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Woke Capital: The Role of Corporations in Social Movements

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WOKE CAPITAL: THE ROLE OF CORPORATIONS IN SOCIAL MOVEMENTS

JENNIFER S. FAN*

Iconic companies such as Apple, BlackRock, Delta, Google (now Alphabet), Lyft, Salesforce, and Starbucks, have recently taken very public stances on various social issues. In the past, corporations were largely silent in the face of them. Now the opposite is true—corporations play an increasingly visible role in social movements and there are times when corporations have led the discussion, particularly in areas where they have a self-interest or public opinion supports it. The enormous influence corporations wield on both the economic and social fabric of our society due to the legal framework and norms under which they operate make them uniquely positioned to affect the outcome of social movements—for better or worse. The contribution of this Article is three-fold: it discusses how court cases and changing norms about the role of the corporation in society led to the rise of the modern business corporation, which in turn laid the groundwork for corporations' involvement in social movements; provides an original descriptive account of the role of corporations in social movements using three case studies and the ways in which corporations have helped or hindered such movements; and tackles the underlying normative question about the appropriateness of the involvement of corporations in social movements in light of the legal framework in which it resides. This Article concludes that despite the perils, corporate law holds the promise of being a force for social change.

INTRODUCTION		442
I. THE EVOLVING CORPORATION AND SOCIAL MOVEMENTS		445
A. <i>Corporate Purpose</i>		445
B. <i>Corporate Law and Social Norms</i>		451
C. <i>Corporations Today</i>		452
II. CASE STUDIES		457
A. <i>Challenging the President: How Corporations Responded to the Muslim Ban</i>		459
B. <i>Finding Moral Ground: How Corporations Found a Role in the Gun Control Movement</i>		467
C. <i>Building Blocks for Success: How Corporations Advanced the Goals of the LGBTQ Rights Movement</i>		476
III. NORMATIVE CONCERNS, REASONS FOR THE INVOLVEMENT OF CORPORATIONS, AND GUIDING PRINCIPLES		484
A. <i>Normative Concerns</i>		485
1. <i>Covert Advocacy</i>		485
2. <i>Too Much Power</i>		486

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3. Self-Interested and Not Agents of Change	489
B. <i>Reasons Why Corporations Get Involved with Social Movements</i>	491
1. Moral Authority and Leadership	491
2. Responding to Boycotts	491
3. Responding to Proxy Proposals	492
C. <i>Guiding Principles for Corporations Involved in Social Movements</i>	492
CONCLUSION	494

INTRODUCTION

On February 14, 2018, a former student at Marjory Stoneman Douglas High School killed seventeen people with an AR-15 assault rifle. In the aftermath of prior school shootings, the media frenzy tapered off after the initial uproar;¹ there was no passage of meaningful gun reform legislation;² and the communities affected by these tragedies would quietly soldier on and try to put the pieces back together.³ And, for-profit corporations did not make their viewpoints known.⁴ This time, it was different. Media coverage continued, students mobilized, and communities let their outrage be known.⁵ Even corporations across many different industries reacted swiftly,⁶ sometimes to the detriment of the corporation itself.⁷ In many ways, the willing-

¹ See Rick Hampson, *Gun Control Momentum 'Didn't Happen Out of the Blue': Why Parkland's Different*, USA TODAY (Mar. 7, 2018, 4:30 PM), <https://www.usatoday.com/story/news/2018/03/07/gun-control-momentum-didnt-happen-out-blue-why-parklands-different/401312002/>.

² See Editorial Board, *How Congress Has Dithered as the Innocent Get Shot*, N.Y. TIMES (Feb. 15, 2018), <https://www.nytimes.com/interactive/2018/02/15/opinion/congress-gun-progress.html>.

³ See Jonah Engel Bromwich, *'Something About Parkland Has Been Different': Survivors From 20 Years of Mass Shootings Speak*, N.Y. TIMES (Mar. 23, 2018), <https://www.nytimes.com/2018/03/23/us/mass-shooting-survivors-march-lives-.html>.

⁴ See generally Melissa Jeltsen, *Public Outrage Over Mass Shootings Is Running On Empty*, HUFFINGTON POST (Jan. 31, 2018, 3:43 PM), https://www.huffingtonpost.com/entry/public-outrage-mass-shootings_us_5a70dbf6e4b0a6aa487424be. This article was published only two weeks before the shooting at Marjory Stoneman Douglas High School. *Id.*

⁵ See Hadas Gold, *The Persistence of Parkland: How the Florida Shooting Stayed in the Media Spotlight*, CNN MONEY (Feb. 22, 2018, 10:47 PM), <http://money.cnn.com/2018/02/22/media/parkland-florida-shooting-media-coverage/index.html>.

⁶ Among the companies that spoke out or changed their policies after the Parkland shooting were: Aetna, Avis, Budget, Black Rock, Bumble, Delta Airlines, Dick's Sporting Goods, Enterprise Holdings, First National Bank of Omaha, Gucci, Hertz, Kroger, L.L.Bean, Lockton, Lyft, MetLife, Paramount RX, REI, SimpliSafe, Starkey, Symantec, True Car, United Airlines, Walmart. See Students of Marjory Stoneman Douglas High School, *'Please Help Us': A Letter to the Business Community from the Marjory Stoneman Douglas Survivors*, BUS. INSIDER (Mar. 11, 2018, 8:00 AM), <http://www.businessinsider.com/parkland-survivors-ask-businesses-to-support-march-for-our-lives-2018-3>.

⁷ For example, Delta was threatened with the loss of a lucrative tax break in Georgia almost immediately after it announced its plan to stop offering discounted fares to National Rifle Association (NRA) members. Marwa Eltagouri, *A Georgia Republican's Threat to Delta: Restore NRA Benefits, or You Won't Get Your Tax Break*, WASH. POST (Feb. 27, 2018), <https://>

ness of corporations to take a stand was remarkable as corporations typically choose to remain out of the fray of social issues, fearing consumer backlash. Indeed, on most social issues, corporations have historically been reluctant to speak out; they are more likely to speak out when economic issues are at stake.⁸ Today, the economic might of a number of corporations now rivals that of national economies and gives them increased political power as a result.⁹ “While corporations have a vested interest in influencing their institutional environment . . . not all the issues firms engage in are clearly salient to their overall objectives. In fact, some firms have, in recent times, engaged in sociopolitical issues that are divisive, unsettled, emotionally charged, or contested.”¹⁰ In the United States, the rise of corporations has come against the backdrop of government receding, increasingly partisan politics, and an ever-widening divide between rich and poor. As a society, we grapple with how innovations like social media and artificial intelligence have fundamentally altered the fabric of our society and how we communicate and process information. We have entered a new age—the age of the Information Technology Revolution¹¹—and corporations are at the center of it.

Historically, corporations were derided as a source of “evil”¹² and “a vehicle for the voices and interests of an exceedingly small managerial and financial elite—the notorious [one] percent”;¹³ they are synonymous with the status quo. As this Article will show, however, the role of corporations and the corporate law framework in which it resides is not so black and white. Corporations can and have played significant roles in social move-

www.washingtonpost.com/news/business/wp/2018/02/26/georgia-republicans-threat-to-delta-stop-boycotting-the-nra-or-lose-your-tax-breaks/. The Georgia legislature swiftly followed through on their threat when Delta did not reinstate the NRA discount. Marwa Eltagouri, *Georgia Republicans Honor Their Threat to Punish Delta for Cutting Ties with NRA*, WASH. POST (Mar. 1, 2018), https://www.washingtonpost.com/news/business/wp/2018/03/01/georgia-republicans-honor-their-threat-to-harm-delta-in-defense-of-the-nra/?utm_term=.5b06730f6f0c.

⁸ “Traditionally, corporations aimed to be scrupulously neutral on social issues. No one doubted that corporations exercised power, but it was over bread-and-butter economic issues like trade and taxes, not social issues. There seemed little to be gained by activism on potentially divisive issues, particularly for consumer brands.” Jerry Davis, *What’s Driving Corporate Activism*, NEW REPUBLIC (Sept. 27, 2016), <https://newrepublic.com/article/137252/whats-driving-corporate-activism>.

⁹ Michael Nalick, Matthew Josefy, Asghar Zardkoohi & Leonard Bierman, *Corporate Sociopolitical Involvement: A Reflection of Whose Preferences?*, 30 ACAD. MGMT. PERSP. 384, 384 (2016).

¹⁰ *Id.*

¹¹ See Matthew Bey, *The Tech Revolution Comes of Age*, STRATFOR (Mar. 29, 2016), <https://worldview.stratfor.com/article/tech-revolution-comes-age>.

¹² Angela Allan, *How the ‘Evil Corporation’ Became a Pop-Culture Trope*, ATLANTIC (Apr. 25, 2016), <https://www.theatlantic.com/business/archive/2016/04/evil-corporation-trope/479295/>.

¹³ Kent Greenfield, *Can Corporations Be Good Citizens?*, SYMPOSIUM MAG. (Nov. 3, 2013), <http://www.symposium-magazine.com/can-corporations-be-good-citizens/>.

ments.¹⁴ Whether they can and should under the existing legal framework is a question this Article will begin to explore.

The relationship between social movements and the law has generally focused on constitutional theory and lawyering theory.¹⁵ This Article offers a different viewpoint by examining social movements through the lens of corporate law. It begins by analyzing whether the involvement of corporations in social movements fits within existing corporate law doctrine. It then puts forth a normative vision of the relationship between social movements and corporate law scholarship, and offers an interpretive theory of the role of corporations in both advancing and impeding social movements through overt and covert actions (as well as inaction).

While litigation has traditionally served as one of the most widely used tactics for change in social movements, now corporations provide another avenue to address social issues. However, whether corporations help or hinder the goals of social movements remains to be seen and will be discussed in greater detail below.

The evolving role of the corporation, the advent of social media, and the effect of shareholders, managers, and consumers on businesses have pushed corporations to become leaders on social issues and influencers in social movements in particular. “Information about companies and their policies is increasingly transparent. Customers can now use the Buycott app to scan bar codes and determine if the product they are considering buying aligns with their values, from labor practices to whether it contains GMOs.”¹⁶ In considering whether and to what extent corporations should be involved in social movements, this Article will consider the confluence of factors that led to this juncture and why now might be a defining moment for corporations.

To frame the ensuing analysis, the Article proceeds in three parts. Part I discusses the scholarship on corporate purpose and law and social norms as well as court cases that influenced the contours of corporate law. Specifically, this Part shows how the laws under which corporations operate in the

¹⁴ A social movement can be defined as a “loosely organized but sustained campaign in support of a social goal, typically either the implementation or the prevention of a change in society’s structures or values.” Ralph H. Turner, Lewis M. Killian & Neil J. Smelser, *Social Movement*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/topic/social-movement> (last visited Dec. 31, 2018).

¹⁵ See Scott L. Cummings, *The Puzzle of Social Movements in American Legal Theory*, 64 UCLA L. REV. 1554 (2017) (citing Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1501–11 (2005)); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 419–20 (2001); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1364 (2006); see also Mary Ziegler, *Framing Change: Cause Lawyering, Constitutional Decisions, and Social Change*, 94 MARQ. L. REV. 263, 280–84 (2010).

¹⁶ Gerald F. Davis & Christopher J. White, *The New Face of Corporate Activism*, STAN. SOC. INNOVATION REV. (Fall 2015), https://ssir.org/articles/entry/the_new_face_of_corporate_activism.

United States have evolved and laid the groundwork for corporations to become more influential over time. It then illustrates that changes in the workforce and the increasing power of consumers and executives has spurred corporations to take a more active role in social issues and in social movements generally. Taken together, corporate law and the evolving norms around the role of corporations form the basis of the legal framework for whether and when corporations can be involved in social movements. Part II then analyzes three case studies from different social movements, showing the range of responses by corporations, their positive and negative attributes, and ways in which the responses of corporations to social movements both helped and hindered. In particular, this Part uses framing analysis which originates from social movement theory to examine the effectiveness of the corporation within the particular social movement. Part III discusses the normative implications of having corporate law influence social movements and offers guiding principles on what corporations should consider when involved with such movements. This Article concludes that despite the perils associated with the involvement of corporate law within social movements, there is the promise of meaningful change.

I. THE EVOLVING CORPORATION AND SOCIAL MOVEMENTS

A. *Corporate Purpose*

Since the early days of America, the role and view of corporations have changed considerably.¹⁷ Chief Justice Marshall described a corporation as “an artificial being, invisible, intangible, and existing only in contemplation of law.”¹⁸ Corporations have also been characterized as “purely legal creatures, without flesh, blood, or bone. Their existence and behavior is determined by a web of legal rules found in corporate charters and bylaws, state corporate case law and statutes, private contracts, and a host of federal and state regulations.”¹⁹ By the mid-nineteenth century, “the corporate charter had evolved into a readily accessible instrument for a vibrant entrepreneurial society”—the “essential handmaiden of economic growth.”²⁰ When viewing

¹⁷ For an overview of role and view of corporations in early America and the nineteenth century, see Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629 (2011). Corporations have affected society in both small and large ways since the time of the slave trade. *15 Major Corporations You Never Knew Profited from Slavery*, ATLANTA BLACK STAR (Aug. 26, 2013), <http://atlantablackstar.com/2013/08/26/17-major-companies-never-knew-benefited-slavery/>.

¹⁸ *Trs. of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819).

¹⁹ Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 176 (2008). Indeed, “[c]orporations to a considerable degree are legal creatures, and it is the law, more than politics or government, that seems best able to trace the bounds between their private rights and public responsibilities.” Morton Keller, *The Making of the Modern Corporation*, in *CORPORATE POWER IN THE UNITED STATES* 12 (Joseph Sora ed., 1998).

²⁰ Keller, *supra* note 19, at 7.

corporations through the lens of corporate constitutional rights jurisprudence, the United States Supreme Court (the Court) characterized corporations as associations of individuals.²¹ As two corporate law scholars assert, however, the Court's view of corporations worked until the late nineteenth century when American businesses experienced a dramatic transformation.²² "[Corporations] were taking on identities—often tied to brands—that were truly separate from any of their individual investors, directors, or managers" ²³ The corporate form evolved and began being used for cooperatives, clubs, advocacy associations, nonprofits, and the like.²⁴ Then came the rise of the modern business corporations where the Court "recognized protections for commercial speech, corporate political spending, and statutory protection for religious free exercise."²⁵ For example, in 2010, *Citizens United v. FEC*²⁶ upended the notion of corporations; corporations were now conferred with "personhood."²⁷ In a five-to-four decision, the Court held that the First Amendment prohibits the government from restricting independent political expenditures by corporations and unions.²⁸ This ruling had vocal supporters and opponents and led to calls to amend the U.S. Constitution,²⁹ cries for congressional fixes,³⁰ and much academic³¹ and public commentary.³² More recently, in *Burwell v. Hobby Lobby Stores, Inc.*, the Court held

²¹ See Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1678 (2015).

²² *Id.*

²³ *Id.*

²⁴ *Id.* "Corporations, as has so often been observed, are social as well as economic institutions, and the attractive power of the corporate culture should not be underestimated." Keller, *supra* note 19, at 13.

²⁵ Blair & Pollman, *supra* note 21, at 1679. "[T]he Court consistently treated corporate rights as either derivative or instrumental rights." *Id.* The conception of corporate rights as derivative and instrumental "has not taken account of large, modern business corporations that cannot be seen as representing an association of identifiable people." *Id.* at 1742.

²⁶ *Citizens United v. FEC*, 558 U.S. 310 (2010).

²⁷ 558 U.S. 310, 466.

²⁸ 558 U.S. 310, 340, 365. "No less striking is the halting and uncertain, slow and limited record of the state and of public opinion when it comes to subjecting corporations to significant government control." Keller, *supra* note 19, at 12.

²⁹ Paul Blumenthal, *Citizens United Constitutional Amendment Backed By Vermont Legislature*, HUFFINGTON POST (Apr. 19, 2012, 6:31 PM), https://www.huffingtonpost.com/2012/04/19/citizens-united-constitutional-amendment-vermont_n_1439002.html.

³⁰ Liz Kennedy & Alex Tausanovitch, *Eight Years After Citizens United, It's Time for Bold Ways to Fix Democracy*, HILL (Jan. 20, 2018, 9:00 AM), <http://thehill.com/opinion/civil-rights/369861-eight-years-after-citizens-united-its-time-for-bold-ways-to-fix>.

³¹ See, e.g., Nadia Imtanes, *Should Corporations Be Entitled to the Same First Amendment Protections as People?*, 39 W. ST. U. L. REV. 203 (2012); Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L. & POL'Y REV. 217 (2010); Joseph F. Morrissey, *A Contractarian Critique of Citizens United*, 15 U. PA. J. CONST. L. 765 (2013).

³² See, e.g., Floyd Abrams, *The Citizens United Disaster That Wasn't*, WALL ST. J. (Oct. 16, 2017, 6:56 PM), <https://www.wsj.com/articles/the-citizens-united-disaster-that-wasnt-1508194581>; Ian Vandewalker, *The consequences of 'Citizens United'*, MSNBC (Jan. 20, 2014, 7:55 AM), <http://www.msnbc.com/msnbc/the-consequences-citizens-united>; Ellen L. Weintraub, *Taking on Citizens United*, N.Y. TIMES (Mar. 30, 2016), <https://www.nytimes.com/2016/03/30/opinion/taking-n-citizens-united.html>.

that a business does not need to solely pursue a profit as a matter of state corporate law.³³ Based on these two recent Court cases, corporations do have a legal basis for being vocal on social issues or in social movements since maximizing shareholder value does not need to be the sole driver of their actions. As we will see in the discussion that follows regarding different theories on corporate purpose, corporations can find support for their involvement in social movements under certain theories as well.³⁴

Historically, the shareholder primacy theory (where the central driver is making a profit for shareholders) has had many proponents. Conservative economist Milton Friedman opined that the “one and only one social responsibility of business” is to “use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game”—that is, to “make as much money as possible.”³⁵ Corporate managers who shied away from any social obligations pointed to Friedman’s words as absolving them of any responsibility to fulfill these types of obligations. Despite the popularizing of Friedman’s theory, corporations have influenced the path and outcome of both political and social issues.³⁶

Some legal scholars developed theories aligned with Friedman’s premise; others approached the corporation from a different lens. What is clear, however, is that among legal scholars, the debate rages on about the nature and purpose of the corporation.³⁷ The debate is a complex one with no clear answers. Legal scholars have offered different theories of the corporation over time. What follows is a brief overview of the different types of theories regarding corporations that legal scholars have proposed. Admittedly, the debate is much more nuanced than how it is portrayed here, but the purpose is to lay out the competing theories.

³³ Justice Alito, writing for the Court, stated that:

While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives.

Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2771 (2014). See Lyman Johnson & David Millon, *Corporate Law After Hobby Lobby*, 70 BUS. LAW. 1 (2014), for a more in-depth analysis of the *Hobby Lobby* case from the state corporate law perspective.

³⁴ “[T]he corporate form has been extraordinarily useful as a way of giving legal (and public) standing to economic or social ventures.” Keller, *supra* note 19, at 12.

³⁵ Milton Friedman, *The Social Responsibility of Businesses is to Increase its Profits*, N.Y. TIMES MAG., Sept. 13, 1970.

³⁶ See Nalick et al., *supra* note 9, at 384; see also Kabrina Krebel Chang, *Starbucks for President: The Disappearing Line between Government and Business as Agents for Social Change*, 20 REVISTA EMPRESA Y HUMANISMO 35, 38 (2017).

³⁷ “We are in the midst of a moment of real possibility of rethinking the nature of the corporation. What are the purposes of corporations? To whom do they owe obligations? Do they maximize their social value by focusing on economic ends only, or should they be charged with broader social and political obligations?” Kent Greenfield, *Corporate Citizenship: Goal or Fear*, 10 U. ST. THOMAS L.J. 960, 973 (2013).

In the past, shareholder primacy was the prevailing theory among corporate scholars.³⁸ Under this view, corporations are viewed as a “nexus” by which individuals in an enterprise contract with one another.³⁹ In response to this theory, Professors Margaret Blair and Lynn Stout provided a differing viewpoint on corporations. Based on their framework for corporations, directors served as mediating hierarchs based on team production theory.⁴⁰ In their analysis, directors “are not subject to direct control or supervision by *anyone*, including the firm’s shareholders.”⁴¹ Professor Stephen Bainbridge offered another construct of the corporation when he introduced the idea of director primacy which “claims that shareholders are the appropriate beneficiary of director fiduciary duties . . . [D]irector accountability for maximizing shareholder value remains an important component of director primacy.”⁴² There is yet another framework by which to look at corporations: stakeholder theory. Professor Kent Greenfield, one of the architects of this theory, argues that corporations should act in the interest of all stakeholders.⁴³ In effect, stakeholder theory “challenge[s] the American corporation to broaden its role in society and enlarge the obligations it owes beyond

³⁸ In one business article, the authors found that those companies that were most successful at maximizing shareholder value over time did not focus on maximizing shareholder value. Justin Fox & Jay W. Lorsh, *What Good Are Shareholders?*, HARV. BUS. REV., July–Aug. 2012. Some scholars cite *Dodge v. Ford Motor Company*, 170 N.W. 668 (Mich. 1919), as evidence of the shareholder primacy theory. See Kent Greenfield, *Corporate Law’s Original Sin*, WASH. MONTHLY, Jan./Feb. 2015, <https://washingtonmonthly.com/magazine/janfeb-2015/sidebar-corporate-laws-original-sin/>. *But cf.* Stout, *supra* note 19 (arguing that *Dodge v. Ford* is bad law).

