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# Center-Left Politics and Corporate Governance: What Is the 'Progressive' Agenda?

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# Center-Left Politics and Corporate Governance: What Is the “Progressive” Agenda?

*Christopher M. Bruner\**

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## I. INTRODUCTION

For as long as corporations have existed, debates have persisted among scholars, judges, and policymakers regarding how best to describe their form and function as a positive matter, and how best to organize relations among their various stakeholders

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as a normative matter.<sup>1</sup> This is hardly surprising given the economic and political stakes involved with control over vast and growing “corporate” resources,<sup>2</sup> and it has become commonplace to speak of various approaches to corporate law in decidedly political terms. In particular, on the fundamentally normative issue of the aims to which corporate decision-making ought to be directed, shareholder-centric conceptions of the corporation have long been described as politically right-leaning while stakeholder-oriented conceptions have conversely been described as politically left-leaning.<sup>3</sup> When the frame of reference for this normative debate shifts away from state corporate law, however, a curious reversal occurs. Notably, when the debate shifts to federal political and judicial contexts, one often finds actors associated with the political left championing expansion of shareholders’ corporate governance powers, and those associated with the political right advancing more stakeholder-centric conceptions of the corporation.<sup>4</sup>

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1. See generally Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385 (2008) [hereinafter Bruner, *Enduring Ambivalence*].

2. See Christopher M. Bruner, *The Corporation’s Intrinsic Attributes*, in UNDERSTANDING THE COMPANY: CORPORATE GOVERNANCE AND THEORY 60, 77–81 (Barnali Choudhury & Martin Petrin eds., 2017).

3. See, e.g., Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 857–58 (1997) (reviewing PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995)) (describing “the debate between conservative contractarianism and progressive communitarianism”).

4. See, e.g., Christopher M. Bruner, *Conceptions of Corporate Purpose in Post-Crisis Financial Firms*, 36 SEATTLE U. L. REV. 527, 553–60 (2013) [hereinafter Bruner, *Conceptions of Corporate Purpose*] (describing post-crisis federal corporate governance reforms, championed by the left, that favored shareholders); Richard Marens, *Waiting for the North to Rise: Revisiting Barber and Rifkin After a Generation of Union Financial Activism in the U.S.*, 52 J. BUS. ETHICS 109, 113 (2004) (observing that some unions that had promoted takeover defenses under state corporate law nevertheless supported shareholder resolutions through federal securities regulation that “included reducing barriers to potential takeovers”); Brett H. McDonnell, *The Liberal Case for Hobby Lobby*, 57 ARIZ. L. REV. 777, 778–80 (2015) (arguing that, in its 2014 *Hobby Lobby* decision, the Supreme Court’s “conservative majority” described the corporation in terms that “closely resemble the picture drawn by progressive corporate law scholars”); Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335, 337–40 (2015) (arguing that, in its 2010 *Citizens United* decision, the Supreme Court’s “five more conservative judges” premised their decision on “certain assumptions . . . about corporations and their investors [that] are inconsistent with conservative corporate theory”).

The aim of this article is to explain this disconnect and explore its implications for the development of U.S. corporate governance, with particular reference to the varied and evolving corporate governance views of the political left—the side of the spectrum where, I argue, the more dramatic and illuminating shifts have occurred over recent decades and where the state/federal divide is more difficult to explain. A widespread and fundamental reorientation of the Democratic Party toward decidedly centrist national politics fundamentally altered the role of corporate governance and related issues in the project of assembling a competitive coalition capable of appealing to working-class and middle-class voters. Grappling with the legal, regulatory, and institutional frameworks—as well as the economic and cultural trends—that conditioned and incentivized this shift will prove critical to understanding the state/federal divide regarding what the “progressive” corporate governance agenda ought to be and how the situation might change as the Democratic Party formulates responses to the November 2016 election.

I begin with a brief terminological discussion, examining how various labels associated with the political left tend to be employed in relevant contexts (including “progressive,” “communitarian,” “liberal,” and “center-left”), as well as varying ways of defining the field of “corporate governance” itself. I then provide an overview of “progressive” thinking about corporate governance in the context of state corporate law, contrasting those views with the very different perspectives associated with center-left political actors at the federal level.<sup>5</sup>

Based on this descriptive account, I then examine various legal, regulatory, and institutional frameworks, as well as important economic and cultural trends, that have played consequential roles in prompting and/or exacerbating the state/federal divide.<sup>6</sup> These include fundamental distinctions between state corporate law and federal securities regulation; the differing postures of lawmakers in Delaware (the legal home for most U.S. public

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5. *See infra* Part II.

6. *See infra* Part III.

companies<sup>7</sup>) and Washington, D.C.; the rise of institutional investors; the evolution of organized labor interests; certain unintended consequences of extra-corporate regulation (notably regarding pension management); and the Democratic Party's sharp rightward shift since the late 1980s. The article closes with a brief discussion of the prospects for state/federal convergence, concluding that the U.S. corporate governance system (if one can properly use the word here) will likely remain theoretically incoherent for the foreseeable future due to the extraordinary range of relevant actors and the fundamentally divergent forces at work in the very different legal and political settings they inhabit.<sup>8</sup>

## II. CENTER-LEFT POLITICS AND CORPORATE GOVERNANCE

As a threshold matter, a coherent discussion of "progressive" conceptions of corporate governance in the context of state corporate law, and how they contrast with approaches to these issues by actors associated with "center-left" politics at the national level, requires some comment on how these (and related) terms tend to be used. Accordingly, this Part begins with a brief terminological discussion before providing an overview of prevalent left-leaning approaches to these subjects in each setting.

### A. A Comment on Terminology

Historically, the term "progressive" has been used in the United States, with varying degrees of specificity, to refer to various left-leaning political views. In the early decades of the twentieth century the term was associated with "Progressivism," a political movement that opposed entrenched political power and emphasized "a political community in which civically educated citizens were not divided by enduring class, ethnic, or party conflicts, but only by temporary, well-informed disagreements on public issues."<sup>9</sup> Although "Progressives disagreed over issues like

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7. See *About the Division of Corporations*, DELAWARE.GOV, <https://corp.delaware.gov/aboutagency/> (last visited June 25, 2018).

8. See *infra* Parts IV-V.

9. Kenneth Finegold, *Progressive Movement, US*, in 2 THE OXFORD COMPANION TO AMERICAN POLITICS 236, 236 (David Coates ed., 2012).

business regulation,”<sup>10</sup> the movement broadly anticipated stakeholder-oriented associations of the term “progressive” in the emphasis placed upon protecting vulnerable individuals from “the large institutions then forming in business and government.”<sup>11</sup> In this respect, the Progressive movement helped set the stage for New Deal-era reforms, a major element of which involved fragmentation and regulation of concentrated economic and financial power in an effort to “save farmers and workers from the onslaught of capital.”<sup>12</sup>

These broad social and political themes are reflected in contemporary corporate governance literature and discourse, where the term “progressive” refers broadly to the view that corporate law should exhibit direct and substantial regard for the interests of various constituencies and public interests—notably labor and the environment—and a correlative rejection of the notion that maximizing return to shareholders ought to trump all other interests.<sup>13</sup> Along these lines, “progressive” corporate law scholars have been described as “loosely bound both by their rejection of the prevailing paradigm of the corporation as a public good designed exclusively for the maximization of private profit” and their embrace of “themes of efficiency and morality of responsibility, altruism, and unity within the corporate form as well as between the corporation and the broader society.”<sup>14</sup> A core expression of these commitments has involved widespread rejection among progressive corporate law scholars of the atomistic and market-based “contractarian” approach, which generally styles the corporation as a “nexus” of binary contracts with various

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10. *Id.* at 236–37.

11. See MARK J. ROE, *STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE* 30 (1994).

12. See *id.* at 34–42; see also Alan Brinkley, *New Deal*, in 2 *THE OXFORD COMPANION TO AMERICAN POLITICS* 152, 154 (David Coates ed., 2012) (observing the New Deal’s “mobilization and organization of new economic groups—most notably farmers and industrial workers—who would henceforth play a major role in shaping public policy”).

13. See D. Gordon Smith, *The Dystopian Potential of Corporate Law* 3, 7 (Univ. of Wisc. Law Sch. Legal Studies Research Paper Series Paper No. 1040, Mar. 2007), <http://ssrn.com/abstract=976742> (responding to “progressive” corporate scholar Kent Greenfield); see also *infra* Section II.B.

14. *PROGRESSIVE CORPORATE LAW* (Lawrence E. Mitchell ed., 1995) (inside back cover, “About the Book”).

stakeholders who deserve no more or less than their contracts specify.<sup>15</sup> The progressive approach to corporate law, sometimes labeled “communitarian,”<sup>16</sup> has accordingly been associated with public-oriented, left-leaning views, while the contractarian approach has conversely been associated with private-oriented, right-leaning views.<sup>17</sup>

It is important to clarify, however, that we can, at most, speak in terms of general tendencies in broadly associating such views with the progressive left, and strict shareholder-centrism with the right. It has been observed, for example, that “there is a surprising degree of similarity between progressive communitarianism and the philosophical underpinnings of modern social conservatism,” and that “there is a particularly strong communitarian impulse among religious conservatives, who place great importance upon local communities.”<sup>18</sup> For example, Lyman Johnson, a conservative

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15. See, e.g., KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* 29–39 (2006); Lawrence E. Mitchell, *Trust. Contract. Process.*, in *PROGRESSIVE CORPORATE LAW* 185, 186–87, 196–98 (Lawrence E. Mitchell ed., 1995).

16. See Peter C. Kostant, *Team Production and the Progressive Corporate Law Agenda*, 35 U.C. DAVIS L. REV. 667, 668 (2002) (describing “progressive corporate law, many of whose proponents have characterized themselves, or are described by others, as communitarians”); David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013, 1039 (2013) [hereinafter Millon, *Radical Shareholder Primacy*] (“So-called corporate law progressives or communitarians reject shareholder wealth maximization as a legal requirement and also on normative grounds.”).

