in North Carolina, Deutsche Bank relocated some of its operations to Florida, and numerous conventions were canceled.[176] Perhaps the biggest single blow was the NBA's decision to cancel the All-Star game, an event that would have had $100 million "in regional economic impact."[177]

Governor McCrory's popularity plummeted largely as a result of the damage House Bill 2 caused to the state's finances and reputation, and, despite the advantages of incumbency, he lost his bid for reelection by a narrow margin.[178] To date, however, North Carolina's legislature has not been able to agree to a repeal measure.[179] In North Carolina and elsewhere, the political struggle over LGBT rights seems certain to continue.[180]

IV. TWO THEORIES OF CORPORATE EXIT

Thus far, we have established that corporate exit sends a political message, and, accordingly, that corporations can use their economic position as well as their voice to communicate their values. Further, we have argued that while corporations are not democracies,

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173. Alex Kotch, *Tallying Up the Mounting Economic Toll of North Carolina's HB2*, FACING S. (Sept. 16, 2016), https://www.facingsouth.org/2016/09/tallying-mounting-economic-toll-north-carolinas-hb2 [https://perma.cc/4BJM-TP4T].

174. *See id.* (tallying the economic losses the State of North Carolina suffered after passing the bill); Editorial, *North Carolina Pays a Price for Bigotry*, N.Y. TIMES (Sept. 21, 2016), https://www.nytimes.com/2016/09/21/opinion/north-carolina-pays-a-price-for-bigotry.html?emc=eta1 [https://perma.cc/468Q-FQWK].

175. Kotch, *supra* note 173.

176. *See id.* (detailing this economic fallout).

177. *Id.* The NCAA and ACC have also canceled collegiate sporting events. *See id.*

178. *See* Jenny Jarvie, *North Carolina Gov. McCrory Concedes He Lost Reelection Bid*, L.A. TIMES (Dec. 5, 2016, 12:10 PM), http://www.latimes.com/politics/la-na-pol-pat-mccrory-lost-20161205-story.html [https://perma.cc/V58R-8UVG] ("McCrory became the first North Carolina governor to lose reelection.").

179. *See* Katy Steinmetz, *Deeply Divided Lawmakers in North Carolina Leave the Controversial 'Bathroom Law' on the Books*, TIME (Dec. 22, 2016), http://time.com/4607261/north-carolina-bathroom-bill-lgbt-repeal/ [https://perma.cc/82H2-WK4V] (detailing the failed negotiations to repeal the bill).

180. *See* Laura Sydell, *LGBTQ Advocates Fear 'Religious Freedom' Bills Moving Forward in States*, NPR (Feb. 26, 2017, 5:46 AM), http://www.npr.org/2017/02/26/515585721/lgbtq-advocates-fear-religious-freedom-bills-moving-forward-in-states?sc=17&f=1001&utm_source=iosnewsapp&utm_medium=Email&utm_campaign=app [https://perma.cc/6P9Q-FY2X] (detailing recent and developing challenges to LGBTQ rights).

they are mediating institutions responsive to the values of their stakeholders.

Exit, however, is a strong remedy and must be deployed sparingly. Corporations that wish to remain in business cannot plausibly threaten to withdraw from the world. For example, if a corporation has a choice of locating in one of three imperfect jurisdictions, it will need to find some way of prioritizing its values. There may not be an ideal choice available.

In some cases, exit may seem pointless from a practical standpoint. That is, a corporation may decide that all available locations are undesirable or that its own economic leverage cannot be expected to make a difference. By analogy, a consumer dissatisfied with the travails of commercial air travel might have a hard time deciding which airline to boycott, even assuming a particular trip offered a meaningful choice among carriers. To refuse to patronize United is to support American, and so on.[181]

A full assessment of the factors that a particular business might take into account when deciding whether (and how) to use its exit power is beyond the scope of our project.[182] In this final Part, however, we distinguish two kinds of considerations that could motivate exit: (1) the establishment of a price signal intended to cause a community to internalize the costs of its behavior and perhaps to change course, and (2) a moral impetus to avoid complicity with conduct that violates a corporation's core values.