The case against shareholder primacy was argued best by Steven Pearlstein last year in the Washington Post. Maximizing shareholder value, he wrote, is a “pernicious” ideology that “has no foundation in history or in law.” He continued, “What began in the 1970s and ’80s as a useful corrective to self-satisfied managerial mediocrity has become a corrupting, self-interested dogma peddled by finance professors, money managers and over-compensated corporate executives.”

Kent Greenfield, *If Corporations Are People, They Should Act Like It*, ATLANTIC (Feb. 1, 2015), <https://www.theatlantic.com/politics/archive/2015/02/if-corporations-are-people-they-should-act-like-it/385034/> [hereinafter *If Corporations are People*] (citing Steven Pearlstein, *Putting shareholders first*, WASH. POST, Sept. 8, 2013, at G01).

³⁹ Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 12 (1991).

⁴⁰ Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999).

⁴¹ *Id.* at 290 (emphasis in original).

⁴² Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 561 (2003).

⁴³ Greenfield, *Can Corporations Be Good Citizens?*, *supra* note 13. The stakeholder theory has been around for decades.

These critics [of the shareholder primacy norm] call on corporations to act as if they were players not only in the private sphere but in the public one as well. To act, one might say, as citizens. To call on corporations to act as “good corporate citizens” means that they should act as if they have broader obligations to the polity and society that cannot be entirely satisfied by reference to their financial statements.

the bottom line. These scholars have assailed the norm of shareholder primacy and called on corporations to recognize and act on the interests of all stakeholders⁴⁴ The progressive corporate law scholars⁴⁵ who are proponents of stakeholder theory argue that this theory “offers the best potential remedy to the harms of *Citizens United*—and indeed, the other risks of corporate power we have witnessed in the last few years.”⁴⁶ This progressive viewpoint of the corporation falls under the broader idea of demospudence championed by Professors Lani Guinier and Gerald Torres.⁴⁷ “Demospudence . . . is about a practice of law and interpretation of law that increases the quantum of democratic potential in social life.”⁴⁸ In the case of the corporation, it is giving a voice to the non-elites. The noticeable dissent of Alphabet employees through its wholly-owned subsidiary, Google LLC, (roughly 1,400) to current projects and the effect it is having on Alphabet, is one example of how the actions of stakeholders (in this case employees) influence a company.⁴⁹ It is the stakeholder theory which is in greatest alignment with corporations that choose to be involved with social movements.

The conceptions of the role of corporations are ever-changing. Indeed, the theories described above have evolved and to varying degrees align with the realities of the world and business practices. As one scholar noted, corporations “that fail to reflect the social values and priorities of their workforce and their customers are unlikely to thrive.”⁵⁰

⁴⁴ *Id.*

⁴⁵ “The core tenets of the progressive corporate law movement include the principles that shareholders are not supreme and that corporations should be measured by more than economic measures.” Greenfield, *Corporate Citizenship: Goal or Fear*, *supra* note 37, at 970. Professor Greenfield suggests a more pluralistic form of decision-making as a way for corporations to take into account the interests of all stakeholders. For example, he points to Germany as an example of codetermined board structure that mandates representatives of both shareholders and employees. Greenfield, *If Corporations Are People*, *supra* note 38.

⁴⁶ Greenfield, *Can Corporations Be Good Citizens?*, *supra* note 13. *But cf.* D. Gordon Smith, *Response: The Dystopian Potential of Corporate Law*, 57 EMORY L.J. 985, 1010 (2008). Smith contends “that corporate law does not matter in the way [Greenfield] claims because powerful markets constrain corporate decision making” and if “Greenfield somehow succeeded in materially changing the content of corporate decisions, he would sacrifice potential shareholder value in favor of value for non-shareholder constituencies. In the process, Professor Greenfield’s vision of corporate law would destroy much of the good that corporations have done.” *Id.*

⁴⁷ See generally Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demospudence of Law and Social Movements*, 123 YALE L.J. 2740 (2014).

⁴⁸ Gerald Torres, *Legal Change*, 55 CLEV. ST. L. REV. 135 (2007).

⁴⁹ David Meyer, *Tesla Probes, Walmart Wins, Nvidia Trips: CEO Daily for August 17, 2018*, FORTUNE (Aug. 17, 2018), <http://fortune.com/2018/08/17/google-china-tesla-sec-walmart-nvidia-ceo-daily-for-august-17-2018/>. The employees argued that they needed “more transparency, a seat at the table, and a commitment to clear and open processes: Google employees need to know what we’re building.” *Id.*

⁵⁰ Davis & White, *supra* note 16. Compare this to Warren Buffett, who said:

I don’t believe in imposing my views on 370,000 employees and a million shareholders. I’m not their nanny on that [S]o I think you have to be pretty careful . . . I think that it’s a mistake to start getting personal views and trying to impose ’em on an organization.

From the progressive corporate law standpoint, “[a]s corporations more deeply embed themselves in the communities they inhabit or affect, the conception of a corporation as a purely economic actor seems misplaced.”⁵¹ In fact, in their seminal work, Adolf Berle and Gardiner Means prognosticated that corporations would compete with the government as the dominant form of social organization.⁵² As Robert Monks and Nell Minow aptly pointed out, “[c]orporations do not just determine what goods and services are available in the marketplace, but, more than any other institution, corporations determine the quality of the air we breathe and the water we drink, and even where we live.”⁵³ Monks and Minow go on to state: “Corporations have a life, and even citizenship, of their own, with attendant right and powers. Corporations are ‘persons’ within the meaning of the United States Federal Constitution and Bill of Rights.”⁵⁴ Not only are corporations the source of jobs and livelihoods for voters, but they also have a great deal of political capital which makes corporations particularly influential over legislators when laws are made.⁵⁵ Indeed, the pursuit of profit has translated into corporations cultivating friendly community environments in which they can continue to thrive.⁵⁶

The American Law Institute codifies the corporation as an actor in both the economic and social spheres. It states that a corporation’s objectives are to enhance corporate profit and shareholder gain, consider ethical questions so that the corporation can act responsibly, and allocate “a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes.”⁵⁷

Billionaire Investor Warren Buffett Speaks with CNBC’s Becky Quick on “Squawk Box” Today, CNBC (Feb. 26, 2018) (full transcript), <https://www.cnbc.com/2018/02/26/full-transcript-billionaire-investor-warren-buffett-speaks-with-cnbc-becky-quick-on-squawk-box-today.html>.

⁵¹ Michael R. Siebecker, *A New Discourse Theory of the Firm After Citizens United*, 79 GEO. WASH. L. REV. 161, 174 (2010).

⁵² ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 357 (1932).

⁵³ ROBERT A.G. MONKS & NELL MINOW, *CORPORATE GOVERNANCE* 9 (5th ed. 2011).

⁵⁴ *Id.* at 11.

⁵⁵ *Id.*

⁵⁶ On this topic, Siebecker states that:

Noting the increasing attention corporations pay to societal concerns does not serve as a rebuke to the basic premise that corporations exist to make profits for shareholders. But striving for financial gain causes corporations to take a more active role in securing a commercially friendly social framework that makes profits more likely. In that sense, modern corporations possess a mutually reinforcing profit motive and social focus.

Siebecker, *supra* note 51, at 175.

⁵⁷ JEAN JACQUES DU PLESSIS, ANIL HARGOVAN & MIRKO BAGARIC, *PRINCIPLES OF CONTEMPORARY CORPORATE GOVERNANCE* 301 (2d ed. 2011).

B. Corporate Law and Social Norms

In addition to the recent court cases described above and stakeholder theory, corporations can find the legal (or extralegal) basis for their actions in social movements in the scholarship on corporate law and norms. Professor Melvin A. Eisenberg argues that directors, officers, and significant shareholders are not only motivated to avoid liability, but also by the prospect of financial gain and social norms.⁵⁸ Professors Edward B. Rock and Michael L. Wachter built upon this theory and suggest that nonlegal enforceable rules and standards provide the conduit between the theory of the firm and the law and norms literature.⁵⁹ It seems to logically follow then that if the social expectations for corporations are for them to speak out on social issues then they should do so. Like social movements,⁶⁰ corporations can play a critical “creative role in legal ordering.”⁶¹ While social movements can help us better understand change in the social, economic, and technological realms, so can corporations since they are inextricably tied to each of them.⁶² Also, like social movements, corporations can provide a construct by which to give people a sense of purpose to change certain practices and create new norms.⁶³ We will see this in particular in the lesbian, gay, bisexual, transgender, and questioning/queer (LGBTQ) case study in Section II.C below. Finally, just as social movements are important to ensure a continued dynamic relation between legal and social institutions to reorient the law to address evolving social understandings,⁶⁴ so too can corporations play a role in this reorientation due to the economic and social clout that they bring. Historically, social movements take the lead and the courts and lawyers “lag

⁵⁸ Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1252 (1999).

⁵⁹ Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619, 1623 (2001).

⁶⁰ One way to conceptualize social movements is in terms of five key elements:

[F]irst and foremost, they are challengers to or defenders of existing structures or systems of authority; second, they are collective rather than individual enterprises; third, they act, in varying degrees, outside existing institutional or organizational arrangements; fourth, they operate with some degree of organization; and fifth, they typically do so with some degree of continuity.

DAVID A. SNOW & SARAH A. SOULE, A PRIMER ON SOCIAL MOVEMENTS 6 (2010). Social movements are a type of “joint, collective action.” *Id.* at 15.

⁶¹ Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 948 (2006). “[M]uch of our nation’s legal history can be described as the product of social movements The American Revolution, like many revolutions, was a classic social movement, and the Boston Tea Party stands as a paradigmatic image of a mobilized, participatory populace.” Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 63–64 (2001).

⁶² Balkin & Siegel, *supra* note 61, at 948.

⁶³ *Id.*

⁶⁴ *Id.*

rather than lead”;⁶⁵ however, in the case of corporations, as illustrated in Part II, they both lag and lead depending on the context.

C. Corporations Today

Historically, one would not find corporations in the middle of social movements. Instead, under Milton Friedman’s premise, one “could reasonably assume that government would capably manage social issues, and that business managers could put a priority on increasing profits.”⁶⁶ In many cases, chief executive officers (CEOs) of U.S. corporations have generally followed Friedman’s advice and devoted themselves to economic issues and pursuing profit.⁶⁷ However, government is increasingly gridlocked, mired in partisan politics, and in some ways hampered by their constituencies and the desire to be re-elected.⁶⁸ In fact, in the case studies analyzed in Part II below, there is a startling lack of leadership from the federal government.⁶⁹ As a result of this absence of leadership, corporations have stepped into the void to address social issues and, in turn, have both voluntarily and forcibly participated in social movements.⁷⁰

In the not-so-recent past, corporations remained silent on social issues. Now, silence may have negative ramifications.⁷¹ There is a societal expecta-

⁶⁵ Scott Cummings, *The Social Movement Turn in Law*, 43 L. & SOC. INQUIRY 360, 363 (2017). In a “new empirically oriented model of law and social change that Cummings calls *movement liberalism*[,]” he “explore[s] how movement liberalism has been presented within legal scholarship as a way of reasserting a politically productive relationship between courts, lawyers, and social change from the ‘bottom-up.’” *Id.* at 364.

⁶⁶ Don Mayer, *The Law and Ethics of CEO Social Activism*, 23 J.L. BUS. & ETHICS 21, 40 (2017).

⁶⁷ *Id.* But cf. Michael E. Porter & Mark R. Kramer, *Creating Shared Value*, 89 HARV. BUS. REV., Jan. 2011, at 62–77 (“Businesses must reconnect company success with social progress.”).

⁶⁸ E.W., *Unprecedentedly Dysfunctional*, ECONOMIST (Sept. 22, 2014), <https://www.economist.com/blogs/democracyinamerica/2014/09/political-gridlock>; *Dysfunction by Design: Why American Politics is in Gridlock*, CONVERSATION (Apr. 13, 2013), <https://theconversation.com/dysfunction-by-design-why-american-politics-is-in-gridlock-13603>.

⁶⁹ See discussion *infra* Part II.

⁷⁰ Activist entrepreneurs were the first “business” activists in the 1960s and 1970s, with the nonfinancial goal transforming American business through advancing social movements, creating free spaces for marginalized people, and enhancing democracy in small businesses. JOSHUA CLARK DAVIS, *FROM HEAD SHOPS TO WHOLE FOODS: THE RISE AND FALL OF ACTIVIST ENTREPRENEURS* 19 (2017). Interestingly, a 2018 survey by Weber Shandwick and KRC Research found that in 2018 approximately half of Americans (48%) believe that CEO activism actually has an influence on government policy. WEBER SHANDWICK & KRC RESEARCH, *CEO ACTIVISM IN 2018: THE PURPOSEFUL CEO 9* (2018), https://www.webershandwick.com/wp-content/uploads/2018/07/CEO-Activism-2018_Purposeful-CEO.pdf [hereinafter *PURPOSEFUL CEO REPORT*].

⁷¹ “Now, between the endless, real-time conversation taking place on social media, and the rising tide of advocacy bubbling up from their own employees, customers, and investors, saying nothing may be just as dangerous—if not more so.” Sam Walker, *You’re a CEO—Stop Talking Like a Political Activist*, WALL ST. J. (July 27, 2018), <https://www.wsj.com/articles/youre-a-ceostop-talking-like-a-political-activist-1532683844>. The overall opinion of CEO activism has grown more favorable in recent years, increasing from 31% favorably viewed in

tion that companies with more than \$15 billion in annual revenue will weigh in on social issues.⁷² A 2016 study by the Public Affairs Council reported that “[m]ore than three-quarters of these companies said they experienced increased pressure to weigh in on social issues.”⁷³ Typically, publicly traded corporations experienced more pressure than private companies to engage on various social issues.⁷⁴ “The poll of 92 businesses in a wide variety of industries finds that, over the last three years [2013–2016], [sixty] percent have experienced rising stakeholder pressure to speak out on social issues such as discrimination, the environment, education and human rights. No respondents reported that pressure had decreased.”⁷⁵ Those with the most influence over a corporation’s decision to get involved on a particular issue were senior management and employees.⁷⁶ Consumers also play a role. Employees and consumers, particularly millennials, expect and may even demand that corporate leaders speak up. Entrepreneur-turned-venture-capitalist Marc Andreessen observed, “[F]or young companies, everything is connected: stock price, employee morale, ability to recruit new employees, ability to retain employees, ability to sign customer contracts, ability to raise debt financing, ability to deal with regulators.”⁷⁷ According to recent research, forty-seven percent of millennials want CEOs to speak out on important issues.⁷⁸ In fact,

2016 and 2017 to 38% in 2018. PURPOSEFUL CEO REPORT, *supra* note 70, at 8. However, Americans have identified many risks associated with CEOs speaking out on social issues, such as receiving criticism from customers or employees. *Id.* at 16. These same risks applied if the CEO did not speak out as well. *Id.*

⁷² Doug Pinkham, *Why Companies Are Getting More Engaged on Social Issues*, PUB. AFF. COUNCIL (Aug. 30, 2016), <https://pac.org/blog/why-companies-are-getting-more-engaged-on-social-issues>.

⁷³ *Id.*; see also *Taking a Stand: How Corporations Speak Out on Social Issues*, PUB. AFF. COUNCIL (2016), <https://pac.org/wp-content/uploads/taking-a-stand.pdf>. “Overall, high percentages of companies said they have been most involved in recent efforts to protect the environment (74%); end discrimination/restrictions based on sexual orientation (59%), gender (54%), gender identity (52%) or race (50%); improve access to quality education (59%) and protect human rights abroad (49%).” Pinkham, *supra* note 72.

⁷⁴ Pinkham, *supra* note 72.

⁷⁵ *Id.*

⁷⁶ *Id.* In August 2019, the Business Roundtable, an association of CEOs of America’s leading companies, released a new statement of corporate purpose which takes stakeholders into account in a way that it had not done previously. *Business Roundtable Redefines the Purpose of a Corporation to Promote ‘An Economy That Serves All Americans’*, BUSINESS ROUNDTABLE (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefine-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>.

⁷⁷ Gerald Davis, *Post-Corporate: The Disappearing Corporation in the New Economy*, THIRD WAY (Feb. 1, 2017), <https://www.thirdway.org/report/post-corporate-the-disappearing-corporation-in-the-new-economy>.

⁷⁸ Paul Argenti, *When to Say Something: What Companies Need to Know about Engaging with Political Events and Sensitive Issues*, TUCK (Jan. 25, 2018), <http://www.tuck.dartmouth.edu/news/articles/when-corporate-communication-strategy-includes-social-media>. Professor Paul Argenti highlights what corporations should think about when taking a stance on a social issue: the connection to the company’s values, the risks inherent to the company, and how the company communicates its message regarding the particular issue. *Id.* Millennials are ages 18 to 36. WEBER SHANDWICK & KCR RESEARCH, *CEO ACTIVISM IN 2017: HIGH NOON IN THE C-SUITE 3* (July 24, 2017), <http://www.webershandwick.com/news/article/ceo-activism-in-2017-high-noon-in-the-c-suite> [hereinafter HIGH NOON]. In 2018, seventy-seven percent of Ameri-

fifty-six percent of millennials believe that “CEOs and other business leaders have greater responsibility today for speaking out on hotly debated current issues than they used to.”⁷⁹ Corporations understand that their employees are well aware of their company’s “social value proposition”⁸⁰ and how that affects them as workers of a company or as consumers of its goods.⁸¹

According to the U.S. Bureau of Labor Statistics, ninety million Americans self-identified as “conscious consumers.”⁸² There is a \$3.2 trillion conscious consumer market in the United States.⁸³ Over seventy-two percent of consumers report “that they will actively seek a brand that aligns with their values if price and quality are equal.”⁸⁴ In one study, researchers found that for values-oriented companies greater risk may lie with abstaining from a stand than taking one; the opposite is true for results-oriented companies.⁸⁵ “Consumers appear to be forgiving of a company’s different point of view as long as the motivations behind them are not perceived to be based on pretense.”⁸⁶

Corporations come in two varieties: reactive⁸⁷ and proactive.⁸⁸ “Neither type of company is merely paying lip service to social or value-based issues; they are genuinely investing capital, clout, and reputation in the drive for

cans reported that they believe CEOs need to speak out in defense of their company’s value. PURPOSEFUL CEO REPORT, *supra* note 70, at 9. Besides millennials, women and professionals in the tech industry (particularly women in the tech industry) are more likely to favor CEOs speaking out when their company’s values are threatened or on employees’ behalf. *Id.* at 19; WEBER SHANDWICK & KRC RESEARCH, CEO ACTIVISM IN 2018: THE TECH EFFECT 13, 21 (2018), https://www.webershandwick.com/wp-content/uploads/2018/09/CEO-Activism-2018_Tech-Effect.pdf [hereinafter TECH EFFECT]. The view of activism is also divided politically, with “Democrats [being] significantly more likely than Republicans and Independents to say companies should take positions. Republicans are significantly more likely to say they should stick to business.” PURPOSEFUL CEO REPORT, *supra* note 70, at 15.

⁷⁹ HIGH NOON, *supra* note 78, at 5. By contrast, only twenty-eight percent of Gen Xers (ages 37 to 52) and Boomers (ages 53 to 71) “believe CEOs have a responsibility to speak up about issues that are important to society.” *Id.*

⁸⁰ Davis, *What’s Driving Corporate Activism*, *supra* note 8.

⁸¹ CEO activism is more likely to increase employees’ loyalty to an organization (31%) than decrease it (23%). PURPOSEFUL CEO REPORT, *supra* note 70, at 22. In the tech sector in particular, the number who reported CEO activism would increase loyalty was even higher at seventy-five percent. TECH EFFECT, *supra* note 78, at 14.

⁸² Dante Disparte & Timothy H. Gentry, *Corporate Activism is on the Rise*, REAL LEADERS (Oct. 27, 2018), <https://real-leaders.com/corporate-activism-rise/>.

⁸³ *Id.*

⁸⁴ *Id.* Positive or negative, nearly two-thirds of Americans in 2017 and 2018 took some kind of action because of a CEO’s stance on a particular issue. PURPOSEFUL CEO REPORT, *supra* note 70, at 21. Boycotting was the most common response. *Id.*

⁸⁵ Daniel Korschun, Anubhav Aggarwal, Hoori Rafieian & Scott D. Swain, *Taking a Stand: Consumer Responses When Companies Get (or Don’t Get) Political* 20 (Working Paper, July 9, 2016), <https://ssrn.com/abstract=2806476>.

⁸⁶ *Id.*

⁸⁷ Reactive corporations act in response to a crisis. See Disparte & Gentry, *supra* note 82.