17. See, e.g., Bainbridge, *supra* note 3, at 857–58 (describing “the debate between conservative contractarianism and progressive communitarianism”); Grant M. Hayden & Matthew T. Bodie, *Larry from the Left: An Appreciation*, 8 VA. L. & BUS. REV. 121, 122 (2014) (contrasting their left-leaning, “progressive” approach with Larry Ribstein’s “conservative law-and-economics” approach); Kostant, *supra* note 16, at 674–75 (describing the shared view “among progressives . . . that corporate law should treat public corporations as at least quasi-public institutions that must be viewed holistically as more than the sum of their privately ordered constituencies”); David Millon, *Communitarianism in Corporate Law: Foundations and Law Reform Strategies*, in *PROGRESSIVE CORPORATE LAW* 1, 7 (Lawrence E. Mitchell ed., 1995) [hereinafter Millon, *Communitarianism*] (observing contractarians’ adherence to “the familiar libertarian idea that consent should be the sole basis for obligation” and that “[i]t is this libertarian premise that the corporate law communitarians reject”); Lawrence E. Mitchell, *Preface*, in *PROGRESSIVE CORPORATE LAW* xiii, xiii–xiv (Lawrence E. Mitchell ed., 1995) (“Each of the scholars [contributing to *Progressive Corporate Law*] starts from the premise that it is no longer reasonable . . . to treat the corporation as a purely private mechanism . . . .”); Strine & Walter, *supra* note 4, at 338–40 (describing commitment to shareholder wealth maximization as “conservative” and the view that boards should have latitude to consider “the . . . interests of all constituencies” as its “rival”).

18. Bainbridge, *supra* note 3, at 883.

communitarian, whose (positive and normative) rejection of shareholder wealth maximization reflects deeply held religious convictions,<sup>19</sup> has productively co-authored on these topics for decades with his decidedly left-leaning Washington and Lee colleague, David Millon.<sup>20</sup> Johnson's brand of conservatism contrasts starkly with the fundamentally libertarian brand animating the predominant and highly shareholder-centric contractarian conception of corporate law.<sup>21</sup> Conversely, one might point to the Chief Justice of the Delaware Supreme Court, Leo Strine, who self-identifies as "an unabashed New Deal Democrat," yet who appears to favor shareholder wealth maximization as a corporate law rule (and believes as a positive matter that this represents current law). As discussed below, Strine prefers to ameliorate the excesses of shareholder wealth maximization through forms of regulation external to corporate law<sup>22</sup>—policy preferences consistent with the predominant contractarian approach.<sup>23</sup> Accordingly, it is important to remain mindful of the fact that the association of left-leaning politics with communitarianism, and the association of right-leaning politics with shareholder-centrism, are not

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19. See, e.g., Lyman Johnson, *A Role for Law and Lawyers in Educating (Christian) Business Managers About Corporate Purpose* 30 (Univ. of St. Thomas Sch. of Law Legal Studies Research Paper No. 08-22, 2008), <https://ssrn.com/abstract=1260979> ("Many calls for socially responsible conduct, whether merely anti-contractarianism or more fully rendered communitarian visions, lack a compelling moral framework. For religious believers, the notion of faithfulness provides a foundation for constructing, or at least a lens for envisioning, a more ethical corporation.").

20. See David Millon, *Looking Back, Looking Forward: Personal Reflections on a Scholarly Career*, 74 WASH. & LEE L. REV. 699, 705–06 (2017) ("My politics are pretty far to the left and I have always voted as a Democrat. . . . Professor Johnson, in contrast, is a conservative, though not of the stripe that is ascendant today. Values like community, stability, institutional self-reform, and regard for others animate his opposition to policies that valorize shareholder wealth maximization and leave affected nonshareholders to fend for themselves.").

21. See, e.g., *id.* at 706 ("Professor Johnson's religious commitment also led him to reject arguments based solely on so-called free-market economics."); Lyman P.Q. Johnson, *Making (Corporate) Law in a Skeptical World*, 49 WASH. & LEE L. REV. 161, 169 (1992) (contrasting, in an analysis of Justice Lewis Powell's opinions concerning state anti-takeover laws, "an old-line conservatism . . . that manifests 'a serious interest in institutions like the family, church, the local community, the private sector for their value as buffering or mediating forces and for their role in preserving a more diverse and pluralistic social order'" with the "libertarian 'free market' brand that many corporate scholars . . . believed robust takeover activity should both reflect and hasten along").

22. See *infra* notes 269–70 and accompanying text.

23. See *infra* Section II.B.



universals. As we will see, these counter-trends may prove helpful in explaining certain dimensions of the state/federal divide with which this article is concerned.<sup>24</sup>

In contrast with terms like “progressive” and “communitarian,” which bear the foregoing substantive policy connotations in the corporate governance context, the term “center-left” gestures, at a higher level of generalization, toward a relative position on the left-right political spectrum. To be sure, all of these terms have been loosely used to refer broadly to left-leaning views at a high degree of generality.<sup>25</sup> The term “center-left liberalism,” however, is broadly associated in the economic sphere with commitment to “the institutions of capitalism,” though tempered by “calls for regulating those institutions in the interests of fairness, the sustainability of the environment, and the growth and stability of the economy itself” – the ultimate aim being “broadly shared prosperity, raising up the middle class and the poor together.”<sup>26</sup> Consistent with these broad tendencies, political parties inhabiting the “center-left” neighborhood of the political spectrum in Western countries have generally reflected “coalitions that exclude the large party on the right,” while adhering to “non-radical, non-Marxist” policies and thereby excluding the extreme left.<sup>27</sup> Hallmarks of this centrist position have, in recent decades, included continuing ties with organized labor, yet growing skepticism regarding “Keynesian fine-tuning” of the economy<sup>28</sup> – a complex posture with important consequences for the Democratic Party’s national political strategy and regulatory platform.<sup>29</sup>

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24. See *infra* Part IV.

25. See, e.g., Paul Starr, *Liberalism, Center-Left*, in 2 THE OXFORD COMPANION TO AMERICAN POLITICS 68, 69 (David Coates ed., 2012) (observing that the terms “progressive” and “liberal” are “often used interchangeably” in political discourse regarding “the center-left”); AL FROM, *THE NEW DEMOCRATS AND THE RETURN TO POWER* 113 (paperback ed. 2014) (with Alice McKeon) (employing the terms “center-left” and “progressive” to describe the Democratic Party’s rightward shift starting in the late 1980s).

26. Starr, *supra* note 25, at 68, 70, 73.

27. John W. Cioffi & Martin Höpner, *The Political Paradox of Finance Capitalism: Interests, Preferences, and Center-Left Politics in Corporate Governance Reform*, 34 POL. & SOC’Y 463, 493 n.1 (2006).

28. JOHN W. CIOFFI, *PUBLIC LAW AND PRIVATE POWER: CORPORATE GOVERNANCE REFORM IN THE AGE OF FINANCE CAPITALISM* 35–36 (2010).

29. See *infra* Section III.F.

Finally, and in light of the foregoing, it is important to emphasize up front the relatively embracing nature of the term “corporate governance.” Being the product of a much broader range of legal, regulatory, and market structures than corporate law alone, corporate governance reflects the combined impacts of a much broader range of actors than are formally recognized under corporate law. “Corporate law” may be accurately described as “the set of rules that defines the decision[-]making structure of corporations,”<sup>30</sup> a definition that (at least in the United States) focuses exclusively on relationships among the board, officers, and shareholders, to the exclusion of all others—including employees.<sup>31</sup> By contrast, reference to “corporate governance” connotes a much broader array of legal and market forces and constraints, prompted by a much broader range of regulators, market actors, and constituencies. Hence John Cioffi, in a comparative study, speaks of corporate governance as “constituted by a juridical nexus of securities, company, and labor relations law that structurally allocates power among managers, shareholders, and employees within the corporation.”<sup>32</sup> He adds that, as a political matter, “these groups are the most important protagonists” and that conflicts among them will ultimately be “resolved by state actors in widely varying ways that reflect the configuration of interests and allocation of power within the broader political economy.”<sup>33</sup> In the United States, this means that even though corporate law may itself remain a product of state politics, a given corporate governance issue may nevertheless be addressed through national politics, where very different power

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30. Smith, *supra* note 13, at 4.

31. See Matthew T. Bodie, *Employees and the Boundaries of the Corporation*, in RESEARCH HANDBOOK ON THE ECONOMICS OF CORPORATE LAW 85 (Claire A. Hill & Brett H. McDonnell eds., 2012) (observing the irony that employees are irrelevant to U.S. corporate law yet central to the Coasian economic conception of the firm); see also Dalia Tsuk, *Corporations Without Labor: The Politics of Progressive Corporate Law*, 151 U. PA. L. REV. 1861, 1897 (2003) (describing reliance on collective bargaining agreements as the locus for addressing U.S. workers’ interests); Andrew Pendleton & Howard Gospel, *Corporate Governance and Labor*, in THE OXFORD HANDBOOK OF CORPORATE GOVERNANCE 634, 637 (Mike Wright et al. eds., 2013) (describing the U.S. and U.K. perspective that “the best way for labor to be involved in governance was via a system of pluralism and opposition, based on trade unions and collective bargaining”).

32. CIOFFI, *supra* note 28, at 38.

33. *Id.*

relations unfold in very different political fora,<sup>34</sup> giving rise to very different coalitional possibilities—which may well turn on the interests and incentives of organized labor.<sup>35</sup> This in turn means that, notwithstanding the narrow focus of U.S. corporate law, a full account of U.S. corporate governance requires grappling directly with labor’s interests and incentives—something of a moving target over recent decades, due in part to the labor force’s growing stake in corporate equities.<sup>36</sup>

### B. The “Progressive” State Corporate Governance Agenda

With the foregoing terminological clarifications in mind, the policy agendas that have come to be associated with “progressive” corporate law at the state level, and “center-left” corporate governance at the federal level, can be set out with greater specificity. A decidedly “progressive” corporate law agenda emerged in the late 1980s and early 1990s as a response to what were regarded as troubling developments in the market and in academia—the advent of hostile takeovers, and the law and economics-inspired<sup>37</sup> “nexus of contracts” theory of corporate law. A number of scholars began insisting on a more relational conception of the corporation and corporate law that has prompted a range of stakeholder-oriented theoretical approaches. These theories differ in their positive descriptions of corporate law, as well as their normative

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34. See, e.g., Mark J. Roe, *Delaware and Washington as Corporate Lawmakers*, 34 DEL. J. CORP. L. 1, 11 (2009) [hereinafter Roe, *Delaware and Washington as Corporate Lawmakers*].