A. Pricing Injustice

One of the most attractive features of exit when used to support social goals such as civil rights is that it puts a price tag on wrongful behavior. Unlike money a corporation spends on political advertising or lobbying, the withdrawal of tax revenue and jobs hits voters in the pocketbook. Moreover, corporations can further reinforce the norms that they care about by allocating their resources toward jurisdictions that, for example, do not discriminate against their own citizens.

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181. *See* Christopher Ingraham, *Want to Boycott United? Good Luck with That*, WASH. POST (Apr. 11, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/04/11/want-to-boycott-united-good-luck/?utm_term=.843f1b0c6962 [https://perma.cc/K7AB-HRW7] ("At the price points most consumers are willing to pay, the flight experience is essentially identical across the major air carriers: cramped quarters, headaches, delays and a litany of TSA indignities before you board.").

182. For example, different types of business associations have different governance features. Corporations, partnerships, and LLCs all differ in material respects, not to mention their individual differences in ownership structure and governing documents.

In a famous essay, Derrick Bell argued for an analogous statutory mechanism that would grant property owners and business owners a license to practice racial discrimination.[183] Bell contended that the evils of racism could best be addressed through market mechanisms rather than legal prohibition. First, by coupling an affordable license with a strong penalty provision for those who discriminate without a license, the statute would induce business owners to acknowledge their own racism.[184] Perhaps surfacing such impulses could serve to discourage them. Even if not, over time the stigma of being a racist establishment could create external economic consequences and lead the owners to voluntarily change course.

Second, the license would generate an ongoing stream of revenue that could be "placed in an 'equality fund' used to underwrite black businesses, to offer no-interest mortgage loans for black home buyers, and to provide scholarships for black students seeking college and vocational education."[185] These tangible benefits would, Bell argued, outweigh the illusory goal of combating racism in society.[186] According to Bell, racism is a permanent fact of life in America and the answer is to find practical mechanisms for adjusting to it.[187]

Of course, businesses do not write laws—whether to prohibit conduct or authorize it—but their use of exit can create a de facto version of Bell's license to discriminate. Thus, to the extent Bell's policy arguments are sensible, they would seem to apply as well to corporate exit. Some of the best examples in this regard involve collegiate and professional sports organizations. For example, until South Carolina removed the confederate flag from its Statehouse grounds, the NCAA refused to schedule tournaments in the state.[188] Arizona's refusal to honor Martin Luther King, Jr. made it ineligible to host the Super Bowl.[189] And, as noted above, the NBA and the NCAA threatened to

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183. DERRICK BELL, *The Racial Preference Licensing Act*, *in* FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 47, 48 (1992).

184. *Id.* at 61–62.

185. *Id.* at 48–49.

186. *Id.* at 62–63 (arguing that, in order to make a difference, "[c]ivil rights advocates must first see the racial world as it is").

187. *Id.*

188. *See* Prentiss Findlay, *NAACP, NCAA Plan to End Boycott of South Carolina*, POST & COURIER (July 8, 2015), http://www.postandcourier.com/archives/naacp-ncaa-plan-to-end-boycott-of-south-carolina/article_a7b4da97-3eb2-57f3-8948-39f0db2f016f.html [https://perma.cc/W2HK-YZ36] ("The NAACP and NCAA are both poised to lift their boycotts of South Carolina now that the Confederate flag will be removed from the Statehouse grounds.").

189. *See* Marc Berman, *Arizona's Experience with Controversial Laws and Boycotts*, WASH. POST (Feb. 26, 2014), https://www.washingtonpost.com/news/post-nation/wp/2014/02/26/arizonas-experience-with-controversial-laws-and-boycotts/?utm_term=.17028671cea6 [https://perma.cc/

boycott North Carolina until it rescinded laws targeting transgender individuals.[190] In each case, the state chose to pay an annual fee (in the form of foregone revenue) until it elected to change course.