⁸⁸ Proactive corporations take affirmative actions before a crisis occurs. See Disparte & Gentry, *supra* note 82 (describing Starbucks, which actively campaigns on emergent social issues—even when not in the best interests of its shareholders and economic value—as an example of a proactive corporation).

change.”⁸⁹ Take Starbucks as an example. Under Howard Schultz, Starbucks “became a paragon of proactive corporate activism, at times to the detriment of shareholders and short-term economic value.”⁹⁰ In response to increasing racial tension in the United States,⁹¹ Starbucks undertook its controversial “Race Together” campaign, which included full-page ads and in-store communication.⁹² Despite the backlash, it set a “tone at the top” and showed authenticity.⁹³ “While few people want their barista to talk to them about race relations, it is of broad public interest when large corporations take a stance on matters of national import.”⁹⁴ Starbucks’ proactive stance also aligned with its mission statement.⁹⁵ Mr. Schultz said, “You can’t create emotional attachment if you stand for nothing.”⁹⁶ What this has meant for Starbucks and other companies is speaking up on important and sometimes controversial social and political issues.⁹⁷

⁸⁹ *Id.* “Not every topic is ripe for CEO activism. Americans overall are most likely to say CEOs and business leaders should express opinions on job and skills training (70%), equal pay (67%), healthcare coverage (62%) and maternity or paternity leave (61%).” HIGH NOON, *supra* note 78, at 11. On other topics, Americans are more divided. For example, with respect to gender equality, forty-eight percent say that “leaders should publicly address this issue, while other issues—those that are arguably politically charged—are not deemed by the average American as public-platform issues: race relations (37%), climate change (34%), immigration (32%), LGBT[Q] rights (29%), gun control (26%) and refugees (26%).” *Id.* In 2018, these numbers shifted slightly, with Americans identifying the most pressing issues for CEOs’ activism to be job/skills training (80%), equal pay (79%), and sexual harassment (77%). PURPOSEFUL CEO REPORT, *supra* note 70, at 18.

⁹⁰ *Id.*

⁹¹ See, e.g., Lauren Fox, National Journal, *Obama Confronts Race Relations and Ferguson in State of the Union Address*, ATLANTIC (Jan. 20, 2015), <https://www.theatlantic.com/politics/archive/2015/01/obama-confronts-race-relations-and-ferguson-in-state-of-the-union-address/445728/>; Timothy Williams & Michael Wines, *Shootings Further Divide a Nation Torn Over Race*, N.Y. TIMES (July 8, 2016), <https://www.nytimes.com/2016/07/09/us/shootings-further-divide-a-nation-torn-over-race.html>; Jose A. DelReal, ‘Get ‘Em Out!’ Racial Tensions Explode at Donald Trump’s Rallies, WASH. POST (Mar. 12, 2016), https://www.washingtonpost.com/politics/get-him-out-racial-tensions-explode-at-donald-trumps-rallies/2016/03/11/b9764884-e6ee-11e5-bc08-3e03a5b41910_story.html.

⁹² Disparte & Gentry, *supra* note 82.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Our Mission*, STARBUCKS, <https://www.starbucks.com/about-us/company-information/mission-statement> (last visited Dec. 31, 2018) (“[W]e live these values: Creating a culture of warmth and belonging, where everyone is welcome.”).

⁹⁶ See Chang, *supra* note 36, at 36; see also *id.* at 38 (noting that the Mayor of Atlanta feared poor turnout for an integrated event celebrating Martin Luther King, Jr.’s Nobel Peace Prize so he turned to the former CEO of Coca-Cola to convince people to attend the event, which quickly sold out).

⁹⁷ Chang notes that:

For Schultz and many other business leaders, the days of strict adherence to Milton Friedman’s shareholder primacy theory, where a company’s involvement in social issues is considered theft from shareholders, are numbered. Schultz has made it clear that the company creates value for its shareholders by living its values in every transaction, from buying a coffee farm in Costa Rica in order to establish sustainable farming to serving a customer her grande, non-fat, soy latte. More recently, Starbucks has voiced its values in areas such as gun control, LGBT[Q] rights, and race relations.

As a result of being a first mover in social movements, Starbucks has become a leader on social issues. “While the rise of corporate activism speaks to the inherent divisiveness in the American public, many activist firms are not merely pandering to their base, but rather standing for issues that are consistent with their company value systems.”⁹⁸ In political relations theory, when an organization makes a public statement or takes a public stance on social political issues it is called corporate social advocacy (CSA).⁹⁹ “CSA employs a different strategy, typically involving the CEO or other executive speaking directly with the public and/or an elected official, yet it has the potential to influence legislation in the same manner as lobbying.”¹⁰⁰ The impact of CSA is such that when a major corporation shares its thoughts about issues related to diversity and inclusion or guns, “the conversation moves from Washington D.C. to the dinner table.”¹⁰¹ The ability of CEOs and other leaders to communicate directly to the buying public means that people pay attention. Mark Benioff, CEO of Salesforce.com (Salesforce), observed, “it’s not very hard for a CEO like myself or Richard Branson or Michael Dell to tweet something, and one little tweet can make a huge difference.”¹⁰²

Id. at 36. In determining when to speak out, “[m]ore than half of communications and marketing executives (53%) report their companies spend time discussing whether their CEO should speak out on hotly debated current issues.” WEBER SHANDWICK & KRC RESEARCH, CEO ACTIVISM IN 2018: INSIDE COMMS AND MARKETING 7 (2019), <https://www.webershandwick.com/wp-content/uploads/2019/01/CEO-Activism-Inside-Comms-and-Marketing.pdf>. The companies who reported spending time discussing whether CEOs should or should not speak out reported an overall increase in the amount of time dedicated to this issue in the last couple years. *Id.* at 8.

⁹⁸ Disparte & Gentry, *supra* note 82.

⁹⁹ “Whether these stances are planned, as in the formal output of communication, or not, as in the case of a CEO making an off-the-cuff remark to a journalist: the outcome is the perception by the public that the organization is linked in some way with the issue.” Melissa D. Dodd & Dustin W. Supa, *Conceptualizing and Measuring “Corporate Social Advocacy” Communication: Examining the Impact on Corporate Financial Performance*, 8 PUB. REL. J. at 5 (2014). Furthermore, corporate social advocacy has particular implications if:

- (a) the social-political issues addressed by organizations are divorced from issues of particular relevance to the organization; (b) engagement in the social-political issues is controversial and serves to potentially isolate organizational stakeholders while simultaneously attracting activist groups; and, (c) as a result, there is a particularly necessary emphasis on financial outcomes for the organization.

Id. Note that corporate social advocacy differs from corporate social responsibility. Corporate social responsibility is “a self-regulating business model that helps a company be socially accountable—to itself, its stakeholders, and the public. By practicing corporate social responsibility, also called corporate citizenship, companies can be conscious of the kind of impact they are having on all aspects of society including economic, social, and environmental.” *Corporate Social Responsibility*, INVESTOPEDIA, <https://www.investopedia.com/terms/c/corporate-social-responsibility.asp> (last visited Dec. 31, 2018).

¹⁰⁰ Chang, *supra* note 36, at 37.

¹⁰¹ *Id.*

¹⁰² *Id.* “[S]ocial media is a way for social activists to bypass traditional media to create a stage for themselves in public.” Brayden King & Klaus Weber, *Corporate Activism Yesterday, Today, and Tomorrow*, KELLOGG INSIGHT (Mar. 3, 2014), https://insight.kellogg.northwestern.edu/article/corporate_activism_yesterday_today_and_tomorrow. Corporations monitor social

In an era where corporations wield greater political and social power than ever before, a legal analysis of whether corporations can and should be involved in social movements is prudent. It is to this endeavor that this Article now turns.¹⁰³

In the case studies that follow in Part II, I will give a more detailed account about the extent to which corporations shape social movements. As we will see, there are limits to the reach of corporations within such movements, as well as positive and negative outcomes from their involvement.

II. CASE STUDIES

This Part analyzes the legal and business underpinnings for the role of corporations in social movements and its broader implications for society as a whole. Note that I only provide a brief sketch of each of these social movements; a few pages do not do justice to the breadth and depth of each movement. In this Part, I have chosen three case studies to highlight the role (or absence) of the corporation in a particular moment in time in a social movement and its impact on the law and the corporate form itself. I selected these particular case studies based on the following criteria: (1) they figure prominently in academic and practitioner circles and have been among the most divisive social issues of our time; (2) they illustrate both the positive and negative aspects of corporate involvement in social movements; and (3) they offer overarching lessons that can inform guidelines for ways in which corporations should and should not be involved in social movements. The case studies presented illustrate the challenges of sustaining meaningful participation by corporations in social movements that will bring lasting legal changes. It also shows the difficulty of working within and outside of existing legal constructs while simultaneously creating new norms. In the case studies, I also use frame analysis, described below, to illustrate how individual actions meld with an organizational structure like corporations.

In the past, the lacunae between legal scholarship and social scientists may have resided with their different starting points regarding rational actor theory. Legal scholars accepted Mancur Olson's premise that there is a collective action problem with rational actors;¹⁰⁴ social scientists, in contrast, believed that individuals were motivated by ideology.¹⁰⁵ The social movement literature originates from two different approaches—the American approach and the Continental one. Inspired by Mancur Olson's *The Logic of*

media and connect to activists through these channels; however, these relationships are more volatile and harder to manage. *Id.*

¹⁰³ “[C]orporations should be seen as having robust social and public obligations that cannot be encapsulated in share prices.” Kent Greenfield, *In Defense of Corporate Persons*, 30 CONST. COMMENT 309, 328 (2015).

¹⁰⁴ MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 60–65 (1965); see also SIDNEY TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS, COLLECTIVE ACTION AND POLITICS* 13–16 (1994) (illustrating Olson's influence on American social movement theory).

¹⁰⁵ Rubin, *supra* note 61, at 25.

Collective Action, the American approach in social movement literature was referred to as resource mobilization.¹⁰⁶ “Proponents of this approach treat the members of social movements as instrumentally rational actors, and the leaders as policy entrepreneurs who follow coherent organizational and political strategies.”¹⁰⁷ The Continental approach believed that the elite used its influence in the economic sphere to control the political sphere.¹⁰⁸ Central to this viewpoint was the belief that social movements needed “people to generate new ideologies and re-define their own identities.”¹⁰⁹ However, there were shortcomings to both approaches. In the former, the motivation of the individuals in the social movement remained unaccounted for and in the latter, they lacked mechanisms to mobilize those with shared identities into social action.¹¹⁰ To reconcile the two approaches, Erving Goffman developed frame analysis.¹¹¹ In the social movement context, this analysis explains how shared perceptions by individuals lead to action, thereby putting together individual motivation and organizational structure.¹¹² Social movement scholars argue that in order to achieve success, activists should frame issues to resonate with the identities, ideologies, and cultural understandings of those who support the movement or potential recruits to it.¹¹³ Frames are “cognitive cues, metaphors, and symbols that showcase issues in a particular way and suggest possible responses to these issues.”¹¹⁴ They help to “mediate between opportunity structures and action because they provide the means with which people can interpret the political opportunities before them and, thus, decide how to best pursue their objectives.”¹¹⁵

In Part II, using frame analysis, I explain how corporations work within social movements. Unlike individuals, however, corporations already have an organizational structure which is embedded within the corporation itself. Other than in the case of filing amicus briefs, it is unclear if corporations work on their own or in concert with other corporations when they participate in social movements. It seems that when a number of corporations come together for a common cause, they have greater influence on the outcome. As this Part will illustrate, in the context of social movements, corporations have needed to respond to or undertake a leadership role in certain social movements because of one or more of the following reasons: (1) it affects the corporation’s ability to recruit talent; (2) there is a failure of government

¹⁰⁶ *Id.* at 12–13.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 13–14.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 16.

¹¹¹ *Id.* at 16–17.

¹¹² *Id.* at 17.

¹¹³ John L. Campbell, *Where Do We Stand? Common Mechanisms in Organizations and Social Movements Research*, in *SOCIAL MOVEMENTS AND ORGANIZATION THEORY* 41, 48 (Gerald F. Davis et al. eds., 2005).

¹¹⁴ *Id.* at 48–49.

¹¹⁵ *Id.* at 49.

or the government has ceded moral authority; or (3) corporations are forced to act in ways that other actors do not because there is an immediacy to public demand that they need to contend with that politicians are able to wait out.

A. *Challenging the President: How Corporations Responded to the Muslim Ban*

Before becoming President of the United States, Donald Trump promised to keep Muslims out of the country. On January 27, 2017, with Executive Order No. 13769, titled “Protecting the Nation from Foreign Terrorist Entry into the United States,” he tried to make good on that promise.¹¹⁶ Often referred to as the “Muslim Ban,”¹¹⁷ it prevented certain non-citizens from entering the United States and it also, for a ninety-day period, suspended all citizens of seven Muslim-majority countries from entering the United States.¹¹⁸ Syrian refugees were banned and the annual cap on refugee admissions was decreased by fifty percent.¹¹⁹ It also created a review system that preferred Christian refugees living in Muslim-majority countries.¹²⁰ Stoked by worries of protectionist trade and immigration policies, the market cap of five of the biggest technology companies went down by \$32 billion in the aftermath of Trump’s executive order.¹²¹

Ninety-seven technology companies filed an amicus brief protesting the Muslim Ban, including Apple, Microsoft, and Netflix.¹²² Responses from CEOs ranged from strong to tepid statements.¹²³ Google CEO Sundar Pichai, an executive officer and director of Alphabet, said, “We’re upset about the impact of this order and any proposals that could impose restrictions on

¹¹⁶ Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

¹¹⁷ See, e.g., *Timeline of the Muslim Ban*, ACLU WASHINGTON, <https://www.aclu-wa.org/pages/timeline-muslim-ban> (last visited Dec. 31, 2018); Aaron Blake, *Republicans Insist This Isn’t a ‘Muslim Ban.’ Trump and Giuliani Aren’t Helping Their Cause at All.*, WASH. POST (Jan. 1, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/01/30/republicans-insist-this-isnt-a-muslim-ban-trump-and-giuliani-arent-helping-them-make-that-case/>.

¹¹⁸ 82 Fed. Reg. 8977, 8978.

¹¹⁹ Id. at 8979; see also Alicia Parlapiano, Haeyoun Park & Sergio Peçanha, *How Trump’s Executive Order Will Affect the U.S. Refugee Program*, N.Y. TIMES (Jan. 27, 2017), <https://www.nytimes.com/interactive/2017/01/25/us/politics/trump-refugee-plan.html>.

¹²⁰ See id.; Michael D. Shear & Helene Cooper, *Trump Bars Refugees and Citizens of 7 Muslim Countries*, N.Y. TIMES (Jan. 27, 2017), <https://www.nytimes.com/2017/01/27/us/politics/trump-syrian-refugees.html> (noting that Trump admitted in interviews that they were going to “help” Syrian Christians with the order).

¹²¹ Lucinda Shen, *The 5 Biggest Tech Companies Lost \$32 Billion In Value Over Donald Trump’s Muslim Ban*, FORTUNE (Jan. 30, 2017), <http://fortune.com/2017/01/30/donald-trump-muslim-ban-tech-companies/>.

¹²² Kate Conger, *97 Companies File Opposition to Trump’s Immigration Order*, TECHCRUNCH (Feb. 5, 2017), <https://techcrunch.com/2017/02/05/twitter-airbnb-and-others-to-file-opposition-to-trumps-immigration-order/>.

¹²³ Casey Newton, *Silicon Valley’s Responses to Trump’s Immigration Executive Orders, From Strongest to Weakest*, VERGE (Jan. 28, 2017), <https://www.theverge.com/2017/1/28/14426550/silicon-valley-trump-immigration-response>.

Googlers and their families, or that could create barriers to bringing great talent to the US[.]”¹²⁴ In the case of Apple, its CEO Tim Cook, said, “This country is strong because of our immigrant background and our capacity and ability as a people to welcome people from all kinds of backgrounds. . . . That’s what makes us special.”¹²⁵ Although Mr. Cook did not say so at the time the statement was made, government data revealed that many of Apple’s best and brightest employees were immigrants that came in through the H-1 B visa program.¹²⁶ One survey which tracked corporate responses to the executive order “found that 84% were issued directly by CEOs and 73% voiced a clear opinion against the ban. CEOs did not stand on the sidelines as pressure from stakeholders intensified, demanding greater accountability from those at the top.”¹²⁷ Harvard Business School historian Nancy Koehn said that the corporate response to the travel ban compares to nothing else “in scale or swiftness.”¹²⁸ However, for the purposes of this Article, it provides a helpful example of how corporations may act in the future. One journalist noted, “It’s no surprise that Silicon Valley would emerge as the first corporate hub of dissent, considering both the liberal bent of the industry’s workforce and its reliance on foreign-born talent. Less clear is how many non-tech companies with sprawling global operations will join the chorus.”¹²⁹

The corporate response went beyond CEOs’ statements against the Muslim Ban and amicus briefs; corporations provided other types of resources. Some companies made business and financial commitments. Starbucks committed to hiring 10,000 refugees.¹³⁰ Google pledged \$4 million to help those affected by the Muslim Ban;¹³¹ it reported that 187 of its

¹²⁴ Jack Nicas, *Google Criticizes Impact on Staff of Trump Immigration Order*, WALL ST. J. (Jan. 28, 2017), <https://www.wsj.com/articles/google-criticizes-impact-on-staff-of-trump-immigration-order-1485596067>.

¹²⁵ Walker, *supra* note 71.

¹²⁶ *See id.*

¹²⁷ HIGH NOON, *supra* note 78, at 2.

¹²⁸ Jena McGregor, *Why Silence Now Has a Cost*, WASH. POST (Feb. 20, 2017), <https://www.washingtonpost.com/amphml/news/on-leadership/wp/2017/02/20/why-silence-now-has-a-cost/>.

¹²⁹ Tory Newmyer, *Non-Tech Companies Mostly Silent on Trump’s Travel Ban*, FORTUNE (Jan. 30, 2017), <http://fortune.com/2017/01/30/companies-silent-trump-travel-ban/>. CEOs in the tech sector have overall tended to be the most vocal on social issues, with 45% of communications and marketing executives of tech companies reporting activism from their own CEO, compared with 33% to 37% in other industries. WEBER SHANDWICK & KRC RESEARCH, *CEO ACTIVISM IN 2018: INSIDE COMMS AND MARKETING 20* (2019), <https://www.webershandwick.com/wp-content/uploads/2019/01/CEO-Activism-Inside-Comms-and-Marketing.pdf>.

¹³⁰ Phil Wahba, *Starbucks Has a Response to President Trump’s Immigration Ban: Hire 10,000 Refugees*, FORTUNE (Jan. 29, 2017), <http://fortune.com/2017/01/29/donald-trump-muslim-ban-starbucks/>. “I write to you today with deep concern, a heavy heart and a resolute promise,” Schultz wrote in a letter to all Starbucks employees. “We are living in an unprecedented time, one in which we are witness to the conscience of our country, and the promise of the American Dream, being called into question.” *Id.*

¹³¹ Jacob Siegal, *Google Fights Trump’s Immigration Ban with \$4 Million Crisis Fund*, BGR (Jan. 30, 2017), <http://bgr.com/2017/01/30/google-crisis-fund-immigration-ban-aclu/>.

staff were affected by the Muslim Ban.¹³² Lyft also made a substantial contribution to the American Civil Liberties Union (ACLU).¹³³ Airbnb offered free housing for refugees or those impacted by the Muslim Ban.¹³⁴ “[T]he order and what it stands for goes directly against Airbnb’s core mission and the product it sells. [Airbnb’s] stated purpose . . . is belonging . . . [.] that it brings people together and that ‘anyone can belong anywhere.’”¹³⁵ Indeed, Airbnb executives refer to its platform as the “UN at the kitchen table.”¹³⁶ Only sixteen percent of its listings and two of their top ten cities (Los Angeles and New York) are in the United States.¹³⁷ Airbnb’s refugee relief efforts are not new and in fact began in 2015 “when it began offering free housing to relief workers in Greece, Serbia and Macedonia, and added a donation tool to its website where members of its platform could contribute. [Airbnb] says it has housed 3,000 workers and raised \$1.6 million so far.”¹³⁸ Pilot programs such as the “‘livelihood’ program in Jordan . . . helps refugees living in camps earn income by giving tours and providing other ‘local experiences’ to travelers visiting Jordan.”¹³⁹

However, not all of corporate America voiced their opposition to the Muslim Ban.¹⁴⁰ In fact, outside of Silicon Valley, not much was said.¹⁴¹ “[T]he leaders of Apple . . . , Google and Facebook . . . emailed their staff to denounce the suspension of the U.S. refugee program and the halting of arrivals from seven Muslim-majority countries . . .”¹⁴² In contrast, “many of

¹³² Joseph Hincks, *Google is Putting Up \$4 Million to Help Those Affected by Trump’s Immigration Order*, FORTUNE (Jan. 30, 2017), <http://fortune.com/2017/01/30/google-four-million-crisis-fund-immigration-ban/>. “The \$4 million—a composite of a \$2 million fund put up by Google, and up to \$2 million more in employee donations—will be donated to the American Civil Liberties Union, the Immigrant Legal Resource Center, the International Rescue Committee and the United Nation’s refugee agency (UNHCR).” *Id.*

¹³³ Darrell Etherington, *Lyft Donates \$1 Million to the ACLU, Condemns Trump’s Immigration Actions*, TECHCRUNCH (Jan. 29, 2017), <https://techcrunch.com/2017/01/29/lyft-donates-1m-to-the-aclu-condemns-trumps-immigration-actions/>.