35. See CIOFFI, *supra* note 28, at 31–32; Thibault Darcillon, *Corporate Governance Reforms and Political Partisanship: An Empirical Analysis, in 16 OECD Countries*, 17 BUS. & POL. 661, 662 (2015); Pendleton & Gospel, *supra* note 31, at 634.

36. See, e.g., Pendleton & Gospel, *supra* note 31, at 642–43, 650 (observing that employees may have various forms of direct or indirect involvement in corporate governance via employee stock ownership plans and pensions); see also *infra* Sections III.D–E.

37. While clearly a reflection of the “law and economics” (L&E) movement, see Bruner, *Enduring Ambivalence*, *supra* note 1, at 1397, one cannot assume that all L&E scholars fully accept the nexus theory’s claims. Indeed, some have rejected it outright as a descriptive theory. See, e.g., Hayden & Bodie, *supra* note 17, at 136 (citing Henry Hansmann and Michael Klausner in this respect); Michael Klausner, *The “Corporate Contract” Today* 30 (Stanford Law and Economics Olin Working Paper No. 490, 2016), <http://ssrn.com/abstract=2761463> (“The primary question is whether the contractarian theory is a valid positive theory of corporate governance. The answer to that question is no.”). Others, meanwhile, have rejected the nexus theory’s descriptive claims in the corporate context while accepting them in noncorporate settings. See, e.g., Hayden & Bodie, *supra* note 17, at 128 (citing Larry Ribstein in this respect).

prescriptions regarding how corporate governance ought to be structured, but they share a common distaste for the nexus theory's claim that shareholder wealth maximization represents the sole legitimate aim of corporate decision-making.

The nexus theory conceptualizes the corporation as a legal nexus through which various stakeholders come together to pursue corporate production, advancing the mixed positive and normative claim that even if literal negotiation never occurs, corporate law ought to, and generally does, approximate what the relevant stakeholders would rationally have agreed to had they in fact done so.<sup>38</sup> Shareholders, on this account, are by default the ultimate beneficiaries of board decision-making because rational equity investors, knowing that they hold a residual claim (i.e., that they receive a return on their investment only after fixed claimants are paid), would – in a hypothetical negotiation – demand the right to elect the corporation's directors and fiduciary duties compelling those directors to focus on the shareholders' interests.<sup>39</sup> The interests of other stakeholders such as employees, and "social" concerns such as environmental preservation, are by contrast thought to be more efficiently dealt with by contract and/or through extra-corporate regulation (that is, regulation external to corporate law). Employees, on this account, are assumed to be fully capable of bargaining for contractual protections in addition to those made generally available through labor and employment law, while environmental harms are assumed to be susceptible to containment through regulations, ensuring that corporations absorb the cost of externalities (e.g., pollution) arising from the corporation's pursuit of business.<sup>40</sup>

There is unquestionably considerable extra-corporate regulation that impacts employees' relationships with corporate

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38. See FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 14–15 (1991).

39. See *id.* at 36–39, 92–93.

40. See *id.* at 36–39. For additional discussion of the nexus conception of the corporation, see CHRISTOPHER M. BRUNER, *CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER* 53–57 (2013) [hereinafter BRUNER, *CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD*]; Bruner, *Enduring Ambivalence*, *supra* note 1, at 1397–401.

employers<sup>41</sup> and corporations' incentives regarding environmental harms.<sup>42</sup> Progressive corporate scholars have, however, expressed considerable skepticism regarding the notion that employees could be expected to effectively negotiate and enforce sufficient protections, and that environmental and other externalities can be sufficiently contained through extra-corporate regulation. This has led these scholars to conclude that the corporate governance system itself must permit some capacity to pursue aims not tethered to shareholder wealth maximization.<sup>43</sup> Labor vulnerabilities and interests have loomed particularly large in this respect. Indeed, as David Millon has observed, the "communitarian turn in corporate law" that emerged in the late 1980s and early 1990s arose out of "concern about the harm to nonshareholders that can occur as a result of managerial adherence to the shareholder primacy principle," and particularly the "problem of nonshareholder vulnerability [that] emerged starkly during the hostile takeover explosion of the 1980s."<sup>44</sup>

In this light, it has been suggested with some justice that progressive (or communitarian) corporate law scholars are above all else "united by what they oppose,"<sup>45</sup> and progressive scholars

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41. See generally Bodie, *supra* note 31 (discussing the significance of the employer-employee relationship in agency law, intellectual property law, tax law, and of course employment law).

42. See, e.g., Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (2012).

43. See, e.g., GREENFIELD, *supra* note 15, at 14-19; David Millon, *Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1381-86 (1993) [hereinafter Millon, *Communitarians*]; see also Matthew T. Bodie, *Income Inequality and Corporate Structure*, 45 STETSON L. REV. 69, 70 (2015) [hereinafter, Bodie, *Income Inequality*] ("[E]fforts to protect workers through labor and employment laws are insufficient to address the underlying power imbalances within the corporate structure."); Leo E. Strine, Jr., *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance*, 33 J. CORP. L. 1, 9-10 (2007) [hereinafter Strine, *Toward Common Sense*] (arguing that growing competition from countries with lax labor and environmental regulation has heightened investors' demand for "cost-cutting measures," destabilizing the U.S. balance between corporate governance and extra-corporate regulation).

44. Millon, *Communitarianism*, *supra* note 17, at 1-2; see also Deborah A. DeMott, *Trust and Tension Within Corporations*, 81 CORNELL L. REV. 1308, 1308-09 (1996) (reviewing PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995)); Millon, *Communitarians*, *supra* note 43, at 1373-76.

45. Bainbridge, *supra* note 3, at 857; see also DeMott, *supra* note 44, at 1313 ("Disagreement with the contractual characterization is an explicit or implicit starting point for

themselves have acknowledged the importance of developing a positive alternative agenda defined by something more than rejection of the nexus conception of the corporation and the associated focus on shareholder wealth maximization.<sup>46</sup> Coherent theories with a progressive political orientation have, to be sure, been articulated – most noteworthy among them being the “team production” conception, styling the board as a “mediating hierarch” charged with inducing all stakeholders to make firm-specific investments in the company, and accordingly remaining beholden to none of them.<sup>47</sup> Notwithstanding team production theory’s clear rejection of shareholder wealth maximization as the corporation’s singular purpose,<sup>48</sup> however, it bears emphasizing that team production is far from a fully developed “progressive” theory. Indeed, Margaret Blair and Lynn Stout style team production theory as a variant of nexus theory that differs from other such approaches, mainly in its rejection of the notion that

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several of the contributions to *Progressive Corporate Law*.”); cf. Carl Landauer, *Beyond the Law and Economics Style: Advancing Corporate Law in an Era of Downsizing and Corporate Engineering*, 84 CAL. L. REV. 1693, 1694, 1701, 1708 (1996) (reviewing PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995) and MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE (1994)) (critiquing contributions to the *Progressive Corporate Law* volume for themselves being so heavily infused and preoccupied with law-and-economics concepts).

46. See, e.g., Kent Greenfield, *Sticking the Landing: Making the Most of the “Stakeholder Moment,”* 2015 EUR. BUS. L. REV. 147, 148 (2015) (“[T]hose academics advocating for the downfall of the shareholder primacy model, this author included, have had difficulty fully theorizing an alternative approach to corporate governance.”); Millon, *Communitarians*, *supra* note 43, at 1387 (conceding, in 1993, that “[t]hose who say that communitarians have not yet articulated a fully developed alternative agenda are correct”); David Millon, *Shareholder Social Responsibility*, 36 SEATTLE U. L. REV. 911, 923 (2013) [hereinafter Millon, *Shareholder Social Responsibility*] (similarly observing, in 2013, that “the stakeholder approach to [corporate social responsibility] has value primarily because it rejects the narrow notion of corporate purpose that would focus first and foremost on shareholder wealth maximization”); see also J. William Callison, *Seeking an Angle of Repose in U.S. Business Organization Law: Fiduciary Duty Themes and Observations*, 77 U. PITT. L. REV. 441, 446–47 (2016) (“Although there have been attempts to develop a communitarian, sometimes termed ‘progressive,’ approach to business organization law, at this time, such an approach has not been fully developed.”).

47. See Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 269–81 (1999). For additional discussion of the team production conception of the corporation, see BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD, *supra* note 40, at 57–60; Bruner, *Enduring Ambivalence*, *supra* note 1, at 1401–05.

48. See BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD, *supra* note 40, at 58; Kostant, *supra* note 16, at 672.

shareholders represent the sole category of residual claimants, prompting depiction of the corporation as a “nexus of firm-specific investments” by a broader array of critical stakeholders.<sup>49</sup> While corporate law does, as a practical matter, give boards substantial latitude to attend to the interests of non-shareholders—a straightforward consequence of the business judgment rule<sup>50</sup>—and while such broad discretion is critical to the “mediating hierarchy” conception of the board, team production theory, as such, does not call for enhanced accountability to non-shareholders along the lines often favored by progressive scholars.<sup>51</sup>

One way in which progressive corporate scholars clearly have distinguished themselves from contractarians is in their insistent focus on the political and distributive dimensions of corporate law and corporate governance—and particularly their scrutiny of the underlying social and economic conditions that render market-based bargaining an insufficient means of protection.<sup>52</sup> These competing visions reflect “strongly conflicting political visions of the appropriate foundations of corporate law.”<sup>53</sup> Whereas “the communitarian project openly addresses political questions and demands judgments that contractarians often seem to believe . . . to be avoidable,” contractarians by and large “simply do not bother to speak about it in those terms.”<sup>54</sup> Indeed, “the scientific pretensions of the ‘law and economics’ movement” have

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49. See Blair & Stout, *supra* note 47, at 253–54, 262–65, 275, 285, 314 n.178, 319–20.

50. See BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD, *supra* note 40, at 58; Blair & Stout, *supra* note 47, at 299–309; Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005).

51. See Blair & Stout, *supra* note 47, at 254, 319–28; see also David Millon, *New Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law*, 86 VA. L. REV. 1001, 1022 (2000) (observing of team production theory that the absence of any stakeholder-oriented mandate permits boards so minded “to pursue shareholder value with relentless disregard for social costs”); *infra* note 63 (discussing predominant progressive reform proposals).