In one important respect, however, the analogy between Bell's hypothetical license and corporate exit is inexact, and this discrepancy helps to illuminate a different set of motivations for exit. Even assuming that a license to discriminate could be implemented and that it would produce the benefits Bell identifies, the strongest objection to such a scheme is that it implicates the state in racial discrimination. Instead of prohibiting discrimination, the state would be involved in a licensure scheme—selling the right to treat others unequally based on the color of their skin.[191] By contrast, when corporations choose to exit in protest, the economic consequences they create are aligned with the moral stand they take. As discussed in the next Section, exit may be justified even if a corporation lacks the economic leverage to effect change.

B. Avoiding Complicity

Corporate exit communicates total, unyielding disagreement with a law or policy. The choice to engage in dialogue does not ordinarily send as strong a signal, even if the message is identical and delivered forcefully. For example, at President Trump's request, a number of CEOs agreed to join the President's Strategic and Policy Forum, an informal group of business advisors.[192] However, the political difficulty of associating with the Trump Administration became clear in the wake

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TGR3-K5HD] ("It took until November 1992 for the state to finally create the King holiday, after it had lost hundreds of millions of dollars in business over the five years leading up to that point.").

190. *See* Marc Tracy, *N.C.A.A. Ends Boycott of North Carolina After So-Called Bathroom Bill Is Repealed*, N.Y. TIMES (Apr. 4, 2017), https://www.nytimes.com/2017/04/04/sports/ncaa-hb2-north-carolina-boycott-bathroom-bill.html?_r=0 [https://perma.cc/BN93-MAZU].

191. As Bell put it, civil rights leaders "would be unwilling to—as they might put it—'squander our high principles in return for a mess of segregation-tainted pottage.' " BELL, *supra* note 183, at 59.

192. *Press Release - President-elect Donald J. Trump Announces Travis Kalanick of Uber, Elon Musk of SpaceX and Tesla, and Indra Nooyi of PepsiCo to Join President's Strategic and Policy Forum*, AM. PRESIDENCY PROJECT (Dec. 14, 2016), http://www.presidency.ucsb.edu/ws/index.php?pid=119785 [https://perma.cc/83SG-LTWZ]; *see also* Rob Price, *Elon Musk and Uber CEO Travis Kalanick Are Joining Trump's Economic Advisory Team*, BUS. INSIDER (Dec. 14, 2016, 9:27 AM), http://www.businessinsider.com/tesla-ceo-elon-musk-uber-travis-kalanick-join-donald-trump-strategic-policy-forum-economic-team-2016-12 [https://perma.cc/FX4U-L5PU] (reporting on a press release by President-elect Trump's transition team listing new members of an economic advisory board).

of his executive order banning immigrants and refugees from seven predominantly Muslim nations.[193]

On the one hand, access to the President could provide a means for informing him of the consequences of his actions and perhaps dissuading him from undertaking even more damaging measures.[194] While criticizing the President's immigration order, Uber's CEO initially made the case for engagement: "[W]e've taken the view that in order to serve cities you need to give their citizens a voice, a seat at the table. We partner around the world optimistically in the belief that by speaking up and engaging we can make a difference."[195] On the other hand, there was the danger that a CEO's presence would provide material support for the President's immigration policy, thereby strengthening the President's hand. As one commentator described the choice, "Does a meeting with Trump offer influence, or just symbolic support?"[196]

Ultimately, after President Trump failed to offer an unqualified condemnation of rioting by white supremacists in Charlottesville, Virginia, many of the CEOs concluded en masse that the risk of being tarnished by association outweighed the possible benefits of further dialogue:

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193. *See* Protecting the Nation from Foreign Terrorist Entry in the United States, Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017), https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states [https://perma.cc/3UVR-XEBP].

194. Elon Musk, the CEO of Tesla, has defended his presence on the council on these grounds. Jason Del Rey, *Elon Musk Says Activists Should Be Happy That He's Advising President Trump*, RECODE (Feb. 5, 2017, 8:21 PM), http://www.recode.net/2017/2/5/ 14516366/elon-musk-trump-business-council-activists-moderates-extremists [https://perma.cc/ 2KNH-ZMH8].