¹³⁴ Leigh Gallagher, *President Trump Wants to Keep Them Out. Airbnb is Inviting Them In*, FORTUNE (Jan. 30, 2017), <http://fortune.com/2017/01/29/donald-trump-muslim-ban-airbnb/>.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Harriet Taylor, *How Airbnb is Growing a Far-Flung Global Empire*, CNBC (June 8, 2016), <https://www.cnbc.com/2016/06/01/how-airbnb-is-growing-a-far-flung-global-empire.html>.

¹³⁸ Gallagher, *supra* note 134.

¹³⁹ *Id.* “It has also been working with resettlement agencies on programs that would identify hosts in the U.S. and elsewhere who might be interested in temporarily housing refugees.” *Id.* Note that some may cynically say that the companies engaged in such help for good public relations and are not altruistically motivated.

¹⁴⁰ Fortune Editors & Reuters, *Outside Silicon Valley, Not Much Outcry Against Immigration Ban*, FORTUNE (Jan. 30, 2017), <http://fortune.com/2017/01/30/outside-silicon-valley-not-much-outcry-against-immigration-ban/> [hereinafter *Outside Silicon Valley*].

¹⁴¹ *Id.*; see also Newmyer, *supra* note 129 (noting that only a handful of non-high technology companies spoke out against the Muslim Ban, including Ford, General Electric, Goldman Sachs, JPMorgan, Morgan Stanley, and Starbucks).

¹⁴² *Outside Silicon Valley, supra* note 140. Sergey Brin, a co-founder of Google, even joined the protests at San Francisco International Airport, in his personal capacity. T.C. Sottek, *Google Co-founder Sergey Brin Joins Protest Against Immigration Order at San Francisco*

their counterparts in other industries either declined comment or responded with company statements reiterating their commitment to diversity.”¹⁴³

In looking at the mission statements of some of the most vocal members of the high technology corporations—Airbnb, Apple, and Alphabet—there is an evident tie between the mission statement or diversity and inclusion statements of these corporations and the actions that they each individually took. Airbnb’s mission statement evolved over time and was eventually encapsulated in two words: “Belong anywhere.”¹⁴⁴

Apple’s diversity and inclusion statement reads: “Open. Humanity is plural, not singular. The best way the world works is everybody in. Nobody out.”¹⁴⁵ In Google’s code of conduct, it famously said, “Don’t be evil.”¹⁴⁶ After Google’s corporate restructuring under Alphabet Inc., its code of conduct was changed to, “Do the right thing.”¹⁴⁷ Ultimately it was Alphabet’s understanding (as well as other high technology companies) that the lifeblood of Silicon Valley was immigrants. It was this understanding that played a significant role in rallying this particular community to the defense of immigrants.¹⁴⁸ In this way, the actions of high technology companies may have been partially motivated by practical concerns, such as maintaining the ability to attract immigrant talent.¹⁴⁹ According to a 2016 report from the National Foundation for American Policy, a nonprofit, non-partisan public

Airport, VERGE (Jan. 28, 2017), <https://www.theverge.com/2017/1/28/14428262/google-sergey-brin>.

¹⁴³ *Outside Silicon Valley*, *supra* note 140.

¹⁴⁴ Leigh Gallagher, *How Airbnb Found a Mission—and a Brand*, FORTUNE (Dec. 22, 2016), <http://fortune.com/airbnb-travel-mission-brand/>; *Diversity and Belonging*, AIRBNB, <https://www.airbnb.com/diversity>. The best summary of Airbnb’s expansive mission comes from CEO Brian Chesky: “At the heart of our mission is the idea that people are fundamentally good and every community is a place where you can belong. I sincerely believe that [discrimination] is the greatest challenge we face as a company. It cuts to the core of who we are and the values that we stand for.” *Id.*

¹⁴⁵ *Inclusion & Diversity*, APPLE, <https://www.apple.com/diversity/>.

¹⁴⁶ Peter Ward, *What Google’s ‘Don’t Be Evil’ Slogan Can Teach You About Creating Your Company’s Motto*, FORBES (Jan. 5, 2018), <https://www.forbes.com/sites/forbestechcouncil/2018/01/05/what-googles-dont-be-evil-slogan-can-teach-you-about-creating-your-companys-motto>.

¹⁴⁷ *Id.*

¹⁴⁸ Ethan Baron, *H-1B: Foreign Citizens Make Up Nearly Three-Quarters of Silicon Valley Tech Workforce, Report Says*, MERCURY NEWS (Jan. 17, 2018), <https://www.mercurynews.com/2018/01/17/h-1b-foreign-citizens-make-up-nearly-three-quarters-of-silicon-valley-tech-workforce-report-says/> (“About 71 percent of tech employees in the Valley are foreign born . . .”); Ian Hathaway, *Almost Half of Fortune 500 Companies Were Founded By American Immigrants or Their Children*, BROOKINGS: THE AVENUE (Dec. 4, 2017), <https://www.brookings.edu/blog/the-avenue/2017/12/04/almost-half-of-fortune-500-companies-were-founded-by-american-immigrants-or-their-children/> (“Immigrants found . . . half of Silicon Valley high-tech startups.”).

¹⁴⁹ See Mark Latonero, *Tech Companies Should Speak Up for Refugees, Not Only Highly-Skilled Immigrants*, HARV. BUS. REV. (May 16, 2017), <https://hbr.org/2017/05/tech-companies-should-speak-up-for-refugees-not-only-high-skilled-immigrants>.

policy research organization, more than half of all U.S.-based unicorns¹⁵⁰ were founded or co-founded by immigrants.¹⁵¹

As one of the most famous corporations in the world (though not a high technology company), Starbucks clearly stated its opposition to the Muslim Ban. Looking at Starbucks' mission statement and commitment to inclusion on its website, it is clear that speaking out against the Muslim Ban was congruent with both. Its mission statement reads: "To inspire and nurture the human spirit – one person, one cup and one neighborhood at a time."¹⁵² Under the Starbucks credo, diversity is a value and is valued. In defining its commitment to inclusion, Starbucks states on its website, "[e]mbracing diversity . . . enhances our work culture . . . [and] drives our business success [T]he inclusion of these diverse experiences and perspectives [creates] a culture of empowerment, one that fosters innovation, economic growth and new ideas."¹⁵³

Starbucks presents an interesting example of a corporation that did not have an overt stake in this particular movement. However, as Part I points out, millennials now expect corporations to stand for something—as Starbucks does—and in doing so Starbucks appears to align with the value of stakeholder theory. Not only does Starbucks work to advance the interest of its shareholders, but it also tries to improve the lives of its employees (through college scholarships)¹⁵⁴ and the communities that it serves (through environmental initiatives, employment opportunities for veterans and immigrants, etc.).¹⁵⁵ Indeed, Starbucks' involvement in social issues extends well beyond immigration and encompasses each of the social movements described in Part II.¹⁵⁶

¹⁵⁰ Jennifer S. Fan, *Regulating Unicorns: Disclosure and the New Private Economy*, 57 B.C. L. REV. 583 (2016).

¹⁵¹ STUART ANDERSON, IMMIGRANTS AND BILLION DOLLAR STARTUPS 1 (2016), <https://nfap.com/wp-content/uploads/2016/03/Immigrants-and-Billion-Dollar-Startups.NFAP-Policy-Brief.March-2016.pdf>.

¹⁵² Lawrence Gregory, *Starbucks Coffee's Vision Statement & Mission Statement*, PANMORE INSTITUTE (Jan. 31, 2017), <http://panmore.com/starbucks-coffee-vision-statement-mission-statement>.

¹⁵³ *Inclusion at Starbucks*, STARBUCKS, <https://www.starbucks.com/responsibility/community/diversity-and-inclusion>.

¹⁵⁴ Ben Rooney, *Starbucks to Give Workers a Full Ride for College*, CNN MONEY (Apr. 6, 2015), <http://money.cnn.com/2015/04/06/pf/college/starbucks-college-tuition-arizona-state/index.html>.

¹⁵⁵ *Starbucks Makes Global Commitment to Hire 10,000 Refugees By 2022*, STARBUCKS, <https://www.starbucks.com/responsibility/community/refugee-hiring>.

¹⁵⁶ See discussion *infra* sections II.B and II.C. Note, however, that just because a particular corporation is a leader on social issues, that does not always mean that it gets things right. There are certainly missteps along the way. Take for example an April 2018 incident reported by the media where two African-American men were arrested for waiting at a Starbucks in Philadelphia, Pennsylvania, for their friend. Phil McCausland, *Protests Follow Outrage After Two Black Men Arrested at Philly Starbucks*, NBC (Apr. 15, 2018), <https://www.nbcnews.com/news/us-news/protests-follow-outrage-after-two-black-men-arrested-philly-starbucks-n866141>.

What is also striking is that those corporations who spoke against the Muslim Ban were both private at the time (for example, Airbnb¹⁵⁷ and Uber¹⁵⁸) and public (Alphabet,¹⁵⁹ Amazon,¹⁶⁰ Apple,¹⁶¹ and Facebook¹⁶²).¹⁶³ The weight of private companies, especially unicorns, becomes even more apparent in social movements since some of them are more well-known than even America's most iconic companies.¹⁶⁴

Prompted by the public outcry and chaos that ensued when the Muslim Ban was first introduced, a revised travel ban on majority-Muslim countries was issued in March 2017.¹⁶⁵ The changes included removing Iraq from the list and clarifying that visa holders from such countries could still enter the United States.¹⁶⁶ In addition to being narrower, the national security rationale was made in greater detail.¹⁶⁷ In response, fifty-eight high technology com-

¹⁵⁷ It is unclear when Airbnb will go public. See Sriram Iyer & Ruqayyah Moynihan, 'We Have Not Decided If We Will Go Public in 2019': Airbnb Cofounder Hints at IPO Timing, BUSINESS INSIDER INDIA (Mar. 13, 2019, 9:37 AM), <https://www.businessinsider.com/exclusive-airbnb-may-defer-its-ipo-plan-2019-3>.

¹⁵⁸ See *America's Largest Private Companies*, FORBES, <https://www.forbes.com/companies/uber/> (listing Uber as number fifty) (last visited Feb. 3, 2019). At the time of the Muslim Ban, Uber was a private company. It filed to go public on April 11, 2019. Uber Technologies, Inc., Registration Statement (Form S-1) (Apr. 11, 2019). It is currently a public company.

¹⁵⁹ See *Alphabet Replaces Google as Publicly Traded Company*, N.Y. TIMES (Oct. 2, 2015), <https://www.nytimes.com/2015/10/03/business/alphabet-replaces-google-as-publicly-traded-company.html>.

¹⁶⁰ See Peter Cohan, *Amazon Is a Publicly-Traded Startup — Get Over It!*, FORBES (Oct. 24, 2014), <https://www.forbes.com/sites/petercohan/2014/10/24/amazon-is-a-publicly-traded-startup-get-over-it/>.

¹⁶¹ See Jeff Sommer & Karl Russell, *Apple Is the Most Valuable Public Company Ever. But How Much of a Record Is That?*, N.Y. TIMES (Dec. 21, 2017), <https://www.nytimes.com/interactive/2017/12/05/your-money/apple-market-share.html>.

¹⁶² See Julianne Pepitone, *Facebook Trading Sets Record IPO Volume*, CNN MONEY (May 18, 2012), <http://money.cnn.com/2012/05/18/technology/facebook-ipo-trading/index.htm>.

¹⁶³ A team of University of Washington academics recently created a "liberalism" rating scale for corporations that measures organizational political ideology—an organization's support of corporate social responsibility—based on employees' donations to the two major political parties in the United States. See Abhinav Gupta, Forrest Briscoe & Donald C. Hambrick, *Red, Blue, and Purple Firms: Organizational Political Ideology and Corporate Social Responsibility*, 38 STRATEGIC MGMT. J. 1018 (2017). They found that liberal-leaning companies tend to engage in more actions consistent with a strong support of corporate social responsibility than their conservative counterparts. *Id.* Using data from the 2012 election cycle, they found that Google scored the most liberal at 89, Amazon at 84, Facebook at 79, Starbucks at 77, Microsoft at 76, Apple at 72, and Intel at 61. E-mail from Abhinav Gupta, Assistant Professor, University of Washington Foster School of Business, to Jennifer S. Fan, Assistant Professor, University of Washington School of Law (Oct. 25, 2018, 2:16 PM) (on file with author).

¹⁶⁴ *Breakthrough Brands 2017*, FORTUNE (Dec. 22, 2016), <http://fortune.com/breakthrough-brands-marketing-2017/>.

¹⁶⁵ Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017); Colin Lecher, *Trump Tries Again with Revised Immigration Ban*, VERGE (Mar. 6, 2017), <https://www.theverge.com/2017/3/6/14828624/trump-immigration-ban-revised-order>.

¹⁶⁶ Kim Soffen & Darla Cameron, *What Trump Changed in the New Travel Ban*, WASH. POST (Mar. 6, 2017), <https://www.washingtonpost.com/graphics/politics/trump-compare-travel-ban/>.

¹⁶⁷ The newly issued order only applied to new visas from Iran, Libya, Somalia, Sudan, Syria, and Yemen; it also closed (temporarily) the U.S. refugee program. Josie Cox, *Donald Trump Travel Ban: Dozens of Companies Including Airbnb, Lyft and Pinterest Take Fresh*

panies filed another amicus brief in protest.¹⁶⁸ This time, however, Alphabet, Apple, Microsoft, and Netflix (all corporations that are publicly traded) were not among those companies. Instead, private companies (some of which have now gone public) took the lead; Lyft, Airbnb, and Dropbox were among this cohort.¹⁶⁹ The amicus brief stated that the revised ban “would inflict significant and irreparable harm on U.S. businesses and their employees.”¹⁷⁰ After their initial, vocal support, some of the most well-known high technology companies were noticeably absent; there was not a sustained leadership commitment from the publicly-held corporations in this social movement. This is one of the perils of corporations’ involvement with social movements—they may not always be a steadfast partner. Instead, while they may bring resources to bear at the critical beginning stages, corporate support may dwindle and move on to other things as time passes and the particular issue is no longer under the scrutiny of the press.

When the two predominant suits over the second Muslim Ban first reached the Court,¹⁷¹ 161 technology companies filed an amicus brief against the government’s position.¹⁷² Later, in March of 2018, 112 companies, including technology companies, filed another amicus brief in support of Hawaii’s continuing suit after Presidential Proclamation 9645, which expanded and replaced the second Muslim Ban, was issued.¹⁷³ Ultimately, the Court upheld President Trump’s third version of the Muslim Ban. In a five-to-four vote, Chief Justice Roberts wrote, “The entry suspension is an act that is well within executive authority and could have been taken by any other pres-

Legal Action, INDEPENDENT (Mar. 16, 2017), <https://www.independent.co.uk/news/business/news/donald-trump-travel-ban-muslims-latest-airbnb-lyft-pinterest-companies-hawaii-immigration-us-a7632561.html>.

¹⁶⁸ Brief of Amici Curiae Technology Companies and Other Businesses in Support of Plaintiff’s Motion for a Temporary Restraining Order, *Hawai’i v. Trump*, 241 F. Supp. 3d 1119 (D. Haw. 2017) (No. 1:17-cv-00050-DKW-KSC).

¹⁶⁹ *Id.* Lyft began publicly trading on March 29, 2019, beating Uber in the race to go public. *DealBook Briefing: It’s Lyft I.P.O. Day*, N.Y. TIMES (Mar. 29, 2019), <https://www.nytimes.com/2019/03/29/business/dealbook/lyft-ipo.html?searchResultPosition=66>; see also Andrew J. Hawkins, *Lyft becomes the first ride-hail company to go public, beating Uber*, VERGE (Mar. 1, 2019), <https://www.theverge.com/2019/3/1/18246328/lyft-ipo-ride-share-bikes-scooters-uber-public-sec>. Dropbox went public in March 2018. See Matthew Lynley, *Dropbox Soars More Than 40% in its Debut as a Publicly-Traded Company*, TECHCRUNCH (Mar. 23, 2018), <https://techcrunch.com/2018/03/23/dropbox-pops-more-than-40-in-its-public-debut-as-a-publicly-traded-company/>.

¹⁷⁰ Brief of Amici Curiae Technology Companies and Other Businesses in Support of Plaintiff’s Motion for a Temporary Restraining Order at 1, *Hawai’i v. Trump*, 241 F. Supp. 3d 1119 (D. Haw. 2017) (No. 1:17-cv-00050-DKW-KSC).

¹⁷¹ *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080 (2017); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

¹⁷² Brief of 161 Technology Companies as Amici Curiae in Support of Respondents, *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080 (2017) & *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (Nos. 16-436 & 16-1540).

¹⁷³ Brief of U.S. Companies as Amici Curiae in Support of Respondents, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965); *Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*, Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017).

ident—the only question is evaluating the actions of this particular president in promulgating an otherwise valid proclamation.”¹⁷⁴ Not as many technology executives said anything in the aftermath of the decision.¹⁷⁵ Microsoft president, Brad Smith, said in a tweet, “While disappointed with today’s [Court] travel ban decision, we will continue to support the legal rights of our employees and their families.”¹⁷⁶ The CEO of Airbnb, Brian Chesky, joined by his two co-founders, issued a statement: “We are profoundly disappointed by the Supreme Court’s decision to uphold the travel ban—a policy that goes against our mission and values. To restrict travel based on a person’s nationality or religion is wrong.”¹⁷⁷

In the context of the opposition to the Muslim Ban, which is only a part of the larger immigrant rights movement, only a segment of corporations from a particular industry voiced its opposition. Nevertheless, given the visibility of these industries, there was near-daily reporting of actions undertaken to disassemble what some deemed to be the pernicious effects of the Muslim Ban.¹⁷⁸ Using the framing analysis originating from social movements, the frame projected was the objection to the Muslim Ban which forbade a particular group of people based on their religion and country of origin from entering the United States. The frame participants in this case were the high technology companies who each had a significant number of employees who were immigrants; in fact, the CEOs of a number of them were immigrants themselves. Together, these companies banded together to mobilize an army of lawyers to file amicus briefs.¹⁷⁹ But they did not rely on the law alone. Instead, they amplified the impact of their actions by pledging help to the immigrant community in the form of jobs and the funding of

¹⁷⁴ Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

¹⁷⁵ “Google, Apple, Facebook, and Uber all declined or did not respond to a request for comment.” Robinson Meyer, *The Tech Industry Is Fighting Trump—and Mostly Losing*, ATLANTIC (June 27, 2018), <https://www.theatlantic.com/technology/archive/2018/06/tech-companies-travel-ban-muslim/563786/>.

¹⁷⁶ *Id.*

¹⁷⁷ Brian Chesky (@bchesky), TWITTER (June 26, 2018, 10:07 AM), <https://twitter.com/bchesky/status/1011657266473234433>.

¹⁷⁸ See, e.g., Erin Schrode, *10 Concrete Ways to Take Action Against the Muslim Ban*, HUFFINGTON POST (Jan. 29, 2017), https://www.huffingtonpost.com/entry/10-concrete-ways-to-take-action-against-the-muslim-ban_us_588e205ce4b017637794fdcf; Rachel Abrams et al., *Starbucks, Exxon, Apple: Companies Challenging (or Silent on) Trump’s Immigration Plan*, N.Y. TIMES (Jan. 30, 2017), <https://www.nytimes.com/interactive/2017/business/trump-immigration-ban-company-reaction.html>; Tory Newmyer, David Morris, Madeline Farber & Lucinda Shen, *23 Huge Companies That Have Responded to President Trump’s Immigration Ban*, FORTUNE (Jan. 31, 2017), <http://fortune.com/2017/01/31/donald-trump-immigration-ban-responses/>; Janko Roettgers, *Apple May Take Legal Action Against Trump Travel and Immigration Ban*, VARIETY (Feb. 1, 2017), <http://variety.com/2017/digital/news/apple-trump-travel-ban-1201975518/>.

¹⁷⁹ Conger, *supra* note 122; Chaim Gartenburg, *Airbnb, Lyft, and 56 Other Tech Companies File Brief Opposing Trump’s Revised Travel Ban*, VERGE (Mar. 15, 2017), <https://www.theverge.com/2017/3/15/14935530/airbnb-lyft-file-amicus-brief-opposing-trumps-revised-travel-ban>.

nonprofit organizations that have expertise in these areas.¹⁸⁰ In this particular example, corporations helped the immigrant rights social movement in a multi-pronged way: legal, economic, social, and political. Their support was both overt and covert. Interestingly, in terms of this particular movement, corporations took the reins and jumped to action while deploying their ample resources (both financially and in terms of the teams of people at their disposal) to take the lead in the legal actions taking place. Meanwhile, nonprofit organizations (some of which were eventually funded by corporations) mobilized volunteers, worked in concert with corporations' in-house counsel, and sought funding to help those affected by the Muslim Ban at airports and elsewhere.¹⁸¹ In the end, however, even with the support of corporations, the Muslim Ban was not overturned. It is difficult to tell whether the sustained commitment of all the corporations which participated when the Muslim Ban first went into effect (even if it was only limited to high technology companies) would have made a difference.