52. See Millon, *Communitarianism*, *supra* note 17, at 7–9. As Stephen Bainbridge has observed, “there is a surprising degree of similarity between progressive communitarianism and the philosophical underpinnings of modern social conservatism”—notably the “great importance [placed] upon local communities and other mediating institutions.” The two camps disagree fundamentally, however, as Bainbridge observes, regarding “the proper role of the state.” Bainbridge, *supra* note 3, at 883–85; see also *id.* at 885–90 (exploring what he terms the “essentially statist nature of the progressive agenda”).

53. Millon, *Communitarians*, *supra* note 43, at 1377.

54. *Id.* at 1387.

encouraged a tendency among scholars in this tradition to presume that corporate law in the United States and elsewhere will ultimately converge on consistent and (presumptively) optimal regulatory responses to broadly similar corporate governance challenges, as if by a sort of apolitical natural law.<sup>55</sup>

To be sure, progressive scholars have differed markedly in their descriptive accounts of how contemporary corporate law addresses these fundamental matters—particularly with respect to Delaware, the predominant jurisdiction of incorporation for U.S. public companies.<sup>56</sup> While states that have adopted so-called “constituency statutes,” giving boards of directors broad latitude to take account of non-shareholder interests in corporate decision-making, would appear straightforwardly to have adopted a more progressive conception of corporate purpose,<sup>57</sup> Delaware has not adopted such a statute,<sup>58</sup> fueling some controversy regarding where Delaware falls on this theoretical and political continuum. The Delaware statute provides no clear definition of corporate purpose, and likewise provides no clear answers regarding who prevails in predictable collisions of board and shareholder governance powers, leaving these matters to Delaware’s courts—a pattern discernible both in the hostile takeover battles of the 1980s and 1990s, as well as the shareholder bylaw battles raising fundamentally similar issues today.<sup>59</sup> Some progressive corporate

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55. See BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD, *supra* note 40, at 6, 112–15 (describing these tendencies in the comparative corporate governance context).

56. See *supra* note 7.

57. See McDonnell, *supra* note 4, at 794 (“[O]ver half of the states have adopted a corporate constituency statute, which explicitly allows directors to consider the interests of enumerated stakeholders. Although a cramped reading of these statutes is conceivable, it seems pretty clear that in these states the stakeholder conception has triumphed.”); see also BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD, *supra* note 40, at 44.

58. See Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 762, 780–81 (2015) [hereinafter Strine, *The Dangers of Denial*].

59. See BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD, *supra* note 40, at 42–52, 172–73; see also DEL. CODE ANN. tit. 8, §§ 102(a)(3) (providing that it suffices for the charter to state that “the purpose of the corporation is to engage in any lawful act or activity”), 109(b), 141(a) (giving shareholders unilateral authority to enact bylaws regarding the “rights or powers” of shareholders and directors, yet giving boards of directors plenary authority to manage the “business and affairs” of the corporation, with no reconciling principle), 203 (imposing modest limits on “[b]usiness combinations with interested stockholders,” but providing no general guidance regarding takeovers) (2018). In



scholars, as well as jurists who self-identify as leaning toward the political left, have concluded that Delaware embraces shareholder wealth maximization as the corporation's defining aim, through preferential treatment afforded shareholders under the statute (e.g., the power to elect directors), as a beneficiary of direct fiduciary duties, and through the courts' requirement that stock price be maximized in a sale or break-up of the company.<sup>60</sup> Others, myself included, have emphasized that Delaware case law permits substantial management discretion to show regard for non-shareholder interests, that shareholder wealth maximization remains unenforceable beyond a narrow range of final-period scenarios (that arise only when the board so decides), and that the governance powers afforded to shareholders under the Delaware statute are remarkably weak in comparison with those afforded to their counterparts in other common-law jurisdictions.<sup>61</sup> I have described these realities elsewhere as expressions of fundamental "ambivalence" regarding "the locus of ultimate

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just a handful of areas, the Delaware legislature has clarified the appropriate reach of shareholder-enacted bylaws. *See* DEL. CODE ANN. tit. 8, §§ 112 (permitting bylaws enabling shareholders to advance their own board nominees through the company's proxy statement), 115 (prohibiting bylaws that "prohibit bringing [internal corporate] claims in the courts of this State"), 216 (insulating from board amendment or repeal a "bylaw amendment adopted by stockholders which specifies the votes that shall be necessary for the election of directors") (2016).

60. *See generally, e.g.,* Strine, *The Dangers of Denial*, *supra* note 58 (expressing sympathy toward "center-left" views while arguing that "stockholder welfare [is] the sole end of corporate governance" under Delaware law); David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181 (2014) (identifying with "progressive" scholars normatively while arguing that Delaware law embraces "shareholder primacy"); *see also* GREENFIELD, *supra* note 15, at 22 (arguing that those describing corporate law as embracing "shareholder supremacy" are, in terms of "pure description, . . . more right than wrong"); Greenfield, *supra* note 46, at 147-48 (reporting "significant pushback against the shareholder primacy norm" while arguing that "accounts of [its] imminent death . . . are exaggerated").

61. *See, e.g.,* BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD, *supra* note 40, at 36-65; LYNN STOUT, THE SHAREHOLDER VALUE MYTH 24-32 (2012); Bruner, *Enduring Ambivalence*, *supra* note 1, at 1408-27; Elhauge, *supra* note 50; Kostant, *supra* note 16, at 683; Lyman Johnson, *The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law*, 68 TEX. L. REV. 865, 898-903, 909-17 (1990); Millon, *Radical Shareholder Primacy*, *supra* note 16, at 1014, 1022-25, 1043-44. Tellingly, those who locate strong-form commitment to shareholder wealth maximization in Delaware law acknowledge that such a rule (assuming it exists) is effectively unenforceable, and that the handful of judicial expressions of commitment to such a conception of corporate purpose cite no authority. *See* Strine, *The Dangers of Denial*, *supra* note 58, at 772-77; Yosifon, *supra* note 60, at 190-94, 223-24.

corporate governance authority, the intended beneficiaries of corporate production, and the relationship between corporate law and the achievement of the social good.”<sup>62</sup>

The critical point for present purposes, however, is simply the broadly shared normative commitment among self-identified “progressives” to the notion that the interests of non-shareholders, and issues not tethered to maximizing shareholder return, should be regarded as legitimate ends of corporate decision-making.<sup>63</sup> This, as the following section explores, sharply distinguishes the posture of progressive corporate scholars focusing on state-level corporate law from the posture of actors associated with the “center-left” at the federal level, whom one might have expected to represent the progressive corporate scholars’ natural allies.

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62. BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD, *supra* note 40, at 37; Bruner, *Enduring Ambivalence*, *supra* note 1, at 1386. Though not couched in political terms, others have developed the intriguing argument that corporate law must maintain some degree of ambiguity regarding corporate purpose in order for a singular duty of loyalty to apply to heterogeneous directors. See generally Martin Gelter & Genviève Heleringer, *Lift Not the Painted Veil! To Whom Are Directors’ Duties Really Owed?*, 2015 U. ILL. L. REV. 1069 (2015); see also *OptimisCorp v. Waite*, No. 523, 2015, 2016 WL 2585871, \*1, \*3 (Del. Apr. 25, 2016) (Strine, C.J.) (expressing commitment to collaborative decision-making by the entire board and correlative skepticism regarding “board factions”).

63. See Millon, *Radical Shareholder Primacy*, *supra* note 16, at 1013; see also Yosifon, *supra* note 60, at 184 (arguing that “shareholder primacy is indeed the law,” while advocating “broader responsibilities on corporate boards”). As Kent Greenfield observes, the policy positions “most routinely discussed by ‘progressive’ corporate law scholars” include “relaxing the profit maximization norm, extending management’s fiduciary duty to include workers, and requiring some kind of worker representation on boards of directors.” GREENFIELD, *supra* note 15, at 154; see also Bodie, *Income Inequality*, *supra* note 43, at 84–89 (advocating employee involvement in corporate governance); Greenfield, *supra* note 46, at 150–60 (advocating stakeholder-oriented fiduciary duties, stakeholder board representation, and greater board diversity); Marleen A. O’Connor, *Promoting Economic Justice in Plant Closings: Exploring the Fiduciary/Contract Law Distinction to Enforce Implicit Employment Agreements*, in PROGRESSIVE CORPORATE LAW 219, 228–30 (Lawrence E. Mitchell ed., 1995) (arguing that fiduciary duties should be owed to both shareholders and employees); cf. Strine, *The Dangers of Denial*, *supra* note 58, at 767–68, 786–93 (arguing that if non-shareholders are to be protected within corporate law they should be given “enforceable rights,” but that strong “externality regulation” would be preferable). It must be acknowledged, however, that progressive scholars are hardly unanimous regarding the viability of such reforms. See, e.g., Millon, *Communitarianism*, *supra* note 17, at 11–22 (arguing that “the multifiduciary approach” remains “vague,” while implicit contract theory remains similarly “indeterminate” and susceptible to disclaimer); see also DeMott, *supra* note 44, at 1322–25 (agreeing with Millon).

C. *The “Center-Left” Federal Corporate Governance Agenda*

In stark contrast with the stakeholder-oriented agenda associated with “progressives” at the level of state corporate law, various political groups, who one might have assumed would share their views, have in fact pursued agendas at the federal level that flatly contradict the views described above.<sup>64</sup> The Democratic Party and important constituencies thereof—notably, organized labor—have strongly favored corporate governance reforms premised on views that corporate law progressives categorically reject, including the notion that shareholder wealth maximization represents the defining aim of the corporation and the appropriate metric for director and officer decision-making.

Traditionally, the process of incorporation and the development of corporate law governing relations among a corporation’s directors, officers, and shareholders has been left to the states under an unusual choice-of-law rule called the “internal affairs doctrine.”<sup>65</sup> It is critical to recognize, however, that Congress retains unquestioned plenary power to federalize corporate law as, and when, it likes under the Commerce Clause of the U.S. Constitution.<sup>66</sup> While efforts to federalize corporate law outright arose at various points in the twentieth century, those initiatives were not successful.<sup>67</sup> Federal corporate governance initiatives enacted over the last several decades have tended to be sporadic and crisis-driven—a pattern reflected in the creation of federal securities regulation and the Securities and Exchange Commission

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64. Cf. Greenfield, *supra* note 46, at 147–49 (describing the “tension” between progressives “who seek to emphasize ‘shareholder activism’ to further progressive ends and those who want to defeat shareholder primacy by a greater emphasis on managerial discretion and autonomy”).