195. Travis Kalanick, *Standing Up for What's Right*, FACEBOOK (Jan. 28, 2016, 4:34 PM), https://www.facebook.com/traviskal/posts/1331814113506421 [https://perma.cc/4P9J-M7TQ]. To put it mildly, Kalanick's position was not well received. *See* Matthew Dessem, *Why #DeleteUber Took Off on Saturday Night: 'I Don't Need a Ride to Vichy,'* SLATE (Jan. 29, 2017, 7:35 AM), http://www.slate.com/blogs/the_slatest/2017/01/29/why_users_deleted_uber_in_response_to_trump_s_executive_order.html [https://perma.cc/89M7-496X]. Kalanick resigned from President Trump's council of business advisors after angry customers began deleting the Uber app. *See* Henry Grabar, *Actually, It's a Good Thing That Travis Kalanick Quit Trump for Business Reasons*, SLATE (Feb. 2, 2017, 7:22 PM), http://www.slate.com/blogs/moneybox/ 2017/02/02/actually_it_s_a_good_thing_that_travis_kalanick_quit_trump_for_business.html [https://perma.cc/P4HN-CDUX] (stating that "it's obvious that Kalanick quit the council not because of his burgeoning disgust with the president's policies, but because of the swift reaction from customers").

196. Grabar, *supra* note 195. As for executives who remained on the council despite the immigration order, new opportunities to revisit that decision soon arose. *See* Julia Horowitz, *Elon Musk to Trump: You Quit Paris, So I Quit You*, CNN MONEY (June 2, 2017, 12:58 PM), http://money.cnn.com/2017/06/01/news/elon-musk-resigns-trump-adviser/index.html [https://perma.cc/UUG3-9TAS] (reporting that Tesla CEO Elon Musk and Disney CEO Bob Iger resigned from the business advisory council because of President Trump's decision to withdraw from a global pact intended to combat climate change).

> [I]n a rebuke to the president, who suggested that both the racist groups and the counterprotesters . . . were to blame for the violence there, a wave of chief executives who had agreed to advise Mr. Trump quit his business advisory councils, leading to the dissolution of two groups.[197]

The collapse of the business advisory councils conveyed a message to the President—he could cater to white supremacists or participate in polite society, not both.

Corporate exit as dissent is explicable in terms proposed by Henry David Thoreau in his classic essay, *On the Duty of Civil Disobedience.*[198] Writing at a time when slavery was still legal throughout the South, Thoreau argued that if a person does not actively contest government wrongs, "it is his duty, at least, to wash his hands of it, and . . . not to give it practically his support."[199] For Thoreau, this duty meant more than voting; to avoid the "disgrace" of association with a government that countenanced slavery, among other wrongs, an individual ought to withhold all support, including tax revenue.[200]

By relocating, corporations deprive jurisdictions of tax revenue and jobs; it is this kind of pressure that Thoreau believed was necessary to effect change. To be sure, a corporation's shift from one jurisdiction to another, partly motivated by profits, is not to be equated with civil disobedience and the braving of legal penalties for the sake of spiritual virtue.[201] Nevertheless, a boycott sends a strong message.

However, as Thoreau also observed, likelihood of success is not the only criterion for a principled decision to exit. Perhaps other corporations will take the place of those who leave; perhaps a single corporation is too small, economically speaking, to matter. Even so, doing the right thing has intrinsic value. For example, when Georgia's legislature passed a bill authorizing discrimination against same-sex couples, a twenty-person telecommunications firm decided to move to Nevada as a matter of principle:

> If we stayed, we would be funding Georgia's hate. For every dollar that we make, the state of Georgia gets some. As a black, gay male, I don't feel good funding hate. I've never done

197. David Gelles, *The Moral Voice of Corporate America*, N.Y. TIMES (Aug. 19, 2017), https://www.nytimes.com/2017/08/19/business/moral-voice-ceos.html?mwrsm=Email&_r=0 [https://perma.cc/T9WG-2U4K].