B. Finding Moral Ground: How Corporations Found a Role in the Gun Control Movement

Thirty-one out of every million people in the United States die from gun homicides¹⁸²—“the equivalent of 27 people shot dead every day of the year.”¹⁸³ Since 1968, when Dr. Martin Luther King Jr. and Senator Robert F. Kennedy were assassinated, at least 1.6 million Americans have been killed by guns (victims of suicides or homicides); this is more than the number of Americans who died in all of our country's wars altogether.¹⁸⁴

Mass shootings, particularly those at schools, have become increasingly common. Since the Sandy Hook Elementary School shooting in Newtown, Connecticut, in 2012, where a gunman killed twenty-six people (twenty first graders and six adults), 239 school shootings have occurred nationwide with

¹⁸⁰ See discussion *supra* notes 130–137.

¹⁸¹ Jonah Engel Bromwich, *Lawyers Mobilize at Nation's Airports After Trump's Order*, N.Y. TIMES (Jan. 29, 2017), <https://www.nytimes.com/2017/01/29/us/lawyers-trump-muslim-ban-immigration.html> (describing the number of attorneys for nonprofits, law firms who helped immigrants affected by the Ban); Lucy Westcott, *Thousands of Lawyers Descend on U.S. Airports to Fight Trump's Immigrant Ban*, NEWSWEEK (Jan. 29, 2017), <http://www.newsweek.com/lawyers-volunteer-us-airports-trump-ban-549830> (noting that over 4,000 lawyers signed up to help through the nonprofit corporation, International Refugee Assistance Project).

¹⁸² Kevin Quealy & Margot Sanger-Katz, *Comparing Gun Deaths by Country: The U.S. Is in a Different World*, N.Y. TIMES (June 13, 2016), <https://www.nytimes.com/2016/06/14/upshot/compare-these-gun-death-rates-the-us-is-in-a-different-world.html>.

¹⁸³ *Id.* “The homicides include losses from mass shootings, like Sunday's Las Vegas attack, the Orlando, Fla., nightclub shooting in June 2016, or the San Bernardino, Calif., shooting in December 2015. And of course, they also include the country's vastly more common single-victim killings.” *Id.*

¹⁸⁴ Clyde Haberman, *Do Stronger Gun Laws Stand a Chance? It's Been an Uphill Battle*, N.Y. TIMES (Apr. 29, 2018), <https://www.nytimes.com/2018/04/29/us/gun-control-laws-retro-report.html> (stating approximately 1.4 million Americans died in all the wars this country has fought).

438 people shot and 138 killed as of June 2016.¹⁸⁵ In the aftermath of the shooting, the U.S. Senate did not pursue legislation encompassing assault weapons and magazines and was unable to pass even background checks legislation in its watered-down form.¹⁸⁶ After the Sandy Hook shooting, corporations took little action.¹⁸⁷

In contrast, in the wake of the 2018 high school shooting in Parkland, Florida, a “perfect storm” of student activism, online savvy, and the current political climate converged to create a new norm where gun control became mainstream.¹⁸⁸ Young activists helped to shift the norm on the gun control debate from something that was not mainstream to something that is.¹⁸⁹ ThinkProgress, a nonprofit corporation,¹⁹⁰ published a list of thirty-two companies with relationships to the NRA,¹⁹¹ on February 20, 2018.¹⁹² Numerous

¹⁸⁵ Jugal K. Patel, *After Sandy Hook, More Than 400 People Have Been Shot in Over 200 School Shootings*, N.Y. TIMES (Feb. 15, 2018), <https://www.nytimes.com/interactive/2018/02/15/us/school-shootings-sandy-hook-parkland.html>. *But cf.* Chris Wilson, *This Chart Shows the Number of School Shooting Victims Since Sandy Hook*, TIME (Feb. 22, 2018), <http://time.com/5168272/how-many-school-shootings/> (pointing out discrepancies in numbers of shootings between Time’s study versus the New York Times’ study).

¹⁸⁶ “It was a profoundly bitter day, punctuated by Obama excoriating Congress for its failure to act.” Jason Cherkis & Sam Stein, *How Congress Utterly Failed In Its Response To The Sandy Hook Shooting*, HUFFINGTON POST (July 5, 2017), https://www.huffingtonpost.com/entry/congress-sandy-hook-newtown_us_5952822de4b0da2c731ed66b. In contrast, some states took action after Sandy Hook. Massachusetts has required permits for guns since 1968 and already had the strictest gun control laws in the country in 2013 when the Sandy Hook shooting occurred. Jonathan Cohn, *This Is The Toughest Gun Law In America*, MSN (May 6, 2018), <https://www.msn.com/en-us/news/us/this-is-the-toughest-gun-law-in-america/ar-AAwPfaZ>. However, after Sandy Hook, Massachusetts strengthened its gun laws by expanding police discretion to issue gun permits to rifles and shotguns. An Act Relative to the Reduction of Gun Violence, 2014 Mass. Acts ch. 284.

¹⁸⁷ *See, e.g.*, Saya Weissman, *Bad Brand Social Responses to Sandy Hook Tragedy*, DIGIDAY (Dec. 17, 2012), <https://digiday.com/marketing/bad-brand-social-responses-to-sandy-hook-tragedy/>.

¹⁸⁸ Derek Thompson, *Why Are Corporations Finally Turning Against the NRA?*, ATLANTIC (Feb. 26, 2018), <https://www.theatlantic.com/business/archive/2018/02/nra-discounts-corporations/554264/>.

¹⁸⁹ “An eloquent, quick-witted group of young survivors has created a new political and moral electricity. In only two weeks, regulation of assault weapons — thwarted and danced around by lawmakers for years — has become an urgent and mainstream concern.” Heidi N. Moore, *Corporations Only Break with the Gun Industry When It’s Cheap and Easy*, WASH. POST (Mar. 1, 2018), <https://www.washingtonpost.com/news/posteverything/wp/2018/03/01/dont-be-fooled-companies-cut-ties-to-the-nra-only-when-its-cheap-and-easy/>.

¹⁹⁰ Jedd Legum, *Welcome To The New ThinkProgress*, THINKPROGRESS (Aug. 8, 2016), <https://thinkprogress.org/welcome-to-the-new-thinkprogress-14fd01bda9ccl>.

¹⁹¹ Kira Lerner & Josh Israel, *The NRA is Being Supported by These Companies*, THINKPROGRESS (Feb. 20, 2018), <https://thinkprogress.org/corporations-nra-f0d8074f2ca7/>. The NRA is a nonprofit corporation with tax-exempt status. Alexandra F. O’Neill & Daniel P. O’Neill, *The NRA, a Tax-Exempt Loaded with Private Interest*, THE COALITION TO STOP GUN VIOLENCE, <https://www.csgv.org/nra-tax-exempt-loaded-private-interest/>.

¹⁹² The publication of these names “sparked a movement, prompting people around the country to take to their phones and social media and call on those companies to sever ties with the massive gun lobbying group.” Danielle McLean, *How Corporate Pressure Changed the National Conversation on Gun Control*, THINKPROGRESS (Mar. 2, 2018), <https://thinkprogress.org/corporate-pressure-gun-control-2932cf771931/>. Furthermore, “[t]he protests have since transformed into a widespread phenomenon, with public pressure forcing a diverse set of com-

companies severed long-standing ties with the NRA, including Budget, Delta Airlines (Delta), Dick's Sporting Goods, and Symantec.¹⁹³ Delta, which employs 33,000 people in the state of Georgia, announced that it would discontinue its discounts for NRA members.¹⁹⁴ This action met with swift reprisal from the Republican-controlled Georgia state legislature;¹⁹⁵ it eliminated a proposed tax break on jet fuel that was estimated to be worth \$40 million in savings for Delta.¹⁹⁶ Walmart, a Delaware corporation, said it would increase the minimum age for firearm purchases to twenty-one and remove certain items from its website that looked similar to assault-style

panies to enter into the gun control debate in a number of different ways.” *Id.* As of March 2, 2018, twenty-four companies had ended their relationship with the NRA. *Id.*

¹⁹³ Melina Delkic, *Here Are the Businesses Boycotting Guns or the NRA*, NEWSWEEK (Feb. 28, 2018), <http://www.newsweek.com/here-are-businesses-boycotting-guns-nra-823697> (listing the names of businesses “that have stopped selling guns; cut ties or stopped discount programs with the NRA; or boycotted gun violence in some way in the wake of the Marjory Stoneman Douglas High School shooting”). “This avalanche of companies abandoning the NRA is just the latest chapter in the gradual politicization of every square inch of the public sphere, which has compelled traditionally nonpartisan companies to take one partisan stand after another.” Thompson, *supra* note 188 (providing other examples, which include Uber’s then-CEO Travis Kalanick resigning from the White House advisory council after the travel ban; Elon Musk, CEO of Tesla, and Bob Iger, CEO of Disney, leaving the same council after President Trump withdrew from the Paris climate agreement; and Kenneth Frazier, Merck’s CEO, leaving the manufacturing council after President Trump refused to condemn protesters in Charlottesville). For clarification, Symantec is a company that specializes in cybersecurity. *Technology Overview*, SYMANTEC, <https://www.symantec.com/about/corporate-profile/technology> (last visited Dec. 31, 2018). In a similar fashion, the Strategy & Policy Forum and the Manufacturing Council—two business advisory councils composed of top American corporate leaders that advised President Trump—disbanded in response to Trump’s equivocal remarks on the violence in Charlottesville in August 2017. Jena McGregor & Damian Paletta, *Trump’s Business Advisory Councils Disband as CEOs Abandon President Over Charlottesville Views*, WASH. POST (Aug. 16, 2017), <https://www.washingtonpost.com/news/on-leadership/wp/2017/08/16/after-wave-of-ceo-departures-trump-ends-business-and-manufacturing-councils/>. CEOs from companies such as JP Morgan, Campbell Soup, 3M, General Electric, Merck, and Johnson & Johnson resigned from the councils or made statements against racism and white supremacy to counter Trump’s message. *Id.*

¹⁹⁴ Scott Neuman, *Georgia Lawmakers Punish Delta Air Lines over NRA Feud*, NPR (Mar. 2, 2018), <https://www.npr.org/sections/thetwo-way/2018/03/02/590149921/georgia-law-makers-punish-delta-air-lines-over-nra-feud>. Note that Delta has over 100 million domestic passengers a year; the NRA has only a few million members and not all of them travel by plane. *See* Thompson, *supra* note 188. In June 2018, the CEO of Delta, Ed Bastian, said at Fortune’s CEO Initiative conference that he cut Delta’s ties with the NRA based on the company’s values and did not check with the board before making his decisions; the board was supportive in the aftermath of his statement. Beth Kowitz, *Delta CEO Didn’t Check with Board Before Cutting Ties With NRA*, FORTUNE (June 26, 2018), <http://fortune.com/2018/06/26/delta-ceo-nra-parkland-board-of-directors/>. Only thirteen people had signed up for the discount in 2018. *Id.*

¹⁹⁵ *See* Neuman, *supra* note 194.

¹⁹⁶ *Id.* Some constitutional law scholars pointed out that the Georgia state legislature’s actions could be construed as a First Amendment violation since they punished Delta for its free speech, but the fact that Delta did not already have the tax break made the analysis more nuanced. Miriam Valverde, *Casey Cagle’s tweet on Delta, the NRA and tax breaks. Is it legal?*, POLITIFACT (Mar. 1, 2018), <http://www.politifact.com/georgia/article/2018/mar/01/does-casey-cagles-tweet-delta-suggest-constitution/>.

rifles, including non-lethal airsoft guns and toys.¹⁹⁷ Well-known clothing company L.L.Bean, a Maine corporation, announced it would no longer sell guns or ammunitions to any person under twenty-one years of age. Kroger, an Ohio corporation in the supermarket industry, followed suit stating that it would increase the minimum age for gun purchases and ammunition to twenty-one years of age at its Fred Meyer stores.¹⁹⁸ Over the last few years, gun sales have decreased.¹⁹⁹ Coupled with the fact that support for gun control is the highest it has been in twenty-five years and the NRA is increasingly growing out of favor with the public, corporations have largely sided with the gun control movement.²⁰⁰ Professor Robert Spitzer at the State University of New York at Cortland, who studies crime, law and policy, and gun control, stated that the reason corporations can impact the national debate on gun control is because they are not normally part of the political fray: “They seem to be sensing that the great middle of America is being roused and moved, that the NRA is seen as ever more marginal, dogmatic, and unyielding, so there is both a [public relations] and commercial reason for [corporations] to stake out their recent public positions.”²⁰¹

Some commentators noted that the actions taken by these companies “[were] not a brave moral stand by America’s corporate sector. The companies understand that it is a transaction”²⁰² In fact, for financial reasons, some companies chose to continue business as usual. As an example, FedEx ships (and will continue to ship) guns for the NRA as well as eighty-six firearms manufacturers and dealers.²⁰³ FedEx stated it “‘has never set or changed rates for any of our millions of customers around the world in response to their politics, beliefs or positions on issues,’ and that the NRA is one of ‘hundreds of organizations’ that pay discounted rates for shipping.”²⁰⁴ High technology companies with a broad consumer base, such as Amazon and Apple, have struggled to find the middle ground in these highly charged debates.²⁰⁵

¹⁹⁷ Melanie Zanona, *Corporate America Throws Weight Behind Gun Controls*, HILL (Mar. 3, 2018), <http://thehill.com/business-a-lobbying/business-a-lobbying/376517-corporate-america-throws-weight-behind-gun-controls>.

¹⁹⁸ *Id.*

¹⁹⁹ See Moore, *supra* note 189.

²⁰⁰ *Id.*

²⁰¹ Dominic Rushe, *Will Corporate Backlash Against Guns Actually Change Anything?*, GUARDIAN (Mar. 2, 2018), <https://www.theguardian.com/us-news/2018/mar/02/will-corporate-backlash-against-guns-actually-change-anything>.

²⁰² Moore, *supra* note 189. “It costs these companies almost nothing to stop offering discounts to the relatively paltry membership of the NRA, and in exchange, executives can win a reputation boost and customer goodwill you can’t pay for.” *Id.*

²⁰³ *Id.*

²⁰⁴ Julia Horowitz, *FedEx and UPS Go Back and Forth Over the NRA*, CNN MONEY (Feb. 28, 2018), <http://money.cnn.com/2018/02/28/news/companies/fedex-ups-nra-fight/index.html>.

²⁰⁵ “At issue is NRA TV, a free online channel focused on pro-gun content, which many technology companies offer through their streaming services and devices alongside more popular options such as Netflix, ESPN and HBO.” Spencer Soper & Selina Wang, *Amazon, Apple Struggle to Sit out NRA Gun-Control Debate*, BLOOMBERG (Feb. 28, 2018), <https://www>

Some may argue that the involvement of corporations in social movements, such as the gun control movement, is a positive development because our institutions have failed. This institutional failure has created a vacuum which corporations are now filling. “[T]he fact that companies, rather than Congress or the courts, are shifting in response to political activism in the United States says something profound—about American tribalism, the demise of political cooperation, and the rise of a sort of liberal corporatocracy.”²⁰⁶ In other words, corporations have been moved to action and leadership because they can get things done in a way that the courts or Congress cannot. It is not immediately obvious whether this is a normatively positive or negative development. To the extent corporations are otherwise filling a role that other organizations were designed to fill, but have not, there is an argument to be made that corporate involvement is a good thing to prevent gridlock. Others may posit that the role of the corporation is in the business realm and that corporations should not involve themselves in social movements. In fact, there is an opposing argument that corporate involvement may needlessly complicate already complex matters even more.

Interestingly, one of the companies to come out most strongly against gun control was not a corporation, but a co-op. REI, a Seattle-based outdoors co-op, announced that it would suspend orders of ski goggles, water bottles, bike helmets, and other products from well-known brands like CamelBak, Giro, and Bolle, because Vista Outdoor, their parent company, produces ammunition and assault-style rifles.²⁰⁷ REI put out the following statement in connection with its action: “[I]t is the job of companies that manufacture and sell guns and ammunition to work towards common sense solutions that prevent the type of violence that happened in Florida Vista does not plan to make a public statement that outlines a clear plan of action.”²⁰⁸ REI’s actions are well in line with its mission statement which states: “As a purpose-driven cooperative, REI’s business and core purpose are intertwined—we grow our business by furthering our purpose. We’re committed to promoting environmental stewardship and increasing access to outdoor recreation.”²⁰⁹

In the wake of the shooting in Parkland, BlackRock, the largest investment firm in the world, said that it was reassessing its holdings in gun makers and gun retailers.²¹⁰ It is the largest shareholder in Sturm Ruger and

.bloomberg.com/news/articles/2018-02-28/amazon-apple-struggle-to-sit-out-nra-gun-control-debate.

²⁰⁶ See Thompson, *supra* note 188.

²⁰⁷ Gene Johnson, *Bike Helmets, Ski Goggles Swept up in Gun Control Debate*, U.S. News (Mar. 2, 2018), <https://www.usnews.com/news/business/articles/2018-03-02/bike-helmets-ski-goggles-swept-up-in-gun-control-debate>.

²⁰⁸ *Id.*

²⁰⁹ REI, *REI Overview*, <https://www.rei.com/about-rei/business>.

²¹⁰ BlackRock manages trillions of dollars for investors ranging from major pensions to endowments to mom and pop fund investors. Chris Isidore, *BlackRock Turns Up the Pressure on Gun Makers*, CNN MONEY (Mar. 2, 2018), <http://money.cnn.com/2018/03/02/investing/blackrock-gunmakers/index.html>.

American Outdoor Brand, the owner of Smith & Wesson (both gun makers), and the second largest shareholder in Vista Outdoor.²¹¹ Moreover, BlackRock announced that “it will start offering clients the option to invest in funds that exclude firearm manufacturers and retailers.”²¹² BlackRock also said it would engage more actively with gun manufacturers and may vote against the wishes of company management in some circumstances.²¹³ Fund managers have historically viewed their role as “stewards of investor money, not social or political activists.”²¹⁴ However, Larry Fink, the CEO of BlackRock, signaled in early 2018, pre-Parkland, that he envisioned a different role for corporations. In his annual letter to CEOs titled “Sense of Purpose,” Mr. Fink said, “We . . . see many governments failing to prepare for the future, on issues ranging from retirement and infrastructure to automation and worker retraining. As a result, society increasingly is turning to the private sector and asking that companies respond to broader societal challenges.”²¹⁵ Mr. Fink continued, “the public expectations of your company have never been greater. Society is demanding that companies, both public and private, serve a social purpose. To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society.”²¹⁶ In his letter, Mr. Fink championed a stakeholder theory of corporate law by pointing out that “[c]ompanies must benefit all of their stakeholders, including shareholders, employees, customers, and the communities in which they operate.”²¹⁷ Indeed, Mr. Fink’s letter is identical to what progressive corporate scholars have long argued for: corporations should consider all of their stakeholders in making their decisions. In light of the letter, it was in some ways not surprising that BlackRock took the stance it did on gun control.²¹⁸

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ Liz Moyer, *BlackRock Says It’s Time to Take Action on Guns, May Use Voting Power to Influence*, CNBC (Mar. 2, 2018), <https://www.cnbc.com/2018/03/02/blackrock-says-its-time-to-take-action-on-guns-may-use-voting-power-to-influence.html>.

²¹⁵ Larry Fink, *A Sense of Purpose: Larry Fink’s Annual Letter to CEOs*, BLACKROCK, <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter>. Compare Warren Buffett, CEO of Berkshire Hathaway, and arguably one of the most famous investors of all time, who answered in response to a question about doing business with gun owners, “I don’t believe in imposing my political opinion on the activities of our businesses. . . I don’t think we should put a question on the Geico policy form [that says]: ‘Are you a member of the NRA? And if you are, you’re just not good enough for us.’ Or something like that.” Fred Imbert, *Warren Buffett Pleases Berkshire Hathaway’s Crowd with Answer on Not Imposing a Litmus Test on Gun Ownership*, CNBC (May 5, 2018), <https://www.cnbc.com/2018/05/05/warren-buffett-doubles-down-on-doing-business-with-gun-owners.html>.

²¹⁶ See Fink, *supra* note 215.

²¹⁷ *Id.*

²¹⁸ As one business scholar and ex-CEO pointed out:

Shareholder value is the result of having a clear mission and set of values that motivate employees to serve customers. Companies that start with the mantra of “maximizing shareholder value” ultimately destroy the very shareholder value that they

Professor William Klepper of Columbia Business School, an expert on corporate leadership, noted that “[b]usinesses have to respond to political crises even faster than political parties do.”²¹⁹ He observes, “[p]olitics is competitive, but the competition is constrained—by time (e.g., elections only happen every two, four, or six years), by geography (e.g., the gerrymandering of districts), and by partisanship, in which every issue often boils down to ‘the other side is worse.’”²²⁰ Companies do not have the luxury of any of these constraints on their competition. “Politicians assume they can wait out the outrage, but national companies have to respond to the immediacy of demand[.]”²²¹ The strategic use of social media by savvy student leaders created a dynamic which demanded immediate action by corporations. “Angry tweets and Facebook memes help political groups rally around anger and perceived villainy; but also, they create unavoidable choices for multinational companies that have to respond to political crises by picking a side.”²²²

Corporate action was initially swift across a number of different industries due to the political environment that was created in the wake of Parkland. Other than changing company policies regarding who guns were sold to and severing any existing deals for NRA members, there were no legal changes that corporations spearheaded nor amicus briefs they could file. This particular social movement showcases the limitations of corporate involvement from a legal perspective when the issue does not involve their employees. Instead, it was the students of Parkland who led the gun control movement.²²³ Being adept consumers of social media, #NeverAgain became the rallying cry.²²⁴ Organized walkouts and marches occurred all over the

are trying to create because they refuse to make the long-term investments required to create sustainable shareholder value.