65. See *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 302(2), 304 (1971).

66. See U.S. CONST. art. I, § 8, cl. 3 (giving Congress authority to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”); see also Leo E. Strine, Jr., *Breaking the Corporate Governance Logjam in Washington: Some Constructive Thoughts on a Responsible Path Forward*, 63 BUS. LAW. 1079, 1084 (2008) (“No substantial argument can be made that Congress does not have the constitutional authority to enact a preemptive corporate law governing publicly traded corporations operating in interstate commerce.”).

67. See Mark J. Roe, *Delaware’s Competition*, 117 HARV. L. REV. 588, 597 (2003) [hereinafter Roe, *Delaware’s Competition*].

(SEC) in the early 1930s following the stock market crash and ensuing “Great Depression,” and then more recently in the Sarbanes-Oxley Act following the Enron and WorldCom bankruptcies, and the Dodd-Frank Act following the financial crisis.<sup>68</sup> Critically, for present purposes, each of these reform initiatives was championed by Democrats.

The creation of federal securities regulation was, the SEC explains, “designed to restore investor confidence in [U.S.] capital markets by providing investors and the markets with more reliable information and clear rules of honest dealing.”<sup>69</sup> In this light, it is hardly surprising that the SEC’s institutional disposition would be to maintain a heavy focus on capital providers; the SEC’s mission is, in the Commission’s words, “to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.”<sup>70</sup> The federal securities regime, and the SEC itself, represent one of numerous federal reforms enacted under the administration of Democratic President Franklin Delano Roosevelt, who appointed Joseph Kennedy—father of a later

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68. See, e.g., Christopher M. Bruner, *Corporate Governance Reform in a Time of Crisis*, 36 J. CORP. L. 309, 332–35 (2011) [hereinafter Bruner, *Corporate Governance Reform in a Time of Crisis*]; Christopher M. Bruner, *Managing Corporate Federalism: The Least-Bad Approach to the Shareholder Bylaw Debate*, 36 DEL. J. CORP. L. 1, 26–29 (2011) [hereinafter Bruner, *Managing Corporate Federalism*]; Roe, *Delaware and Washington as Corporate Lawmakers*, *supra* note 34, at 7–12; Roe, *Delaware’s Competition*, *supra* note 67, at 591–93. This is not to suggest, however, that securities reforms occur exclusively in response to crises. See generally Usha R. Rodrigues, *Dictation and Delegation in Securities Regulation*, 92 IND. L.J. 435 (2017) (arguing that the crisis-based account of securities reform is incomplete, and that private industry favors prescriptive legislation minimizing agency interference in non-crisis contexts to directly operationalize their deregulatory preferences, yet favors delegation to agencies following crises to maximize opportunities to prevent restrictive regulation from materializing).

69. *What We Do*, U.S. SECURITIES AND EXCHANGE COMMISSION, <https://www.sec.gov/about/whatwedo.shtml> (last modified June 10, 2013); see also Bruner, *Managing Corporate Federalism*, *supra* note 68, at 43 (observing that, with respect to corporate governance debates, “the SEC is effectively a single-constituency regulator”); Cioffi & Höpner, *supra* note 27, at 484 (observing “the Democrats’ historical support for the regulatory state,” evidenced by the fact that “the New Deal of the 1930s created modern securities regulation”). To observe that the SEC’s mission is “to protect investors” is not, however, to say that the SEC invariably achieves this aim. See, e.g., Renae Merle, *Despite Travails, White Calls SEC ‘Aggressive and Successful,’* WASH. POST (May 27, 2016), [https://www.washingtonpost.com/news/on-leadership/wp/2016/05/27/despite-travails-white-calls-sec-aggressive-and-successful/?utm\\_term=.b56a45faa8c5](https://www.washingtonpost.com/news/on-leadership/wp/2016/05/27/despite-travails-white-calls-sec-aggressive-and-successful/?utm_term=.b56a45faa8c5) (reporting “complaints” about the SEC, including that “the agency has not been tough enough on Wall Street” and has historically been “a slow and toothless tiger”).

70. *What We Do*, *supra* note 69.

Democratic President, John F. Kennedy—to serve as the SEC’s first chairman.<sup>71</sup>

Over recent decades, the gulf between the SEC’s shareholder-centric focus and greater regard for other stakeholders under state-level corporate law has come fully into focus. As of the early 1990s, state takeover law increasingly suggested that “the appropriate balance among shareholder and nonshareholder interests . . . can no longer be resolved by a facile bow in the direction of shareholder primacy,” yet at the same time, the SEC, “pursuing its usual single constituency agenda, . . . revised its proxy rules to encourage institutional shareholder activism . . . .”<sup>72</sup> While Republicans did achieve limited victories during the years of the Clinton administration in passing “securities litigation reform legislation designed to reduce the incidence of securities litigation”<sup>73</sup>—including “the *only* successful override of a presidential veto during Clinton’s two terms in office”<sup>74</sup>—the trend in federal policymaking during the Clinton years strongly favored shareholders.

Since the turn of the millennium, shareholder-centric corporate governance reforms at the federal level have picked up pace, and such reforms have uniformly emerged from the political left.<sup>75</sup> The collapse of Enron and other finance-driven corporate scandals created a real crisis of public confidence in capital markets, prompting greater federal willingness to intervene in public company corporate governance<sup>76</sup> and permitting “reformers to

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71. *Id.*

72. Millon, *Communitarians*, *supra* note 43, at 1376; *see also* Cioffi & Höpner, *supra* note 27, at 481–82.

73. Cioffi & Höpner, *supra* note 27, at 481.

74. CIOFFI, *supra* note 28, at 105–07 (describing enactment of the Private Securities Litigation Reform Act of 1995); *see also* H.R. 1058 (104<sup>th</sup>): *Private Securities Litigation Reform Act of 1995*, GOVTRACK, <https://www.govtrack.us/congress/votes/104-1995/h839> (last visited June 25, 2018) (tabulating the House votes); H.R. 1058 (104<sup>th</sup>): *Private Securities Litigation Reform Act of 1995*, GOVTRACK, <https://www.govtrack.us/congress/bills/104/hr1058> (last visited June 25, 2018) (“This bill was enacted after a congressional override of the President’s veto on December 22, 1995.”).

75. *See* Cioffi & Höpner, *supra* note 27, at 482–83; Martin Gelter, *The Pension System and the Rise of Shareholder Primacy*, 43 SETON HALL L. REV. 909, 949–50 (2013) [hereinafter Gelter, *The Pension System*]; Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1528, 1549–51, 1556 (2005).

76. CIOFFI, *supra* note 28, at 110–11.

break through the bottlenecks and veto points of politics” for a certain window of time.<sup>77</sup> As Cioffi observes of this period, one finds “for the first time . . . the interests and perceptions of the investor class [being] viewed, however questionably, as largely coterminous with those of the citizenry at large,” with consequent heavy political emphasis on the “rhetoric of shareholder value.”<sup>78</sup> Passage of the Sarbanes-Oxley Act (SOX) in 2002 indeed “represented a break with established forms of regulation and federalism in American corporate governance,” marking a shift from historically disclosure-based federal securities reforms toward “expanded federal regulatory authority over corporate accounting” and more direct regulation of the structure of the board of directors itself.<sup>79</sup> Reforms included, among other things, a requirement that the accounting firm for a public company report directly to an “audit committee” consisting entirely of independent directors<sup>80</sup>—a shift toward federally mandated independence strongly reinforced by a New York Stock Exchange requirement that “[l]isted companies must have a majority of independent directors.”<sup>81</sup> While votes on SOX’s enactment in both the House of Representatives and the Senate were virtually unanimous,<sup>82</sup> it is well understood that SOX “was the product of a political struggle between Democrats using financial scandals against the Republicans and Republicans seeking to delay or dilute the legislation in keeping with their loyalty to corporate supporters and their antiregulation ideological policy agenda.”<sup>83</sup> As Cioffi observes, Republicans ultimately “sought to neutralize the scandals as a potent November 2002 election issue by

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77. *Id.* at 137.

78. *Id.* at 110–16.

79. *See id.* at 97–99, 117, 119–20.

80. *See* Sarbanes-Oxley Act of 2002, H.R. 3763, 107th Cong. §§ 204, 301 (2002).

81. NEW YORK STOCK EXCHANGE LISTED COMPANY MANUAL § 303A.01 (last amended Nov. 25, 2009).

82. *See* H.R. 3763 (107th): Sarbanes-Oxley Act of 2002, GOVTRACK, <https://www.govtrack.us/congress/votes/107-2002/h348> (last visited June 25, 2018) (tabulating the House votes); H.R. 3763 (107th): Sarbanes-Oxley Act of 2002, GOVTRACK, <https://www.govtrack.us/congress/votes/107-2002/s192> (last visited June 25, 2018) (tabulating the Senate votes).

83. CIOFFI, *supra* note 28, at 111–12.

supporting corporate governance reform and accepting only minor compromises from the Democrats.”<sup>84</sup>

Following the financial crisis that emerged in 2007, Democrats sought numerous shareholder-focused federal reforms, achieving a number of them. Firms subject to the Troubled Asset Relief Program (TARP) faced not only pay restrictions and oversight by the Department of Treasury, but also “say-on-pay” votes giving shareholders an advisory vote on executive compensation.<sup>85</sup> More ambitiously, Democratic Senator Charles Schumer of New York introduced a bill in May 2009 that aimed to “provide shareholders with enhanced authority over the nomination, election, and compensation of public company executives” – a raft of proposed reforms styled as a “Shareholder Bill of Rights.”<sup>86</sup> Had it been enacted, Schumer’s Shareholder Bill of Rights Act would have brought with it a number of reforms strongly enhancing the corporate governance position of shareholders, including clear authority for the SEC to give shareholders greater access to the company’s proxy statement in order to nominate directors (an initiative typically referred to as “proxy access”), shareholder say-on-pay and golden parachute votes, and exchange listing rules requiring independent board chairs and annual elections of directors by majority vote (differing markedly from the default plurality voting system).<sup>87</sup> While the Shareholder Bill of Rights Act was not ultimately enacted, the Dodd-Frank Act, signed into law by President Barack Obama in July 2010, did include certain of these reforms. Dodd-Frank reforms favoring shareholders included say-on-pay and golden parachute votes, disclosure requirements focusing on how executive compensation relates to the corporation’s performance, a three-year clawback mechanism for incentive-based compensation following accounting restatements, and clear authority for the SEC to provide enhanced proxy

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84. *Id.* at 116; *see also* Romano, *supra* note 75, at 1564–65.