198. HENRY DAVID THOREAU, WALDEN AND CIVIL DISOBEDIENCE 269 (Penguin Books 2017) (1849).

199. *Id.* at 277.

200. *Id.* at 274 ("How does it become a man to behave toward this American government today? I answer, that he cannot without disgrace be associated with it.").

201. On the other hand, Thoreau's own one-night sojourn in jail was hardly an unsupportable sacrifice. And, if that is unfair—it was a friend who paid the tax, not at Thoreau's request—the larger point is that principled stands need not involve total sacrifice.

> it, and I'm not going to start now. We're gonna make it known that we don't appreciate it. We're leaving and taking our tax dollars with us.[202]

In addition to its economic consequences, exit has expressive value. To criticize someone's views from within a shared community of interest is to communicate from a baseline position of respect; to "unfriend" someone on Facebook because of their politics is to say that the person is unworthy of further engagement.[203] Disengagement is both a strategy and a reflection of moral commitment.[204] Likewise, when corporations withdraw from jurisdictions to protest violations of civil rights, there may be important economic consequences, but the exit also contributes to democratic discourse by signaling dissent in the strongest possible terms.

CONCLUSION

In *Citizens United v. Federal Election Commission*, the Supreme Court held that corporations have a constitutional right to spend unlimited amounts of money for the election of their preferred political candidates.[205] Consequently, some have concluded that "American democracy is for sale to the highest corporate bidder."[206] Such dire statements exaggerate the significance of corporate expenditures; corporations do not need *Citizens United* to bend the ears of elected officials who care about tax revenue and jobs. Nor would redrawing the boundaries of the First Amendment keep corporations out of the public sphere.

This Essay contributes to the literature on corporate political activity by identifying the salience of exit as a form of political activity.

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202. Stern, *supra* note 162. The company, 373k, Inc., picked Nevada because of its progressive stance on gay rights. *Id.* ("We thought it'd be really dumb for us to move out of our own oppressive state right into another.").

203. *See* Darren Samuelsohn, *Trump and Clinton Wreck Facebook Friendships*, POLITICO (Aug. 19, 2016, 5:03 AM), http://www.politico.com/story/2016/08/donald-trump-hillary-clinton-facebook-friendships-227175 [https://perma.cc/R5HL-9FDW].

204. *See, e.g.*, Zack Linly, *It's Time to Stop Talking About Racism with White People*, WASH. POST (Sept. 7, 2016), https://www.washingtonpost.com/posteverything/wp/2016/09/07/its-time-to-stop-talking-about-racism-with-white-people/?utm_term=.1ad8ef5480ec [https://perma.cc/97KN-FRSC]:

> The fact is, we can fight systemic racism without white validation. We can continue shutting down bridges and highways every time there's a new Alton Sterling, Philando Castile or Korryn Gaines in the news and let white folks complain about the intrusion on their lives. We can continue moving our black dollars into black banks and keeping our money in our businesses and communities. We don't need them to "get it" for us to keep fighting.

205. 558 U.S. 310, 314 (2010).

206. Floyd Abrams & Burt Neuborne, *Debating 'Citizens United,'* NATION (Jan. 13, 2011), https://www.thenation.com/article/debating-citizens-united/ [https://perma.cc/CED4-LRBZ].

From the "grab your wallet" campaign to the fight for LGBT rights in states such as Georgia, Indiana, and North Carolina, corporate exit has played a significant role in recent political controversies. In particular, corporations that align their actions with their words have more influence in public affairs; the power of exit enhances the power of voice.[207]

Although corporations run on hierarchy and authority, corporate exit should not be dismissed as an antidemocratic circumvention of the popular will. Corporations are market institutions susceptible to pressure from consumers, employees, investors, and other stakeholders. By creating a pathway for citizens to participate in public decisionmaking, corporations can help to promote democratic values of accountability, equality, and inclusion.

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207. *See* HIRSCHMAN, *supra* note 4, at 123–24 (observing that voice and exit are complementary mechanisms).