Bill George, *Why BlackRock CEO Larry Fink Is Not A Socialist*, FORBES (Mar. 12, 2018), <https://www.forbes.com/sites/hbsworkingknowledge/2018/03/12/why-blackrock-ceo-larry-fink-is-not-a-socialist/2/#203f3cef457c> (emphasis in original).

²¹⁹ Thompson, *supra* note 188.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ Parkland students who survived the shooting, Emma Gonzalez and David Hogg, became regulars on news channels and helped to broaden the movement by including other communities affected by gun violence. See Saba Hamedy, *The Parkland Kids Keep Checking Their Privilege*, CNN (Mar. 25, 2018), <https://www.cnn.com/2018/03/24/politics/march-for-our-lives-students-checking-privilege-trnd/index.html>; Lori Aratani, *Parkland student Emma Gonzalez Demonstrates the Power of Silence*, WASH. POST (Mar. 24, 2018), <https://www.washingtonpost.com/local/2018/live-updates/politics/march-for-our-lives/parkland-student-emma-gonzalez-demonstrates-the-power-of-silence/>; David Hogg & Emma Gonzalez, *Since Parkland, We’ve Been Demanding Action. Now It’s Time to Join Us.*, WASH. POST (Nov. 5, 2018), <https://www.washingtonpost.com/outlook/2018/11/05/since-parkland-weve-been-demanding-action-now-its-time-join-us/>.

²²⁴ Alyssa Newcomb, *How Parkland’s Social Media-Savvy Teens Took Back the Internet – and the Gun Control Debate*, NBC (Feb. 22, 2018), <https://www.nbcnews.com/tech/tech-news/how-parkland-students-are-using-social-media-keep-gun-control-n850251>.

country.²²⁵ The number of participants in March 2018 gun control rallies surpassed those of the women's marches in January 2018 which were held in support of the #MeToo movement.²²⁶ The students moved the corporations to action; they are also the ones sustaining the gun control movement. The students continue to lead the movement by organizing more walk-outs,²²⁷ appearing frequently in the media,²²⁸ and appealing to state legislatures to change the laws.²²⁹

In the case of this particular social movement, the frame projected was gun control, and the alignment of the frame participants came from the students who mobilized others, including corporations, to action. Harnessing the power of social media and the web, the students were able to make their opinions heard on a broad platform.²³⁰ The students shrewdly framed the issue as a moral one and then appealed to corporations on that ground while

²²⁵ Sarah Gray, *What to Know About March for Our Lives and Other Student-Led Gun Control Protests*, TIME (Mar. 12, 2018), <http://time.com/5165794/student-protests-walkouts-florida-school-shooting/>.

²²⁶ Compare Ryan Sit, *More Than 2 Million in 90 Percent of Voting Districts Joined March for Our Lives Protests*, NEWSWEEK (Mar. 26, 2018), <http://www.newsweek.com/march-our-lives-how-many-2-million-90-voting-district-860841> (reporting that more than two million people participated in the marches to advocate for tougher gun laws), with Hannah Golden, *How Big Were The 2018 Women's Marches? The Numbers Are Massive*, ELITE DAILY (Jan. 24, 2018), <https://www.elitedaily.com/p/how-big-were-the-2018-womens-marches-the-numbers-are-massive-8001200> (reporting that 1.5 million people participated in the women's marches); C.K., *Gun Politics After Parkland*, ECONOMIST (Mar. 3, 2018), <https://www.economist.com/blogs/democracyinamerica/2018/05/neveragain>.

²²⁷ In the aftermath of the Parkland shootings, "tens of thousands of students from some 3,000 schools participated in the #ENOUGH National School Walkout to demand tighter gun control regulations." Keith Coffman, *U.S. Students Walk Out Again to Protest Gun Violence*, REUTERS (Apr. 20, 2018), <https://www.reuters.com/article/us-usa-guns/u-s-students-walk-out-again-to-protest-gun-violence-idUSKBN1HR1DG>. This was followed by the March 24, 2018, "March For Our Lives" rallies that took place in cities throughout the United States; they "were some of the biggest U.S. youth demonstrations in decades, with hundreds of thousands of young Americans and their supporters taking to the streets." *Id.* On April 20, 2018, a walk-out was organized to honor those killed in the Columbine School shootings. *Id.*

²²⁸ Julie Turkewitz & Anemona Hartocollis, *Highlights: Students Call for Action Across Nation; Florida Lawmakers Fail to Take Up Assault Rifle Bill*, N.Y. TIMES (Feb. 20, 2018), <https://www.nytimes.com/2018/02/20/us/gun-control-florida-shooting.html>.

²²⁹ The student-organized social movement has caused many state legislatures to take action. See Madison Park, *New Jersey Is One of the Latest States to Enact New Gun Control Measures*, CNN (June 13, 2018), <https://www.cnn.com/2018/04/09/us/gun-laws-since-parkland/index.html> (providing information about state legislatures that have taken action since the Parkland shootings). Some states are initiating action on their own, using novel tactics. In the case of New Jersey, which already has strong gun laws, it is releasing firearms trafficking data from the Bureau of Alcohol, Tobacco, Firearms and Explosives. For example, it reported "gun-trace data for the first quarter of 2018 to show that 77 percent of guns used in crimes in New Jersey come from out of state." Mike Catalini, *Quick Release of Gun Data Called Trailblazing and Troubling*, AP NEWS (May 13, 2018), <https://apnews.com/2b91456c75b24c899a1e3aad0d7a6790>.

²³⁰ "[S]ocial media and the web have changed the environment for business by making it cheaper and easier for activists to join together to voice their opinions and by making corporate activities more transparent." Davis, *supra* note 8. One example of the student activists' use of social media occurred when they discovered that Vice President Pence would be attending the NRA convention and no firearms were allowed. Cameron Kasky commented on the irony of it by tweeting, "The NRA has evolved into such a hilarious parody of itself." Cameron

simultaneously putting them in the media spotlight, forcing corporations to act. Interestingly, in the case of gun control, corporations punished those identified as bad actors by the students by withdrawing financial support to organizations viewed as disparaging of those individuals who became the faces of the movement. These covert actions had an immediate effect. As an example, when Fox News host Laura Ingraham mocked David Hogg, a Parkland shooting survivor, nearly twenty advertisers pulled their ads from the show.²³¹

With the passage of time, however, polling suggests that gun control is now a less pressing issue than it was when the Parkland shooting first occurred;²³² this is a consistent pattern with past mass shootings.²³³ That being said, scholars and commentators note that this student-led movement could be a turning point for gun control. For example, it has led to collaborations such as Levi Strauss' Safer Tomorrow Fund, which will "direct more than \$1 million in philanthropic grants from Levi Strauss & Co. over the next four years to fuel the work of nonprofits and youth activists who are working to end gun violence in America."²³⁴ According to Eric Orts, a legal studies and

Kasky (@cameron_kasky), TWITTER (Apr. 28, 2018, 6:16 AM), https://twitter.com/cameron_kasky/status/990218168525377536.

²³¹ The full list of advertisers who pulled their sponsorships were: Bayer, Hulu, Johnson & Johnson, Liberty Mutual, Wayfair, TripAdvisor, Nestle, Nutrish, Ruby Tuesday, Atlantis Resort, Office Depot, Jenny Craig, Expedia Group, Miracle-Ear, Ace Hardware, Stitch Fix, Principle Financial Group, Honda, and Entertainment Studios. Carol Wolf, *Laura Ingraham Returns, with Far Fewer Advertisers*, CBS NEWS (Apr. 9, 2018), <https://www.cbsnews.com/news/laura-ingraham-returns-with-far-fewer-advertisers/>. The show lost approximately fifty percent of its on-air advertisers. *Id.*

²³² See *Gun Politics After Parkland*, *supra* note 226.

²³³ *Id.*

And even when the will for change is there, it may make little difference to policy-making. Most Americans support background checks for all gun-buyers and a majority want a ban on assault weapons; neither has been introduced. Pew Research suggests even the majority of gun owners backed a federal database to track gun sales before the Florida tragedy. Congress has shown no desire to pass such a law.

Id. There is even a subset of supporters of the gun control movement who own guns. See Jess Bidgood & Sabrina Tavernise, *Do Gun Owners Want Gun Control? Yes, Some Say, Post-Parkland*, N.Y. TIMES (Apr. 24, 2018), <https://www.nytimes.com/2018/04/24/us/gun-owners-laws-parkland.html>.

²³⁴ Chip Bergh, *Levi Strauss CEO: Why Business Leaders Need to Take a Stand on Gun Violence*, FORTUNE (Sept. 4, 2018), <http://fortune.com/2018/09/04/levi-strauss-gun-violence-parkland/>. Additionally, Levi Strauss is partnering with Everytown for Gun Safety and company executives like Michael Bloomberg to form Everytown Business Leaders for Gun Safety, "a coalition of business leaders who believe . . . that business has a critical role to play in and a moral obligation to do something about the gun violence epidemic in this country." *Id.* Bergh says that business leaders "simply cannot stand by silently when it comes to the issues that threaten the very fabric of the communities where we live and work. While taking a stand can be unpopular with some, doing nothing is no longer an option." *Id.* Recently, Levi Strauss went public. Alan Murray & David Meyer, *Apple Announcements, Obamacare Gamble, Brexit Votes: CEO Daily for March 26, 2019*, FORTUNE (Mar. 26, 2019), <http://fortune.com/2019/03/26/apple-announcements-obamacare-gamble-brexit-votes-ceo-daily-for-march-26-2019/>. Its action on gun control was just one part of a very long history of incorporating public purpose into its business strategies. *Id.* A decade before Jim Crow laws were eliminated, the company desegregated factories in the South. *Id.* It was also one of the early adopters of giving health

business ethics professor at Wharton, the corporate responses to the #Never-Again campaign are “‘quite complex’ and involve multiple factors.”²³⁵ These factors include a sense of business responsibility, consumer activism (for example, boycotts), and investors wanting to decrease the potential risk of investing in companies that are not on the right side of the gun rights debate.²³⁶ Professor Orts predicted “a movement . . . similar to what we’ve seen on fossil fuels on university campuses [concerning] investor responsibility.”²³⁷ Furthermore, he believed retailers would cut their ties with suppliers refusing to pledge their support to combat gun violence.²³⁸ Professor Brian Berkey, also a legal studies and business ethics professor at Wharton, observed, “members of the public more broadly have played the foundational role in moving businesses to adopt new policies.”²³⁹ Just as corporations have done in the context of LGBTQ rights, discussed in further detail below, they can choose to create a higher standard for gun control rather than what is prescribed by federal law. By doing so, corporations fit squarely within stakeholder theory as now they are not only considering interests beyond shareholders, but taking into account their employees and surrounding communities as well.

C. *Building Blocks for Success: How Corporations Advanced the Goals of the LGBTQ Rights Movement*

Out of all the social movements discussed in the case studies, the LGBTQ community has advanced the furthest and is the most developed. But in the not-too-distant past, the future of LGBTQ rights looked bleak. In 1961, “twenty-nine states and the District of Columbia required the hospitalization of ‘psychopathic persons,’ a term that was often a code for homosexuals.”²⁴⁰ Twenty-five years later, the Court upheld the constitutionality of anti-sodomy laws in *Bowers v. Hardwick*;²⁴¹ it was a blow to the LGBTQ rights movement. In the aftermath of the decision, the architects of the LGBTQ rights movement focused on state level advocacy.²⁴²

benefits to same-sex partners and stopped funding the Boy Scouts after it banned gay individuals. *Id.* Bergh opined, there is a “hunger for companies that are committed to a moral compass, that are committed to doing the right thing.” *Id.*

²³⁵ *Gun Control After Parkland: What Can Firms Really Do?*, KNOWLEDGE@WHARTON (Mar. 12, 2018), <http://knowledge.wharton.upenn.edu/article/ethical-debate-guns/>.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ Eskridge, *supra* note 15, at 428.

²⁴¹ 478 U.S. 186 (1986). *Hardwick* challenged the constitutionality of Georgia’s anti-sodomy law after he was observed and charged for engaging in consensual homosexual sodomy with another adult in his home. *Id.*

²⁴² Scott Cummings, *Law and Social Movements: Reimagining the Progressive Canon*, 2018 WISC. L. REV. 101, 130 (2018).

Fast forward to 1992 and the state of the LGBTQ rights movement began to look different. Lotus Development became the first U.S. public company to offer domestic partner benefits for LGBTQ employees.²⁴³ This was considered radical at the time because very few firms adopted such policies.²⁴⁴ “Even some companies that explicitly marketed to the gay community were wary of providing benefits to domestic partners.”²⁴⁵ The efforts of the United Automobile Workers union led Ford, General Motors, and Chrysler to adopt domestic partner benefits in 1999;²⁴⁶ domestic partner benefits had entered the mainstream. In 2013, Walmart—“America’s largest employer by far—was compelled to adopt domestic partner benefits after finding that it was almost the last large retailer to do so.”²⁴⁷

Over twenty years ago, when President Bill Clinton’s office tried to get CEOs to support gay rights initiatives he met with resistance.²⁴⁸ But then there was a shift. Ultimately, “companies have helped to spur a rapid evolution in public opinion in the United States, with a majority of Americans now supporting not only marriage equality but also laws to prevent discrimination against gay people.”²⁴⁹ In 2002, the Human Rights Campaign began publishing the Corporate Equality Index, which ranks major companies on their LGBTQ policies.²⁵⁰ At its inception, 13 out of the 319 companies surveyed received perfect scores.²⁵¹ In 2015, with even more stringent standards, 366 out of 781 companies had perfect scores, “including fourteen of the top twenty on *Fortune*’s rankings of the largest companies in the U.S.”²⁵²

The question is: “Why have corporations shifted from ‘abiding local custom’ around segregation and other divisive social issues to ‘bullying elected officials’ to support LGBT[Q] rights?”²⁵³ There are several possible answers to this question. Part of the answer may lie in the estimated \$800 billion worth of buying power of the LGBTQ community.²⁵⁴ In addition, according to one study, it found that there was no material difference in a

²⁴³ Davis & White, *supra* note 16.

²⁴⁴ *Id.* Domestic partner benefits were limited to creative or technology companies. *Id.*

²⁴⁵ *Id.* “At that time it was legal in most states to fire employees for being gay, so there could be real costs for being an out supporter.” *Id.* For a map of the states where it is still legal to fire employees for being LGBTQ, please see *Equality Maps: State Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited Mar. 8, 2019).

²⁴⁶ Davis & White, *supra* note 16.

²⁴⁷ *Id.* (“The early actions of social entrepreneurs ultimately changed the shape of corporate America and its standards about whose families count.”).

²⁴⁸ Richard Socarides, *Corporate America’s Evolution on L.G.B.T. Rights*, NEW YORKER (Apr. 27, 2015), <https://www.newyorker.com/business/currency/corporate-americas-evolution-on-l-g-b-t-rights>.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ Davis, *supra* note 8.

²⁵⁴ Eric Berger & Nicole Douillet, *What’s the Effect of Pro-LGBT Policies on Stock Price?*, HARV. BUS. REV. (July 2, 2014), <https://hbr.org/2014/07/whats-the-effect-of-pro-lgbt-policies-on-stock-price>.

company's stock based on its stance on LGBTQ issues and no adverse impact on equity performance when instituting LGBTQ practices and policies.²⁵⁵ Another answer lies in changing public opinion. In a Pew Research Center poll conducted in 2001, same-sex marriage was opposed by Americans fifty-seven percent to thirty-five percent.²⁵⁶ In a 2017 poll conducted by the Pew Research Center, the numbers had flipped: sixty-two percent supported same-sex marriage and thirty-two percent opposed.²⁵⁷ In short, the consumer clout of the LGBTQ community, the absence of any material effects on stock performance when implementing LGBTQ policies, and increased public support for LGBTQ rights, each played a role in changing corporate behavior and creating a new behavioral norm where more aggressive tactics were acceptable.

Recent court victories for the LGBTQ community have contributed to the advancement of the aims of the LGBTQ rights movement as well.²⁵⁸ Nearly 380 corporations and employer organizations joined together to file an amicus brief urging that the Court declare state bans on gay marriage unconstitutional in *United States v. Windsor*.²⁵⁹ Amazon, Bristol-Meyers Squibb, Citigroup, The Coca-Cola Company, eBay, General Mills, Intel, Procter & Gamble, and Target were just a few of the corporations that signed on to the brief.²⁶⁰ One of the most striking aspects of the amicus brief was the sheer number of corporations who signed on to it and the fact that they spanned many different industries. In contrast, there were far fewer corporations who signed on to the amicus briefs opposing the Muslim Ban, and those that did were primarily from the high technology realm.²⁶¹

More recently, there was controversy around religious freedom and LGBTQ rights. When then-Governor Michael Pence tried to sign into law Indiana's religious freedom laws, Apple CEO Tim Cook, the first openly gay

²⁵⁵ *Id.*

²⁵⁶ Davis, *supra* note 8.

²⁵⁷ *Id.* (showing that support for same-sex marriage has risen among different age cohorts, race, and ideologies).

²⁵⁸ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that same-sex couples may not be deprived of the right to marry); *Hollingsworth v. Perry*, 570 U.S. 693 (2013) (upholding the lower court's decision that a California law banning same-sex marriage was unconstitutional); *United States v. Windsor*, 570 U.S. 744 (2013) (holding that the federal Defense of Marriage Act's definition of marriage—as a legal union between a man and a woman—was unconstitutional); *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that state bans on sodomy were unconstitutional).

²⁵⁹ 570 U.S. 744 (2013); Alexander C. Kaufman, *Here Are The 379 Companies Urging The Supreme Court To Support Same-Sex Marriage*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffingtonpost.com/2015/03/05/marriage-equality-amicus_n_6808260.html.

²⁶⁰ *Id.*

²⁶¹ See Brief of Amici Curiae Technology Companies and Other Businesses in Support of Plaintiff's Motion for a Temporary Restraining Order, *Hawai'i v. Trump*, 241 F. Supp. 3d 1119 (D. Haw. 2017) (No. 1:17-cv-00050-DKW-KSC); Brief of 161 Technology Companies, as Amici Curiae in Support of Respondents, *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017) & *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (Nos. 16-436 & 16-1540); Brief of U.S. Companies as Amici Curiae in Support of Respondents, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965).

CEO of a major public company,²⁶² argued that such laws were antithetical to the company's values. Salesforce offered to pay the relocation costs of Indiana-based employees if they chose to move in light of the proposed law.²⁶³ Salesforce CEO Marc Benioff believes "the days of strict adherence to Milton Friedman's shareholder primacy are over: 'today CEOs need to stand up not just for their shareholders, but their employees, their customers, their partners, the community, the environment, schools; everybody.'" ²⁶⁴ In effect, Benioff threw his support behind the LGBTQ rights movement after considering the interests of all stakeholders, not only the shareholders of Salesforce.²⁶⁵

The principles set forth by the Business Roundtable—an organization of CEOs that works to promote a healthy economy and create more opportunities for all Americans through public policy²⁶⁶—does not usually provide specific guidance on social activism; instead, it looks to corporate strategy and risk for general guidance, stating that public pronouncements by a CEO regarding social issues should fit within the company's overall strategy and not pose undue risk.²⁶⁷ In the case of Salesforce, taking a stance on LGBTQ issues resonated with its core values on equality.²⁶⁸ Likewise, Tim Cook's vocal support of LGBTQ rights makes sense from a corporate strategy standpoint in light of Apple's strong commitment to diversity.²⁶⁹ In a new turn of events, in March 2019, the CEO of IBM, Ginny Rometty, in her capacity as the head of the Education and Workforce Committee of the Business Roundtable, wrote a direct letter to Congress urging them to pass the Equality Act.²⁷⁰ The Equality Act would amend existing federal civil rights laws to

²⁶² Disparte & Gentry, *supra* note 82.

²⁶³ Charles Riley, *Salesforce CEO: We're Helping Employees Move Out of Indiana*, CNN MONEY (Apr. 2, 2015), <http://money.cnn.com/2015/04/01/news/salesforce-benioff-indiana-religious-freedom-law/index.html>.

²⁶⁴ Chang, *supra* note 36, at 41.

²⁶⁵ In response to the Indiana law dispute, over three dozen CEOs and senior leaders of technology companies issued a joint statement asking state legislatures to add sexual orientation and gender identity to the list of protected classes under state civil rights laws. Nick Wingfield, *Tech Leaders Call for Anti-Discrimination Laws to Protect Gays in all 50 States*, N.Y. TIMES: BITS (Apr. 1, 2015), <https://bits.blogs.nytimes.com/2015/04/01/tech-leaders-call-for-anti-discrimination-laws-to-protect-gays-in-all-50-states/>. Their letter stated: "Religious freedom, inclusion and diversity can coexist and everyone, including L.G.B.T.[Q.] people and people of faith, should be protected under their states' civil rights laws." *Id.*

²⁶⁶ *About Us*, BUSINESS ROUNDTABLE, <https://www.businessroundtable.org/about-us> (last visited Dec. 31, 2018).