85. *See* American Recovery and Reinvestment Act of 2009, H.R. 1, 111th Cong. § 7001 (2009); Emergency Economic Stabilization Act of 2008, H.R. 1424, 110th Cong. §§ 111, 302 (2008).

86. Shareholder Bill of Rights Act of 2009, S. 1074, 111th Cong. pmbll., § 1 (2009).

87. *Id.* §§ 3–5.

access.<sup>88</sup> Additional Dodd-Frank reforms affecting corporate governance included a requirement that certain larger financial firms have risk committees<sup>89</sup> and additional regulation for incentive-based pay in certain financial firms that regulators conclude “could lead to material financial loss to the covered financial institution.”<sup>90</sup> The Dodd-Frank Act itself was enacted following clear party-line votes, with almost no Republicans voting in favor.<sup>91</sup>

Post-crisis reform efforts of this sort, strongly redounding to the benefit of shareholders, were sought by union pensions (among others)<sup>92</sup>—retirement funds associated with the principal purported beneficiaries of stakeholder-oriented “progressive” initiatives at the state level—and as noted, the reforms described above were enacted at the behest of Democrats. That shareholder-centric corporate governance reforms would have been adopted in response to a crisis thought to have resulted from excessive risk-taking is puzzling enough, given the well-understood preference of equity investors for greater risk-taking and the empirical literature’s association of shareholder-centric governance with poor performance in the run-up to the crisis.<sup>93</sup> That such reforms

88. See Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. §§ 951, 953, 954, 971 (2010).

89. *Id.* § 165(h).

90. *Id.* § 956(a)(1)(B). For additional background on these reform efforts, including challenges faced by regulators in operationalizing proxy access and regulation of incentive-based pay in financial firms, see BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD, *supra* note 40, at 268–72; see also Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II*, 95 MINN. L. REV. 1779, 1783, 1796–1812 (2011) [hereinafter Bainbridge, *Dodd-Frank*].

91. See H.R. 4173 (111th): *Dodd-Frank Wall Street Reform and Consumer Protection Act*, GOVTRACK, <https://www.govtrack.us/congress/votes/111-2010/h413> (last visited June 25, 2018) (tabulating the House votes); H.R. 4173 (111th): *Dodd-Frank Wall Street Reform and Consumer Protection Act*, GOVTRACK, <https://www.govtrack.us/congress/votes/111-2010/s208> (last visited June 25, 2018) (tabulating the Senate votes).

92. See, e.g., Letter from Jeff Mahoney, Gen. Counsel, Council of Institutional Inv’rs, and others, to the Honorable Nancy Pelosi, Speaker of the House 1–2 (Dec. 2, 2008), <http://www.ott.ct.gov/pressreleases/press2008/PR12022008.pdf>.

93. For an overview of this literature and corporate governance reform proposals responding to it, see BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD, *supra* note 40, at 262–65; see also CIOFFI, *supra* note 28, at 206–08; Bainbridge, *Dodd-Frank*, *supra* note 90, at 1818–19; Adam Zurofsky, *Corporations: The “Positive Discipline” Model*, DEMOCRACY: J. IDEAS (2016), <http://democracyjournal.org/magazine/41/corporations-the-positive-discipline-model/>.



would be championed by the political left, however, in stark contrast with stakeholder-oriented “progressive” initiatives in state-level corporate law, is doubly surprising. Part III explores potential explanations for this extraordinary state/federal divide among the political left.

### III. EXPLAINING THE STATE/FEDERAL DIVIDE

The disjuncture between the corporate governance policy preferences of the political left at the state and federal levels is complex indeed, though measured by reference to traditional political affiliations, it is the left’s preferences at the federal level that are more difficult to explain. As John Cioffi and Martin Höpner observe, one might reasonably expect that “the center-left should oppose, rather than support, corporate governance reform” that favors shareholders because the political economy literature “tend[s] to identify the center-left and organized labor as . . . hostile to shareholder interests.”<sup>94</sup>

Undoubtedly these phenomena reflect the interaction of numerous political factors, and this Part canvasses a range of potential explanatory variables, some of which have received substantial attention in the U.S. corporate governance literature while others have received less attention. Ultimately, I acknowledge that accounts emphasizing institutional and political distinctions between state and federal politics and regulatory regimes point us in the right direction, though such distinctions do not always in fact break the way that prior literature predicts. It has been suggested that constituencies such as organized labor have a greater voice at the federal level, though in reality such actors have demonstrably impacted corporate governance politics at the state level as well. More telling is the fact that these actors have themselves pursued very different courses at state and federal levels, often in response to legal and regulatory structures not traditionally regarded as central to “corporate governance.”

This Part of the Article argues that the diametrically opposed normative agendas pursued by left-leaning actors at state and federal levels reflect the extraordinary legal, institutional, and

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94. Cioffi & Höpner, *supra* note 27, at 464.

political complexities of corporate governance in the United States. While I acknowledge the significance of familiar distinctions between state corporate law and federal securities law as forms of regulation, and between Delaware and Washington, D.C., as sites of rulemaking, I argue that this normative divide among the left more proximately reflects structural changes in capital markets and the labor movement that have reinforced a fundamental reorientation of the Democratic Party since the mid-1980s toward decidedly centrist national politics.

Several trends have prompted a center-left politics of corporate governance at the federal level bearing no relation whatsoever to the progressive agenda for corporate law at the state level, including a reorientation of labor unions away from traditional organizing activities and toward pension management, as active union membership dwindles relative to the population of aging pensioners; an intense focus of applicable labor regulation on generating returns for pensioners, including fiduciary obligations interpreted to require pensions to engage in activism aimed at forcing corporate managers to focus intently on maximizing returns to shareholders; and the increasingly centrist Democratic Party's efforts to capitalize on these pro-shareholder trends by assembling an anti-manager "middle class" coalition of workers and financial institutions. These trends have fundamentally altered the role of corporate governance and related issues in the project of assembling a competitive electoral coalition. The legal, economic, and cultural trends that conditioned and incentivized this shift are critical to understanding the state/federal divide regarding what the "progressive" corporate governance agenda ought to be.

#### *A. Corporate v. Securities Law*

As noted above, corporate law (including in Delaware) arguably remains ambivalent regarding the degree to which corporate governance ought to empower shareholders and focus narrowly on their interests,<sup>95</sup> whereas securities regulation, essentially by design, reflects no such ambivalence when it comes

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95. See *supra* notes 61–62 and accompanying text.

to corporate governance—the clear aim of the regulatory regime and the SEC being investor protection.<sup>96</sup> While it is undoubtedly true that this mission renders securities regulation’s purview broader in some respects than that of corporate law—bondholders, for example, having standing to sue under the former regime but not the latter<sup>97</sup>—it nevertheless remains the case that in corporate governance debates the SEC has strongly favored shareholders’ interests.

It has been argued with some force that there is a fundamental complementarity between securities regulation and corporate law—the relatively homogenous interests of investors when making trades prompting undifferentiated, disclosure-based securities regulation, whereas the more heterogeneous interests of investors holding stock prompt “greater flexibility and diversity” in corporate law.<sup>98</sup> This notion of regulatory complementarity presumes that securities regulation remains a predominantly disclosure-based field. Yet, as we have already seen, there is substantial and increasing overlap between the two fields as the securities regime has, over recent decades, increasingly focused attention on core aspects of corporate governance traditionally left to the states.<sup>99</sup> In addition to proxy voting—enabled by state corporate law, yet long regulated substantially at the federal level for public companies<sup>100</sup>—core elements of public company board structure and operations have, since the turn of the millennium, come to be governed by securities regulation and associated stock exchange rules requiring (among other things) a majority independent board and fully independent audit and compensation

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96. *See supra* notes 69–74 and accompanying text.

97. *See* James J. Park, *Reassessing the Distinction Between Corporate and Securities Law*, 64 UCLA L. REV. 116, 154–55 (2017).

98. *Id.* at 121–22.

99. Park acknowledges this, framing his argument conceptually as a means of discerning what the line between these fields ought to be. *See id.* at 129–30, 157–58, 163–82; *see also* Bainbridge, *Dodd-Frank*, *supra* note 90, at 1796–812.

100. *See* DEL. CODE ANN. tit. 8, § 212(b) (2012) (authorizing voting by proxy in Delaware corporations); 15 U.S.C. § 78n (2012) (granting the SEC authority to enact rules regulating the solicitation of proxies for securities issued by companies registered under § 12 of the Securities Exchange Act of 1934); 17 C.F.R. §§ 240.14a-1–240.14b-2 (2017) (Regulation 14a, including SEC-enacted rules governing proxy solicitation).

committees.<sup>101</sup> As the securities regime looms larger in corporate governance, so too does its primary constituency—shareholders.

These dynamics are certainly relevant to explaining the state/federal divide with respect to degrees of shareholder-centrism in these two fields. Such dynamics do not, however, shed light in any clear way on the specific question that this article addresses—the divide between left-leaning voices at state and federal levels with respect to fundamental corporate governance policy preferences. As noted above, straightforward party affiliations would lead one to expect the left to adopt positions at the federal level resembling those we have encountered in “progressive” accounts of corporate law at the state level,<sup>102</sup> yet we find exactly the opposite. This political divide requires a more complete explanation.