²⁶⁷ It is unclear if the CEOs who made public statements in support of certain social movements sought the guidance of their boards or subcommittees before making such statements.

²⁶⁸ *Equality*, SALESFORCE, <https://www.salesforce.com/company/equality/> (last visited Dec. 31, 2018) ("We believe that businesses can be powerful platforms for social change and that our higher purpose is to drive Equality for all.").

²⁶⁹ *Inclusion & Diversity*, APPLE, <https://www.apple.com/diversity/> (last visited Dec. 31, 2018).

²⁷⁰ Ina Fried, *IBM CEO, Business Group Call on Congress to Pass LGBT Rights Bill*, AXIOS (Mar. 7, 2019), <https://www.axios.com/ibm-chief-1551972283-d2868b8c-7681-4b18-aca6-f265f416e988.html>. In the letter, Rometty stated:

explicitly add sexual orientation and gender identity to the list of protected classes.²⁷¹

In March 2015, the Arkansas legislature passed House Bill 1228,²⁷² which would have allowed LGBTQ discrimination based on “religious freedom.”²⁷³ The CEO of Walmart, the second largest employer in the state,²⁷⁴ encouraged the governor to veto the bill.²⁷⁵ “Not surprisingly, given [Walmart’s] status in the state and the corporate backlash that accompanied a similar law in Indiana, the governor obliged and eventually signed a modified bill.”²⁷⁶

In the case of North Carolina’s “bathroom bill,” which was passed in 2016, statewide antidiscrimination protections excluded gender identity and sexual orientation, and mandated transgender people to use restrooms in public buildings corresponding to the sex on their birth certificates.²⁷⁷ According to an Associated Press analysis, this bill is projected to cost the state over \$3.7 billion in lost business over a dozen years.²⁷⁸ Concerts, conventions, sporting events, and the like have been cancelled due to the outrage over the bill. PayPal canceled a project in Charlotte that would have resulted

As employers, America’s leading companies know that our economy works best when our employees can be who they are, without fear of bias, discrimination, or inequality — in the workplace or in their communities. And as Americans, we are firmly committed to the principles of equality and fairness that have distinguished our nation since its founding. . . . The Business Roundtable endorses the Equality Act and urges that it be enacted by Congress without delay.

Id.

²⁷¹ *The Equality Act*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/resources/the-equality-act> (last updated Mar. 20, 2019). The Equality Act would give protection from discrimination with regards to employment, housing, credit, education, public spaces and services, federally funded programs, and jury service. *Id.*

²⁷² H.B. 1228, 90th Gen. Assemb., Reg. Sess. (Ark. 2015).

²⁷³ See Davis, *supra* note 8.

²⁷⁴ ARK. ECON. DEV. COMM’N STRATEGIC PLANNING & RESEARCH DIV., ARKANSAS’S LARGEST EMPLOYERS — 2015 (2015), <https://www.arkansasedc.com/docs/default-source/compare-arkansas/arkansas-largest-employers-2015.pdf>.

²⁷⁵ The CEO of Walmart tweeted, “Today’s passage of HB1228 threatens to undermine the spirit of inclusion present throughout the state of Arkansas and does not reflect the values we proudly uphold.” Walmart Newsroom (@WalmartNewsroom), TWITTER (Mar. 31, 2015, 3:36 PM), <https://twitter.com/WalmartNewsroom/status/583032659787448320>.

²⁷⁶ Davis, *supra* note 8; Laura E. Monteverdi, *Ark. Governor Won’t Sign ‘Religious Bill’ as is*, USA TODAY, (Apr. 1, 2015), <https://www.usatoday.com/story/news/politics/2015/04/01/govt-and-business-leaders-object-to-ark-religion-bill/70757942/>; Eric Bradner, *Arkansas Governor Signs Amended ‘Religious Freedom’ Measure*, CNN (Apr. 2, 2015), <https://www.cnn.com/2015/03/31/politics/arkansas-religious-freedom-anti-lgbt-bill/index.html>. In contrast, Louisiana governor Bobby Jindal decried the “bullying” of elected officials. Bobby Jindal, *Bobby Jindal: I’m Holding Firm Against Gay Marriage*, N.Y. TIMES (Apr. 23, 2015), <https://www.nytimes.com/2015/04/23/opinion/bobby-jindal-im-holding-firm-against-gay-marriage.html>.

²⁷⁷ ‘Bathroom Bill’ to Cost North Carolina \$3.76 Billion, CNBC (Mar. 27, 2017), <https://www.cnbc.com/2017/03/27/bathroom-bill-to-cost-north-carolina-376-billion.html>.

²⁷⁸ *Id.* In the case of North Carolina’s “bathroom bill,” statewide antidiscrimination protections excluded gender identity and sexual orientation and mandated transgender people to use restrooms in public buildings corresponding to the sex on their birth certificates. 2015 N.C. H.B. 2B (N.C. 2015).

in 400 jobs.²⁷⁹ Other corporations such as Deutsche Bank and Adidas also backed out of deals in North Carolina after the bill's passage.²⁸⁰ Executives of over 80 corporations signed a public letter urging the governor to repeal the law.²⁸¹ "When 80 businesses threaten a single state's economy, the aggregate negative effect on *interstate* commerce could be substantial. As such, Coca-Cola, Disney, and other mega-corporations will continue to hold tremendous power in shaping social policy."²⁸²

Even though North Carolina's "bathroom bill" was repealed in March 2017 and, under the new law, transgender people were able to use the bathroom of their choice, challenges remained: there would be no legal recourse if any person, business, or state entity did not allow transgender people to do so.²⁸³ This situation illustrates that despite the might of corporations to influence the debate on a particular social movement, it may not end with the hoped-for outcome. Just as in social movements without corporate participation, change may be incremental and not as sweeping as movements may aspire to. On the positive side, however, there was some progress—just not as much as some of the social movement organizations had worked towards.

In 2016, "legislators in at least twenty-five states . . . proposed more than a hundred bills limiting [LGBTQ] rights, often under the guise of protecting religious freedom; North Carolina, Georgia, and Mississippi have passed laws that, in various ways, make anti-L.G.B.T.[Q.] discrimination legal."²⁸⁴ America's biggest corporations struck back. Dow, General Electric, and Pepsi attacked such a law in Mississippi as "bad for our employees and bad for business."²⁸⁵ Disney threatened to halt film production in Georgia in the event that the governor signed the bill.²⁸⁶ In the end, under the threat of losing Disney's business, Georgia's governor vetoed the religious freedom

²⁷⁹ Jon Kamp & Valerie Bauerlein, *PayPal Cancels Plan for Facility in North Carolina, Citing Transgender Law*, WALL ST. J. (Apr. 5, 2016), <https://www.wsj.com/articles/paypal-cancels-plans-for-operations-center-400-jobs-over-north-carolinas-transgender-law-1459872277>.

²⁸⁰ 'Bathroom Bill' to Cost, *supra* note 277.

²⁸¹ James Surowiecki, *Unlikely Alliances*, NEW YORKER (Apr. 25, 2016), <https://www.newyorker.com/magazine/2016/04/25/the-corporate-fight-for-social-justice>. Apple, Marriott, Microsoft, and Pfizer were among the companies that signed the letter. *Id.*

²⁸² Danielle Weatherby, *Corporate America Just Became the LGBT Community's Most Powerful Ally*, FORTUNE (Apr. 2, 2016), <http://fortune.com/2016/04/02/corporate-america-lgbt-community/>.

²⁸³ Richard Fausset, *Bathroom Law Repeal Leaves Few Pleased in North Carolina*, N.Y. TIMES (Mar. 30, 2018), <https://www.nytimes.com/2017/03/30/us/north-carolina-senate-acts-to-repeal-restrictive-bathroom-law.html>.

²⁸⁴ Surowiecki, *supra* note 281.

²⁸⁵ Allen Smith, *Mississippi 'Religious Freedom' Law Worries Businesses*, SHRM (Apr. 8, 2016), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/mississippi-religious-freedom-law.aspx>.

²⁸⁶ Daniel Miller, *Disney threatens to stop filming in Georgia if anti-gay bill becomes law*, L.A. TIMES (Mar. 23, 2016), <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-disney-georgia-anti-gay-20160323-story.html>.

bill.²⁸⁷ This type of action is not wholly unprecedented. During the civil rights movement in the 1960s, local businesses encouraged moderation in the face of local administrators' resistance to desegregation and suppression of protests.²⁸⁸ "Today's fight is driven by national companies, and they're in the vanguard: there is no federal law protecting L.G.B.T.[Q.] people from discrimination, but three-quarters of Fortune 500 firms have policies forbidding it."²⁸⁹

In the case of LGBTQ rights, exerting corporate pressure on state governors appears to have been an effective tactic to accomplish the goals of this particular social movement.²⁹⁰ "Now, corporations are standing in the shoes of the consumer activists as 'super-consumers' to state economies."²⁹¹ In monetary terms, the influence of corporations on state economies is significantly greater than the aggregate of socially-conscious consumers.²⁹²

Corporations' involvement in LGBTQ issues, like the immigration rights movement discussed in section II.A above, are not entirely selfless. There are business reasons underlying why corporations choose to be at the forefront of such issues. "Businesses are becoming increasingly invested in LGBTQ[Q] rights and diversifying their workforce because . . . 'their competitive edge depends on it.'"²⁹³ In the case of LGBTQ issues, corporations want to be viewed as welcoming environments to everyone regardless of age, gender, race, or sexual orientation.²⁹⁴ Corporations are motivated to attract the best possible person for the job and that means transcending implicit biases against anyone who might be older, female, non-white, or identifies as a member of the LGBTQ community.²⁹⁵ "[M]ultinational com-

²⁸⁷ Surowiecki, *supra* note 281. Politicians are not thrilled with corporations' involvement. As an example, Georgia State Senator Josh McKoon complained that Marc Benioff, the CEO of Salesforce, is "the ringleader for big-business CEOs . . . who use economic threats to exercise more power over public policy and the voters who use the democratic process." Monica Langley, *Salesforce's Marc Benioff Has Kicked Off New Era of Corporate Social Activism*, WALL ST. J. (May 2, 2016), <http://www.wsj.com/articles/salesforces-marc-benioff-has-kicked-off-new-era-of-corporate-social-activism-1462201172>.

²⁸⁸ Surowiecki, *supra* note 281.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ Weatherby, *supra* note 282.

²⁹² *Id.*

²⁹³ Marcie Bianco, *The Simple Reason so Many US Businesses Openly Support LGBT Rights*, QUARTZ (June 26, 2016), <https://qz.com/710643/the-business-sense-of-supporting-lgbt-rights/>.

²⁹⁴ See, for example, lists of best companies to work for if you are a member of the LGBTQ community. Jacquelyn Smith, *The 25 Best Companies For LGBT Employees*, BUS. INSIDER (Mar. 6, 2014), <http://www.businessinsider.com/best-companies-for-lgbt-employees-2014-3>; Corey Barger, *These Companies Promote Gay-Friendly Ideals*, RANKER, <https://www.ranker.com/list/gay-friendly-companies/coreybarger> (last visited Feb. 2, 2019). There are also corporate equality indexes. See *Corporate Equality Index*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/campaigns/corporate-equality-index> (last visited Feb. 2, 2019).

²⁹⁵ This certainly does not mean that corporations do not exhibit implicit biases. See, e.g., Jennifer S. Fan, *Innovating Inclusion: The Impact of Women on Private Company Boards*, 46 FLA. ST. U. L. REV. 345 (2019) (illustrating the implicit biases against women in the venture capital world); Grace Donnelly, *Study: Just the Perception of Implicit Bias Takes a Toll on*

panies hold unique and powerful leverage when it comes to advocating [for] civil rights because states and countries want their business Companies must impress . . . that ‘legal certainty for companies and human rights for citizens go hand in hand.’”²⁹⁶

The frame projected in the LGBTQ rights movement was to recognize and respect the rights of members of the LGBTQ community; the goal of the movement was to ensure that they enjoyed the same rights and privileges as anyone else. The frame participants we discussed originated from social movement organizations and social movement organization fields. From the social movement organization field standpoint, corporations were at the forefront of the LGBTQ rights movement as was the case with the Muslim Ban. However, unlike the Muslim Ban, the corporations who participated in the LGBTQ rights movements came from many different industries and in greater numbers. As discussed above, corporations helped to create a new norm in society by being the first to provide health care coverage to the partners of LGBTQ employees—this was long before laws were passed regarding domestic partnerships and same-sex marriage. The lawyers who framed the movement were successful in creating a cultural shift that laid the groundwork for many of the successes of the LGBTQ rights movement. They also had elite allies in the form of corporations who worked alongside the movement lawyers to spur changes in the law. Corporations also used economic levers to encourage states to act in a certain way. For example, by refusing to do business in states that intended to pass laws that discriminated against members of the LGBTQ community or by pulling out of existing business relationships, corporations dissuaded states from implementing discriminatory laws, such as the religious freedom laws, which would have had pernicious effects on the LGBTQ community. Important court victories also helped to cement LGBTQ rights. Out of the three social movements discussed, one of the reasons the LGBTQ rights movement was the most successful was because its strategy not only mobilized corporate resources at an early stage but sustained and grew such resources as the movement matured.

Although many corporations support the LGBTQ rights movement, there are also those that oppose it. One such example is the fast food chain, Chick-fil-A, Inc. (Chick-fil-A), a family-owned business, founded by S. Truett Cathy.²⁹⁷ Its corporate purpose reads: “To glorify God by being a faithful steward of all that is entrusted to us and to have a positive influence

Companies, FORTUNE (July 13, 2017), <http://fortune.com/2017/07/13/implicit-bias-perception-costs-companies/>; Lisa Mundy, *Why Is Silicon Valley So Awful to Women?*, ATLANTIC (Apr. 2017), <https://www.theatlantic.com/magazine/archive/2017/04/why-is-silicon-valley-so-awful-to-women/517788/>.

²⁹⁶ Aimee Hansen, *LGBTQ Rights: Why Companies are Leading the Charge*, GLASS HAMMER (June 19, 2017), <http://theglasshammer.com/2017/06/19/lgbtq-rights-companies-leading-charge/>.

²⁹⁷ *History*, CHICK-FIL-A, <https://www.chick-fil-a.com/About/History> (last visited Feb. 2, 2019).

on all who come into contact with Chick-fil-A.”²⁹⁸ Chick-fil-A’s founders have a charitable foundation, WinShape Foundation, which is funded by their fortune from Chick-fil-A, frequently partners with Chick-fil-A,²⁹⁹ and has contributed millions of dollars to anti-gay groups.³⁰⁰ Other more regional companies also support anti-LGBTQ efforts, but typically they do not make the news.³⁰¹ Although the media has reported on the anti-LGBTQ stance of Chick-fil-A, it does not seem to have negatively impacted its business in any sustained way.³⁰² Hobby Lobby is another example of a corporation which subscribes to anti-LGBTQ views. In one particular case, Hobby Lobby refused to allow a transgender employee to use the women’s restroom in one of its Illinois stores.³⁰³ Eventually, a state administrative law judge found in the employee’s favor because Hobby Lobby violated the Illinois Human Rights Act.³⁰⁴ Popular sports apparel brand Under Armour, Inc. (Under Armour), has also come under fire for its ties to anti-LGBTQ-related incidents.³⁰⁵

III. NORMATIVE CONCERNS, REASONS FOR THE INVOLVEMENT OF CORPORATIONS, AND GUIDING PRINCIPLES

As illustrated in the case studies above, corporations can influence the trajectory and momentum of social movements. Likewise, social movements can impact the behavior of corporations.³⁰⁶ Part I examined how court cases

²⁹⁸ *Who We Are*, CHICK-FIL-A, <https://www.chick-fil-a.com/About/Who-We-Are> (last visited Feb. 2, 2019) (noting that the company is closed on Sundays).

²⁹⁹ *See, e.g., Be Our Guest*, WINSHAPE FOUNDATION, <https://winshape.org/be-our-guest/> (last visited Mar. 8, 2019) (“We are excited to offer these transformational opportunities [WinShape Marriage and WinShape Team retreats] to our friends at Chick-fil-A.”); *About WinShape Camps*, WINSHAPE CAMPS, <https://camps.winshape.org/about/> (last visited Mar. 8, 2019) (“WinShape Camps partners with Chick-fil-As around the country to bring camp to their communities.”).

³⁰⁰ David W. Miller, *Chick-fil-A and the Question of Faith in Business*, HARV. BUS. REV. (Aug. 9, 2012), <https://hbr.org/2012/08/chick-fil-a-and-the-question-o> (noting that the WinShape Foundation supports groups that advocate for marriage only between a man and a woman and ex-gay conversions).

³⁰¹ *See* Katherine Peralta, *Updated List: Who Has Come Out Against, in Favor of NC’s House Bill 2*, CHARLOTTE OBSERVER (May 19, 2016), <https://www.charlotteobserver.com/news/business/article72407477.html> (listing businesses that came out for and against HB 2).

³⁰² *See* Alicia Kelso, *Chick-fil-A’s Growth Fueled By Demand For Simplicity*, FORBES (Apr. 3, 2018), <https://www.forbes.com/sites/aliciakelso/2018/04/03/chick-fil-as-growth-trajectory-fueled-by-demand-for-simplicity/#399fb94f5612> (noting that Chick-fil-A is “on a staggering growth course to become the third-largest quick-service restaurant in the country”).

³⁰³ *Sommerville v. Hobby Lobby Stores*, Ill. Hum. Rts. Comm’n Rep. 2011CN2993, 2011CN2994 (May 15, 2015).

³⁰⁴ *Id.*

³⁰⁵ As an example, Under Armour continued to do business with “Buck Commander,” a Duck Dynasty spin-off, even after homophobic remarks were made by one of the members of the series; A&E Networks, in contrast, put that particular cast member on hiatus indefinitely. Steve Charing, *Under Armour Staying with ‘Duck Dynasty’*, WASHINGTON BLADE (Dec. 23, 2013), <http://www.washingtonblade.com/2013/12/23/armour-staying-duck-dynasty/>.

³⁰⁶ “Recent research demonstrates that social movements are capable of influencing corporate behavior, ranging from curbing harmful toxic emissions to granting employees same-

and changing norms about the role of corporations led to the modern business corporation. The increasing influence of corporations laid the foundation for corporations' involvement in social movements. Part II demonstrated the role and impact corporations can have on social movements using three case studies. This Part discusses the varying impact of corporations and the various strategies, both legal and nonlegal, that corporations employ when they are involved in particular social movements. Part III discusses the normative concerns of the involvement of corporations in social movements and the underlying reasons they get involved. It then develops guiding principles on what corporations should consider before participating in such movements. Ultimately, this Part of the Article shows how corporations can enhance the legitimacy of social movements using not only legal tactics, but financial ones, and produce desired outcomes within a new normative framework. The aim of this Part is a modest one—it is intended to start a dialogue about the role of corporations in social movements; it does not provide an exhaustive list of the ways in which corporations can be involved in such movements.

A. Normative Concerns

1. Covert Advocacy

Through direct advocacy, financial contributions to certain causes or candidates, lobbying, and political advertising, corporations exert their political influence.³⁰⁷ More covertly, corporations “often fund advocacy groups, trade organizations, or think tanks that work to curry public support using a variety of techniques, from direct-mail campaigns to expert commentary on popular television programs.”³⁰⁸ It is the covert nature of corporations' support which could argue against corporations helping to shape social movements.³⁰⁹ For example, a fast food company could form a nonprofit that has an anti-immigrant platform.³¹⁰

sex domestic partnership benefits to divesting from politically risky countries” Mary-Hunter McDonnell, Brayden G King & Sarah A. Soule, *A Dynamic Process Model of Private Politics: Activist Targeting and Corporate Receptivity to Social Challenges*, 83 AM. SOC. REV. 654 (2015), <http://journals.sagepub.com/doi/pdf/10.1177/0003122415581335>.

³⁰⁷ Wendy L. Hansen & Neil J. Mitchell, *Disaggregating and Explaining Corporate Political Activity: Domestic and Foreign Corporations in National Politics*, 94 AM. POL. SCI. REV. 891 (2000) (examining a range of corporate political activities).

³⁰⁸ Siebecker, *supra* note 51, at 177. Corporations may even use nonprofit groups to gain access to international officials. See Melissa J. Durkee, *Astroturf Activism*, 69 STAN. L. REV. 201, 204 (2017).