#### B. *Delaware v. Washington, D.C.*

As opposed to focusing on the nature of state and federal legal regimes themselves, some accounts focus on the institutional settings in which they are produced. Notably, Mark Roe has explored at length the competitive dynamics between Delaware, the principal site for production of U.S. corporate law as a matter of custom and market practice, and Washington, D.C., the locus of ultimate constitutional competence in the field. Observing that no other states meaningfully compete with Delaware for cross-border incorporations,<sup>103</sup> Roe has forcefully argued that Washington, D.C.—per the Commerce Clause—represents Delaware’s true competition in the production of corporate law.<sup>104</sup>

Critically for the present inquiry, D.C. represents a very different institutional setting, bringing different inputs to bear

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101. See Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. § 952 (2010) (requiring a fully independent compensation committee); Sarbanes-Oxley Act of 2002, H.R. 3763, 107th Cong. § 301 (2002) (requiring a fully independent audit committee); NEW YORK STOCK EXCHANGE LISTED COMPANY MANUAL, *supra* note 81, § 303A.01 (last amended Nov. 25, 2009) (requiring a majority independent board).

102. See *supra* note 94 and accompanying text.

103. See Roe, *Delaware and Washington as Corporate Lawmakers*, *supra* note 34, at 5–6; see also Bruner, *Managing Corporate Federalism*, *supra* note 68, at 27–28.

104. See Roe, *Delaware’s Competition*, *supra* note 67, at 591–93, 596–97, 600–06, 632–33; see also Mark J. Roe, *Delaware’s Politics*, 118 HARV. L. REV. 2491 (2005) [hereinafter Roe, *Delaware’s Politics*].

upon the policymaking process. In his account of Delaware's corporate lawmaking position, Roe observes that, whereas the "general polity is not usually involved directly in Delaware, even though the corporation affects parties beyond managers and investors," in D.C. "the range of interests with the clout to influence policy widens beyond just investors and managers" – for example, labor and "public interest lobbying groups."<sup>105</sup> Instances in which the federal corporate governance machinery has been operationalized have tended to be "sudden, episodic, and crisis-driven,"<sup>106</sup> with reform efforts responding to public attention and "populist anger."<sup>107</sup> Roe identifies various circumstances in which Delaware is more likely to be overcome by D.C., observing that "Congress sets aside Delaware-based, quasi-private lawmaking when the media reveals gross corporate wrongdoing or when poor national economic performance is plausibly tied to corporate governance."<sup>108</sup>

Roe's account is a conceptually rich one, identifying important federal institutional features that undoubtedly affect how and when Delaware can act on its own. Distinctions regarding which actors tend to be operative at each level of government do not, however, resolve the question addressed here, because we have an identifiable political left at both state and federal levels who do not behave consistently – including particular sets of actors who have, themselves, taken inconsistent positions in the two settings. For example, as discussed further below, organized labor supported the enactment of so-called "constituency" statutes in response to hostile takeovers<sup>109</sup> yet has also supported shareholder-centric

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105. Roe, *Delaware's Politics*, *supra* note 104, at 2499–504; *see also* Bainbridge, *Dodd-Frank*, *supra* note 90, at 1784–85.

106. CIOFFI, *supra* note 28, at 137.

107. Bainbridge, *Dodd-Frank*, *supra* note 90, at 1786–87; *see also* Bruner, *Conceptions of Corporate Purpose*, *supra* note 4, at 553–60.

108. *See* Roe, *Delaware's Politics*, *supra* note 104, at 2529; *see also* Bainbridge, *Dodd-Frank*, *supra* note 90, at 1815–19 (advancing a similar critique of Dodd-Frank reforms); Romano, *supra* note 75, at 1525–29, 1563, 1566 (arguing that a crisis context facilitated adoption of SOX reforms, unrelated to Enron's problems, that "policy entrepreneurs" sought for other reasons).

109. *See* Mark J. Roe, *Capital Markets and Financial Politics: Preferences and Institutions*, in *THE OXFORD HANDBOOK OF CORPORATE GOVERNANCE* 79, 83 (Mike Wright et al. eds., 2013) (observing that the AFL-CIO supported adoption of Pennsylvania's anti-takeover law); *cf.* Lynne L. Dallas, *Working Toward a New Paradigm*, in *PROGRESSIVE CORPORATE LAW*

corporate governance reform efforts at the federal level—including initiatives aimed at reducing barriers to hostile takeovers.<sup>110</sup> Accordingly, a full explanation of the divide regarding corporate governance among left-leaning actors at state and federal levels will require some account of the perceived interests of labor, in particular, as they are formulated in different settings and at different times.

### C. *The Rise of Institutions*

In addition to substantive dimensions of the relevant legal fields and institutional dimensions of the relevant state and federal regulatory fora, important market developments have affected the manner in which various actors conceptualize and pursue their interests. Among such market developments, the rise of institutional investors has substantially impacted the salience of shareholder interests in political and market discourse.

For decades, it has been commonplace to describe the U.S. public company as reflecting a “separation of ownership and control,” with widely dispersed minority stockholders remaining entirely passive, and accordingly permitting corporate power to default entirely to the board of directors and appointed officers.<sup>111</sup> At least from the 1930s, large corporations “were seen as autonomous entities governed by a professional, managerial class[,]” and “progressive” scholars placed great emphasis on their capacities to satisfice various constituencies.<sup>112</sup> Peter Gourevitch and James Shinn describe these middle decades of the twentieth century as reflecting “an American version of the corporatist compromise.” During this period, corporate governance “was part

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35, 52 (Lawrence E. Mitchell ed., 1995); Roe, *Delaware and Washington as Corporate Lawmakers*, *supra* note 34, at 25–26.

110. See *infra* Sections III.D–E.

111. ADOLPH A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 5–7 (Transaction Publishers 2010) (1932).

112. Tsuk, *supra* note 31, at 1899–900, 1903–04. Nobel Prize-winning economist Herbert Simon coined the term “satisficing” to describe pursuit of what is “good enough,” in contrast with seeking to maximize. As applied to organizational managers, Simon wrote that “Whereas economic man maximizes, selects the best alternative from among all those available to him, . . . his cousin, administrative man, satisfices, looks for a course of action that is satisfactory or ‘good enough.’” See *Herbert Simon*, *ECONOMIST* (Mar. 20, 2009), <http://www.economist.com/node/13350892> (quoting Simon).

and parcel” of the post-New Deal economic and regulatory environment and was largely “produced by the coalition that supported it: farmers and landowners, labor, industries of many kinds seeking help, thus another burst of populism mixed with owner interests that wanted a regulated economy.”<sup>113</sup> By the 1970s, however, the market began to shift in favor of large, and increasingly assertive, institutional investors.<sup>114</sup> Today they are decidedly “the dominant players” in capital markets, with institutions, including pensions, investment companies (e.g., mutual funds), insurers, university endowments, and bank trust departments collectively holding “approximately three-fourths of the 1,000 largest U.S. corporations and around 70% of the shares of all U.S. corporations.”<sup>115</sup> Such institutions have substantially re-concentrated the otherwise dispersed shareholdings that typified public company stock ownership through much of the twentieth century. Accordingly, shareholders in this institutional form no longer remain passive bystanders—a market reality fostering the emergence of effective advocates for the enhancement of shareholder-centrism, bringing extraordinary market power to bear upon corporate governance.<sup>116</sup>

This greater capacity for, and predilection toward, activism has included reinvigorated use of shareholders’ voting power, both directly and through proxy advisors. It is critical to observe, however, that this re-concentration of voting power has effectively empowered professional managers, not the actual beneficial investors in their funds, creating what now-Chief Justice of the Delaware Supreme Court Leo Strine has called a “separation of ownership from ownership.”<sup>117</sup> This is potentially problematic because the underlying beneficial investors often save for long-term goals, such as retirement or the education of their children,

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113. PETER A. GOUREVITCH & JAMES SHINN, *POLITICAL POWER AND CORPORATE CONTROL: THE NEW GLOBAL POLITICS OF CORPORATE GOVERNANCE* 245–46 (2005).

114. See Tsuk, *supra* note 31, at 1899–900, 1903–04.

115. Millon, *Shareholder Social Responsibility*, *supra* note 46, at 913 (footnote omitted).

116. See Tsuk, *supra* note 31, at 1903–09.

117. Strine, *Toward Common Sense*, *supra* note 43, at 15.

yet the institutions hired to help them achieve these goals often face “pressure to generate short-term results.”<sup>118</sup>

The market pressures resulting from institutions’ short-term time horizon, and greater capacity to enforce more shareholder-centric corporate management, have led David Millon to distinguish between the “traditional” shareholder primacy model, preserving a high degree of board discretion to focus on the long-term and to temper profit maximization, and a new “radical” shareholder primacy model focusing primarily on quarterly earnings and styling the board as a mere agent of the shareholders (economically, if not legally)—a model drawing power from Chicago-school law and economics scholarship.<sup>119</sup> While there may be “no legal authority for the radical shareholder primacy” model, it most assuredly reflects a powerful phenomenon of market culture, and understanding its roots in market and legal pressures exerted upon the institutions themselves is critical to developing a full account of the role of shareholders in modern corporate governance.<sup>120</sup> It is also critical to understanding why left-leaning actors, including labor unions, have sought very different things in state and federal settings—a complex matter addressed in the remainder of Part III of the Article.

#### *D. The Evolution of Organized Labor Interests*

The power base, the interests, and even the identity of organized labor in the United States have evolved substantially over recent decades, and understanding why actors associated with organized labor have increasingly supported—and indeed vocally advocated—shareholder-centric federal corporate governance reforms requires an account of these changes. As this section

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118. See *id.* at 10. Strine’s account is broadly consistent with the “financialization” literature, which has explored “the intensification of pressures on managers to prioritize what are ostensibly ‘owner’ interests in the light of changes in investor composition and behavior,” while emphasizing that “financial intermediaries” themselves have increasingly marginalized both corporate managers and the “ordinary investors” who the institutions ostensibly represent. See Geoffrey Wood & Mike Wright, *An Age of Corporate Governance Failure? Financialization and Its Limits*, in *THE OXFORD HANDBOOK OF CORPORATE GOVERNANCE* 703, 703 (Mike Wright et al. eds., 2013).

119. See generally Millon, *Radical Shareholder Primacy*, *supra* note 16.

120. *Id.* at 1034–42.



explains, there are essentially two dimensions to this—the rise of union-sponsored pensions as prominent institutional investors and the fall of union organizations themselves as labor representatives.