³⁰⁹ Brayden King and Klaus Weber describe two more covert practices of corporate activism: “astroturfing” and “public deliberators.” King & Weber, *supra* note 102. Astroturfing is the attempt by corporations to replicate grassroots-type movements, while public deliberators are paid by corporations to go into communities and start conversations about things that matter to them—which are then relayed to the corporate sponsors. *Id.*

³¹⁰ This is sometimes referred to as “dark money.” See, e.g., Jack Gillum, Chad Day & Stephen Braun, *Shadowy Companies, Big Bucks: Election Mystery Money Returns*, BUS. IN-

There are a few arguments that could be used to counter this particular concern of lack of transparency. First, the information is not covert if it is publicly accessible. In the case of the example given above, someone could obtain the tax filings of the nonprofit corporation to determine which corporations contributed to it. If the individual were so inclined, they could make the information public by reaching out to the media or watchdog groups that could disseminate the corporation's involvement more broadly.

Second, if the nonprofit corporation was properly formed and the for-profit corporation which funds it followed proper protocol (that is, obtained necessary consent), the for-profit corporation is acting within the confines of corporate law. The fact that the for-profit corporation funded the nonprofit without fanfare does not make its actions illegal.

2. Too Much Power

Some believe that corporations have too much power.³¹¹ In fact, in a 2012 survey, eighty-three percent of all Americans believed too much political power and influence was concentrated in the hands of corporations and corporate CEOs.³¹² One could argue that if corporations were more prominent in social movements, the aims of such movements might be negatively impacted by corporate influence.

One rebuttal to this concern is that while some corporations have done bad things with increased power, many have done a lot of good. Corporations, together with social movements, have wrought significant changes with broad implications for our society. They are far more nimble than government institutions and this flexibility gives corporations the ability to quickly revise their policies to meet a movement's demand. As an example, "many Fortune 500 firms supported LGBT[Q] issues long before state or federal governments did, and Fortune 500 firms have been more progressive on specific LGBT[Q] issues than the majority of the American public."³¹³ This support of LGBTQ rights most likely originated from the relationship between the LGBTQ rights movement and corporations.³¹⁴ As the relation-

SIDER (Feb. 3, 2016), <https://www.businessinsider.com/ap-shadowy-companies-big-bucks-election-mystery-money-returns-2016-2>; Paul Blumenthal, *Dark Money Groups Are Funded By Dark Money Groups That Fund Dark Money Groups That Fund* . . . , HUFFINGTON POST (Nov. 9, 2013), https://www.huffingtonpost.com/2013/11/09/dark-money-networks_n_4234206.html.

³¹¹ Liz Kennedy, *Corporate Capture Threatens Democratic Government*, CTR. FOR AM. PROGRESS (Mar. 29, 2017), <https://www.americanprogress.org/issues/democracy/news/2017/03/29/429442/corporate-capture-threatens-democratic-government/> (discussing the dangers of "corporate capture of government").

³¹² *Id.*

³¹³ Brayden King, *It's Time to Study how Corporate Targets Influence Activists*, MOBILIZING IDEAS (July 6, 2015), <https://mobilizingideas.wordpress.com/2015/07/06/its-time-to-study-how-corporate-targets-influence-activists/>.

³¹⁴ *Id.*

ship between the two deepened, each one likely influenced the other, especially given the need of social movements for resources.³¹⁵

Furthermore, when challenged by activists and forced into action as in the gun control case study above, corporations adopt social management devices, such as particular structures or practices, to help them maintain their public image.³¹⁶ By adopting such social management devices, a corporation becomes increasingly receptive to future activist claims.³¹⁷ Therefore, the political opportunities that grow out of a social movement's political environment are dynamic and evolve over time as activist challenges change.³¹⁸

While social movements shape corporate law by spurring corporations to act in a way that helps the goals of the movement, there is also a flip side. Activists who develop relationships with the corporations they intend to influence are not immune from the corporations' influence.³¹⁹ In fact, some of the corporations may hire such activists or seek their counsel when dealing with similar issues in the future.³²⁰ Partnering "with a former target is a form of success inasmuch as it indicates that they now have a seat at the table with a powerful player. The willingness of corporate executives to engage with activists is a form of inclusion that activists rarely receive in government institutions."³²¹ Corporations' continued involvement in social movements is thus necessary both for the good of the corporations and for accomplishing the goals of the social movements themselves.

In addition, corporate involvement may come with increased resources. As corporations play a more prominent role in social movements, they can provide the necessary resources. This, in turn, helps to facilitate public support to both build momentum and help sustain it (but not always) as the particular movement evolves.³²² Resources can take many forms.³²³ "This includes, most generally, people and money, and some degree of legitimacy within one or more sets of relevant actors, such as the movement's constituency or the larger public."³²⁴ In the case of corporations, as Part II illustrates, the resources corporations bring to bear on social movements are legal, economic, social (for example, reputational and cultural), and political. On the legal front, corporations have deployed their in-house lawyers to file amicus

³¹⁵ "Social movements are . . . highly dependent on resources for mobilizing collective action and change. How movements evolve certainly depends on where those resources come from." *Id.*

³¹⁶ McDonnell et al., *supra* note 306, at 671.

³¹⁷ *Id.* at 654.

³¹⁸ *Id.* at 655.

³¹⁹ *Id.* at 674.

³²⁰ King, *supra* note 313.

³²¹ *Id.*

³²² In the mid-1970s, John McCarthy and Mayer Zald developed the premise of resource mobilization where the emergence and sustenance of social movement activity depended on the amount of resources available to channel into movement mobilization and activity. SNOW & SOULE, *supra* note 60, at 87–88.

³²³ *Id.* at 88.

³²⁴ *Id.* at 89.

briefs. From an economic perspective, corporations have used economic levers to persuade other organizations or local or state governments to act in a particular way. On the social front, corporations use their reputational capital and impact on norms in social movements. For example, corporations have used the media to make particular issues more salient in the public consciousness. Corporations can also lay the groundwork for a new norm by implementing changes in social norms that social movements aspire to within the corporation itself.³²⁵ Lastly, corporations can influence the political climate through lobbying or other means.

Even with its broad reach, the power of corporations is not limitless. And, it is certainly not limitless in the context of social movements. Corporate influence can be checked through regulatory reform. The question is to what extent we want to encourage such influence or obstruct or neutralize its effects. The U.S. Department of Labor (DOL) which oversees Employee Retirement Income Security Act-covered (ERISA) employee benefit plans provides one such example of regulatory reform. As a general matter, ERISA requires that plan fiduciaries, who manage a plan's investments, act with the "care, skill, prudence, and diligence" that an individual familiar with such matters would exercise.³²⁶ The regulatory guidance released by the DOL in April 2018 provides more details on this general rule and recommends that a fiduciary have a documented cost-benefit analysis before incurring significant costs in an environmental, social, or corporate governance (ESG) related issue. The DOL is "clarifying" that when fiduciaries make investment decisions, they cannot make such decisions at the expense of returns nor can they assume greater risks so that they can promote collateral ESG policy goals.³²⁷ The DOL went on to state that "fiduciaries must not too readily treat ESG factors as economically relevant to the particular investment choices"³²⁸ and that "the IB was not meant to imply that plan fiduciaries, including appointed investment managers, should routinely incur significant plan expenses to, for example, fund advocacy, press, or mailing campaigns on shareholder resolutions, call special shareholder meetings, or initiate or actively sponsor proxy fights on environmental or social issues."³²⁹ Therefore, corporations (such as BlackRock), which focus on ESG issues, will need to rethink how they can comply with the law while fulfilling their ESG goals.

This recent development with the DOL is not favorable for corporations who want to actively participate in social issues. However, it demonstrates how the government can blunt the actions of corporations in social movements by re-characterizing what a corporation can or cannot do. Constraints

³²⁵ See, e.g., Fan, *infra* note 344.

³²⁶ 29 U.S.C. § 1104 (2018).

³²⁷ U.S. DEP'T OF LABOR, FIELD ASSISTANCE BULL. NO. 2018-01 (2018).

³²⁸ *Id.*

³²⁹ *Id.* "IB" refers to Interpretive Bulletin 2016-01, issued by the Department of Labor to "assist plan fiduciaries in understanding their obligations under ERISA." *Id.*

may also be placed on corporations in their participation in social movements due to their own internal limitations and changing public opinion. For example, with respect to the Muslim Ban, high technology companies were visible at the beginning, but their support waned as the movement continued. We can only speculate as to why this is the case. Perhaps it is because their attention moved on to other more pressing matters. Or maybe their decreased action reflected decreasing public interest. Whatever the answer is, the fact remains that even with the help of corporations, activists were not successful in overturning the Muslim Ban.

3. Self-Interested and Not Agents of Change

At their core, social movements are meant to challenge the status quo. “The *strategy of social or societal transformation* calls for tactics that bring into sharp focus the inequities and injustices of social structures and arrangements or various social practices, such as discrimination against a particular community”³³⁰ (for example, immigrants or members of the LGBTQ community). In contrast, one could argue that corporations are often not seen as agents of change and will only act when they have a self-interest.³³¹

While this is a legitimate concern, one response is that, to a certain extent, simply because corporations are not agents of change does not mean that they cannot help a movement in some fashion. For example, e-mail and tweets help to rapidly disseminate information. When a tweet comes from the CEO of a well-known corporation the message becomes even more widespread. Indeed, the external environment plays a critical role in both

³³⁰ SNOW & SOULE, *supra* note 60, at 168 (emphasis in original).

³³¹ Some companies could be using support of social movements as a calculated marketing move. Consider, for example, the differing opinions on whether Nike and the ad campaign it ran with Colin Kaepernick were intended to support the movement or just cause conversation. Stephen Bainbridge categorizes this campaign under the growing efforts by “social justice warrior [(SJW)] CEOs” to align themselves with “woke coastal millennials.” Bainbridge thinks that the campaign could simply reflect the more inherently liberal values of corporate officers, as the “values, beliefs, and tastes of social justice warrior CEOs like [former Nike CEO] Phil Knight have radically diverged from those of red state populists. In many cases, it simply would not occur to SJWs like Knight that there are folks who would take offense from the Kaepernick ad.” Stephen Bainbridge, *Woke Business: Putting the Nike-Kaepernick Ad Controversy into Context: The Problem of Social Justice Warrior CEOs*, PROFESSORBAINBRIDGE.COM (Sept. 5, 2018), <https://www.professorbainbridge.com/professorbainbridge.com/2018/09/woke-business-putting-the-nike-kaepernick-ad-controversy-into-context-the-problem-of-social-justice-.html>. However, Ann Lipton has some reservations about this assertion, finding it “difficult to believe that Knight was *unaware* this is a controversial move; it seems designed to *be* controversial.” Ann Lipton, *The Revolution Will Be Marketed*, BUSINESS LAW PROF BLOG (Sept. 8, 2018), https://lawprofessors.typepad.com/business_law/2018/09/the-revolution-will-be-marketed.html. Indeed, if stock prices and earnings are any indication, Nike posted a slightly better than predicted quarter despite any blowback from the campaign. Kevin Kelleher, *Don't Blame Kaepernick, But Nike Stock Dropped 4% After Its Earning Report Was Released*, FORTUNE (Sept. 25, 2018), <http://fortune.com/2018/09/25/nike-stock-today-earnings-report-colin-kaepernick-ad-campaign/>. Whether intended or not, Nike’s campaign has effectively commodified dissent.

mobilization and opportunities for success of a given social movement.³³² This connection has been coined the “political opportunity structure.”³³³ In particular, it points to the importance of cultivating elite allies (such as corporations) who can influence social issues through communication channels or funding, among other things.³³⁴

Changing the social norms referred to by Professors Eisenberg, Rock, and Wachter in Part I above, involves trust.³³⁵ Therefore, the actions a corporation undertakes in the name of a social movement can be checked because it must resonate with key stakeholders as well as adhere to the corporation’s strategic plan, mission, and values.³³⁶

The normative concerns outlined above are valid and should not be overlooked. On the positive side, however, corporations can: (1) increase public attention on particular social issues when the corporation’s CEO issues a statement, tweet, or other form of communication; (2) provide funding to the social movement organization which supports the relevant social movement (or, conversely, take away funding from an organization that is at odds with a particular social movement); (3) provide economic incentives to, or withdraw economic support from, state and local governments which propose to pass laws that will harm the beneficiaries of a particular social movement; and (4) implement policies in the corporation itself—even if it is not required by law—to help accomplish the goals of the social movement (for example, offering domestic partnership benefits before it was required by law).

In short, corporations appear to be most effective when they are engaged in a combination of overt and covert actions: pulling advertising dollars, providing or taking away economic incentives, funding nonprofit organizations which engage in the grassroots work necessary to sustain a particular social movement, bringing public attention to issues borne out of the social movement through its extensive access to the media, and having a large enough number of corporations across many different industries who have a continued commitment to the social movement. However, they may hinder social movements by not coordinating their efforts with others in the movement and by not having a sustained commitment, as was the case with the Muslim Ban. Also, corporations may not have the ability to garner the support of those outside of their respective industries; this is where social movement organizations play a particularly important role because they are likely working with social movement organization fields across the spectrum and are not focused on corporations in only one type of industry. They can help to build coalitions to advance the causes of the social movement.

³³² SNOW & SOULE, *supra* note 60, at 222.

³³³ *Id.*

³³⁴ *Id.*

³³⁵ See discussion *supra* notes 58–59.

³³⁶ Don Mayer, *The Law and Ethics of CEO Social Activism*, 23 J.L. BUS. & ETHICS 21, 24 (2017).

B. *Reasons Why Corporations Get Involved with Social Movements*

Constraints may be placed on corporations in their participation in social movements due to their own internal limitations and public perception. However, there are circumstances under which corporations may want or need to step into the fray for business, public perception, or other reasons.

1. *Moral Authority and Leadership*

First, certain corporations may have the moral authority to speak out on a particular issue because their commitment to it may be well-established or they are known to act for what is right based on values that the corporation itself may subscribe to.³³⁷

Indeed, some corporations have denied that their sociopolitical positions are economically motivated; instead, they are value-based pursuant to their mission statement. Apple CEO Tim Cook and former Starbucks CEO Howard Schultz provide illustrative examples.³³⁸ In fact, they went so far as to say “that shareholders were welcome to sell their shares of stock if they disagreed with the company’s sociopolitical positions.”³³⁹ Cook also stated that, “business is just a collection of people, and if people have values, than [sic] a business should, too.”³⁴⁰ These types of corporations have the opportunity to showcase their leadership skills in times of social movements.

2. *Responding to Boycotts*

Corporations may also find themselves involved in social movements because their products or services are boycotted as described in Part I above. They can respond to such boycotts by building an infrastructure within the corporation itself to respond to not only the issue born out of the immediate social concern, but any future issues that may arise.³⁴¹

³³⁷ See discussion *supra* notes 145–155.

³³⁸ Nalick et al., *supra* note 9.

³³⁹ *Id.* “The CEO of Salesforce.com has also spoken with candor on the stands his company has taken on sociopolitical issues such as gay marriage, race, and the Confederate flag, even though these issues appear to be largely unrelated to the company’s operations.” *Id.*

³⁴⁰ Alan Murray & David Meyer, *Trump’s Trade Fallout, Tech Hit, China Bear Market: CEO Daily for June 26, 2018*, FORTUNE (June 26, 2018), <http://fortune.com/2018/06/26/trump-trade-fallout-tech-china-bear-ceo-daily-for-june-26-2018/>. This statement was made in response to the Trump Administration’s policy of separating immigrant children from parents at the border. “You are never going to fulfill your mission of changing the world by” staying quiet and focusing on issues that directly affect the bottom line. *Id.*

³⁴¹ Facebook recently announced that it will link employee bonuses to “making progress on major social issues,” rather than growth. Hannah Murphy, *Facebook to Link Employee Bonuses to Progress on Social Issues*, FIN. TIMES (Feb. 5, 2019), <https://www.ft.com/content/145a87ea-29ce-11e9-a5ab-ff8ef2b976c7>. The issues to be addressed include the spread of fake news, data privacy and security, and “building new experiences that . . . improve people’s lives.” *Id.* While this seems praiseworthy, the social issues to be addressed are ones that have been the center of recent scandals at Facebook. *See id.*

Professor Sarah Soule, who studies organizational management, found that one of the more frequent responses to boycotts by corporations is to establish a corporate social responsibility board committee.³⁴² “These committees usually include nonprofit and civil society representatives that improve the company’s capacity to engage with activists, reduce the likelihood that future grievances will threaten the company’s reputation, and strengthen the company’s ability to recognize and respond to emerging problems in ways that pacify activist stakeholders.”³⁴³

3. Responding to Proxy Proposals

An additional way that social issues are brought to the attention of a corporation’s management are proxy proposals.³⁴⁴ “Proxy proposals can be used by shareholders to bring a wide range of social issues to the attention of a company’s management.” Many social movement organizations engage in this form of “internal” activism where they “operate activist investing units, buying stakes in a company so that they will be able to submit a proxy proposal to draw attention to the issues they care about.”³⁴⁵

According to one research study, many corporations implement corporate social research reports in response to proxy proposals.³⁴⁶ By doing so, corporations “can help alleviate investor uncertainty about a firm’s social and environmental behavior by more proactively communicating the company’s perspective.”³⁴⁷

C. Guiding Principles for Corporations Involved in Social Movements

Based on the three case studies in Part II above, there appears to be an unspoken understanding that corporations will continue to be a part of social movements. In part, this is due to the resources corporations can provide and their ability to facilitate outcomes given their prominent role in our society. Corporations themselves may be motivated to participate in social move-

³⁴² Dale T. Miller, *Sarah Soule: How Activism Can Fuel Corporate Social Responsibility*, STAN. BUS.: INSIGHTS (Oct. 10, 2014), <https://www.gsb.stanford.edu/insights/sarah-soule-how-activism-can-fuel-corporate-social-responsibility>. “Boycotts are a familiar, high-profile ‘external’ form of activism, which often results from a breakdown in the [corporation]’s ability to manage contentious stakeholders and social issues. . . . [B]oycotts generate negative media attention and threaten the reputation of the targeted companies . . .” *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.*; see also 17 C.F.R. § 240.14a-8 (2019) (dealing with proxy proposals); Jennifer S. Fan, *Employees as Regulators: The New Private Ordering in High Technology Companies*, 2019 UTAH L. REV. (forthcoming 2019) (discussing the impact of employees on private ordering in high technology companies).

³⁴⁵ Miller, *supra* note 342. “In more adversarial cases, shareholder resolutions can be publicized as a way to generate media attention and galvanize public pressure to get social concerns on the corporate agenda.” *Id.*

³⁴⁶ *Id.*

³⁴⁷ *Id.*

ments because it behooves them to do so. For example, a significant number of their employees may be immigrants, as was the case in the Muslim Ban. At other times, however, they will not respond at all and choose to weather the public outcry. In other cases, corporations will be forced into action as was the case with the gun control movement. The varying responses of corporations depend on a few different factors: (1) the composition of their workforce (for example, if they have a lot of millennials who tend to be more vocal); (2) whether they have a self-interest in the movement; (3) whether it aligns with their corporate values; and (4) whether there are business reasons to get involved. Some or all of these factors can be found in the different legal theories of the nature and purpose of the corporation discussed in Part I.

In most cases, corporations do not consider how their action or inaction may affect the particular social movement or how their actions can influence existing norms or create new ones. Instead, their conception of norms develops and matures over time at the behest of employees or other stakeholders.

The aim of this section was to offer a few preliminary guiding principles to help corporations rethink their roles in social movements. First, corporations should consider whether their participation is expected and necessary due to their stakeholders. For example, in the case of the LGBTQ movement, corporations were at the forefront of developing workplace policies that included issues unique to the LGBTQ community, such as domestic partner policies, prior to it being required by law. Corporations undertook the initiative at the behest of their LGBTQ employees.

Second, corporations should evaluate the basis of their commitment to the particular social movement and determine whether the goals of the particular movement fit within their corporate purpose. In light of the broad nature of the corporate purpose of many corporations, it will most likely be the case that if a corporation is inclined to lend its support to a social movement the corporate purpose should not pose a barrier.

Third, corporations need to determine whether collaborations with other organizations, such as nonprofit organizations or other corporations, may be helpful in achieving a particular outcome. For example, collaborating with other corporations to prepare amicus briefs could be one way to leverage the collective influence of corporations.

Fourth, corporations need to determine how they will use their legal, political, economic, and social clout in a particular social movement. How they utilize such resources will largely depend on the movement itself and the business implications for the corporation itself.

The suggestions outlined above are not comprehensive. They are a starting point for what I hope will be a larger discussion on the role of corporations on the vexing and pressing social issues that we face today.

CONCLUSION

In a day and age where one tweet or social media post can go viral and make or break the reputation of a corporation seemingly overnight, corporations find themselves in the unenviable position of how to respond to sometimes controversial issues. Where quick responsiveness has become the norm, a single misstep or misreading of public sentiment can result in consequences worth billions of dollars. Corporations must carefully evaluate how to respond to issues over which they have little to no control. In no case is this made more abundantly clear than with respect to social movements. In the past, corporations generally did not take a position on pressing social issues unless forced by economic pressures to do so. Today, however, quite the opposite is true. Corporations are expected to take a stance; to do otherwise is at their peril.

The debate about the role of corporations in our society continues unabated. Court cases and changing norms about the role of the corporation in society led to the development of the modern business corporation. Economics, values, stakeholders, media, and morality led to the involvement of corporations in social movements. By analyzing corporations through the lens of social movements, we place them within a larger epistemological framework thereby deepening our understanding of corporations as an agent of change and the effect of social movements upon them.