Since the 1970s, “defined benefit” pensions, under which employers are obligated to meet a certain payout level and bear investment risk to meet that obligation, have increasingly given way to “defined contribution” pensions (such as 401(k) and 403(b) plans), under which employers’ sole obligation is to provide the promised contributions. Critically, defined contribution plans place the investment risk associated with meeting a desired payout level on the employees themselves.<sup>121</sup> According to a report of the Treasury Inspector General for Tax Administration, from 1977 to 2007, “the number of participants in defined contribution plans increased 358 percent (from 14.6 million to 66.9 million workers) compared to a 31 percent *decrease* in defined benefit plan . . . participants (from 28.1 million workers to 19.4 million workers).”<sup>122</sup> Whereas 65.8 percent of workers with employer-sponsored retirement plans in 1977 had defined benefit plans, by 1997 “the percentages had completely reversed,” with 67.8 percent then having defined contribution plans.<sup>123</sup> By 2007, 77.5 percent had defined contribution plans.<sup>124</sup>

This shift has effectively turned a large swathe of American working families into investors, partially merging employee and investor identities in public discourse. As Martin Gelter has observed, in a defined contribution plan, “an employee is a shareholder, namely either a diversified investor in the capital market or in his own employer through an ESOP” (an employee stock ownership plan)—a shift that naturally tends to predispose employees themselves to look more favorably upon shareholder-

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121. See TREASURY INSPECTOR GEN. FOR TAX ADMIN., NO. 2010-10-097, STATISTICAL TRENDS IN RETIREMENT PLANS 2, 5–8 (Aug. 9, 2010); Gelter, *The Pension System*, *supra* note 75, at 921–25.

122. TREASURY INSPECTOR GEN. FOR TAX ADMIN., *supra* note 121, at 7.

123. *Id.* at 8.

124. *Id.* For additional background on these dramatic shifts, see EMP. BENEFITS SEC. ADMIN., U.S. DEP’T OF LABOR, DOLOPS14D0017, PRIVATE PENSION PLAN BULLETIN HISTORICAL TABLES AND GRAPHS 1975–2014 (Sept. 2016).

centric policies.<sup>125</sup> Interestingly, the data still confirm that “the shareholder class . . . retains elite characteristics.” The “modal shareholder” (revealed by a study of the Fed’s Survey of Consumer Finances and IRS data) is “rich, old, and white.”<sup>126</sup> These trends have, however, undeniably altered the politics of corporate governance and fueled the perception that various socioeconomic strata, notably the “middle class,” have a substantial stake in the capital market—and that the value of that stake would be materially enhanced by embrace of shareholder-centric policies.<sup>127</sup>

More pertinently, for purposes of understanding the state/federal divide in left-leaning corporate governance preferences, these developments have radically altered the position of organized labor via their associated pensions, which manage substantial retirement assets and accordingly find themselves in the position of shareholders—a shift in posture that has been reinforced by attenuation of traditional union activities as union membership declines. “Since its peak in 1954 at approximately 25 million workers or 39.2% of the U.S. workforce, the number of organized laborers has declined to 15.4 million or 12% of the U.S. workforce in 2006.”<sup>128</sup> In light of these trends, with their pensions looming larger and their traditional organizing activities fading

125. Gelter, *The Pension System*, *supra* note 75, at 943, 946–48; *see also* Natalie C. Cotton Nessler & Gerald F. Davis, *Stock Ownership, Political Beliefs, and Party Identification from the “Ownership Society” to the Financial Meltdown*, 2 ACCT. ECON. & L. 1, 2–3 (2012).

126. William W. Bratton & Michael L. Wachter, *Shareholders and Social Welfare*, 36 SEATTLE U. L. REV. 489, 490–91 (2013).

127. *See* BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD, *supra* note 40, at 275–86; Bruner, *Conceptions of Corporate Purpose*, *supra* note 4, at 553–60; *see also* GERALD F. DAVIS, THE VANISHING AMERICAN CORPORATION: NAVIGATING THE HAZARDS OF A NEW ECONOMY 61–65 (2016).

128. Ashwini K. Agrawal, *Corporate Governance Objectives of Labor Union Shareholders: Evidence from Proxy Voting*, 25 REV. FIN. STUD. 187, 191–92 (2012); *see also* Megan Dunn & James Walker, *Union Membership in the United States, Spotlight on Statistics*, U.S. DEP’T LAB. BUREAU LAB. STAT. 1–5 (Sept. 2016), <https://www.bls.gov/spotlight/2016/union-membership-in-the-united-states/pdf/union-membership-in-the-united-states.pdf> (reporting that union membership in the private sector has fallen substantially since the 1980s, and that “five industries accounted for 81 percent of [private sector] union members in 2015,” including education and health services at 1.9 million, manufacturing at 1.4 million, transportation and utilities at 1.1 million, construction at 940,000, and wholesale and retail trade at 871,000); Graham K. Wilson, *American Federation of Labor and Congress of Industrial Organizations*, in 1 THE OXFORD COMPANION TO AMERICAN POLITICS 50, 51–52 (David Coates ed., 2012).

from their prior significance, “obtaining a good return on their investments for aging members became relatively more important.”<sup>129</sup>

A substantial percentage of union pension fund assets are invested in U.S. stocks,<sup>130</sup> reflecting the fact that equities are “the only type of investment to yield profits that are high enough ‘to make retirement income programs work.’”<sup>131</sup> Indeed, the need to generate returns sufficient to meet current obligations represents a critical driver of institutional investors’ behavior more generally. For example, public pension plans (generally structured as defined benefit plans) “have historically assumed an annual rate of return of 8% give or take a half point” in order to fund current obligations—an impossibility for most since the financial crisis, prompting “a focus on short-term stock price performance” and “high turnover rates.”<sup>132</sup> Similar challenges face employer-sponsored pensions (particularly those that remain defined benefit plans), as well as other forms of institutional investors.<sup>133</sup>

Naturally, these practical realities condition policy preferences, and there are certainly areas in which shareholders and workers easily find common cause. Workers might join shareholders in favoring greater transparency as a means of ensuring job security (e.g., by promoting better accounting and reducing managerial “moral hazard”) and constraining executive compensation “widely perceived as excessive by shareholders and workers alike.”<sup>134</sup> Predictably, workers become more likely to align with such a “transparency coalition” when their “financial

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129. Gelter, *The Pension System*, *supra* note 75, at 956; *see also* Bratton & Wachter, *supra* note 126, at 513–14; Eugene Scalia, *The New Labor Activism*, WALL STREET J., Jan. 23, 2008, at A24.

130. *See* Agrawal, *supra* note 128, at 192 (“Approximately 46% of all union pension assets are invested in domestic equities as of September 30, 2006.”).

131. Gelter, *The Pension System*, *supra* note 75, at 928.

132. Millon, *Shareholder Social Responsibility*, *supra* note 46, at 930–32.

133. *See id.* at 933–34; *see also* PYRAMIS GLOBAL ADVISORS, US TAFT-HARTLEY (UNION): MOVING FORWARD DESPITE UNCERTAINTY 4 (Leadership Series: 2013 Pyramis US Taft-Hartley (Union) Pulse Poll, 2013) (“Generating greater risk-adjusted returns may be one of the only viable ways for Taft-Hartley [defined benefit] plans to grow their assets.”); TREASURY INSPECTOR GEN. FOR TAX ADMIN., *supra* note 121, at 5, 12–13 (observing that many defined benefit plans are underfunded).

134. GOUREVITCH & SHINN, *supra* note 113, at 209.

share increases,” as straightforwardly occurs when pension assets are invested in stocks.<sup>135</sup>

There has been considerable debate regarding whether, in fact, advocacy efforts by union pensions have been truly focused on maximizing shareholder wealth, or rather have tended to advance labor interests (for example, by targeting companies with labor problems).<sup>136</sup> To date, the empirical literature on union pension fund incentives, and the effects of their advocacy, remains mixed.<sup>137</sup> One study found that “AFL-CIO-affiliated shareholders become significantly less opposed to directors once the AFL-CIO labor organization no longer represents a firm’s workers” — a pattern differing from other forms of institutional investors<sup>138</sup> and straightforwardly in tension with legal obligations imposed upon pension fund management under federal law.<sup>139</sup> Others, however, examining the impact of “labor union-sponsored shareholder proposals” on various shareholder and labor interests, generally find no “observable patterns,” although there are limited circumstances where union proposals appear to have consequentially advanced shareholder interests, or to have increased unionization rates, respectively.<sup>140</sup>

Accordingly, it appears that union pension fund activism could plausibly advance shareholder interests, or worker/union interests, as the case may be—and these mixed findings may

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135. Darcillon, *supra* note 35, at 667–68; *see also* Bratton & Wachter, *supra* note 126, at 513–14.

136. *See, e.g.*, Bainbridge, *Dodd-Frank*, *supra* note 90, at 1816–17 (“[U]nion and state and local pension funds are precisely the shareholders most likely to use their positions to self-deal . . . or to otherwise reap private benefits not shared with other investors.”); Scalia, *supra* note 129 (describing, in 2008, “a reported AFL-CIO plan to promote shareholder proposals that press companies to offer more generous employee health-care benefits”).

137. *See, e.g.*, Agrawal, *supra* note 128, at 189; Jay B. Kesten, *Shareholder Political Primacy*, 10 VA. L. & BUS. REV. 161, 201–03 (2016); Andrew K. Prevost et al., *Labor Unions as Shareholder Activists: Champions or Detractors?*, 47 FIN. REV. 327, 330 (2012).

138. Agrawal, *supra* note 128, at 187; *see also* David F. Larcker & Brian Tayan, *Union Activism: Do Union Pension Funds Act Solely in the Interest of Beneficiaries?* 2–3 (Stanford Closer Look Series, 2012).

139. *See infra* Section III.E.

140. Prevost et al., *supra* note 137, at 327, 342–44 (“[M]ajority support of proposals interact to produce more independent boards following targeting with a statistically stronger effect within the unionized portion of the sample. . . . Targets that have no initial union presence show a significant increase in unionization over the following three years following targeting.”).

simply illustrate the contradictory position in which unions and their associated pension funds have found themselves over recent decades.<sup>141</sup> As Richard Marens has described,

[O]rganized labor has explored ways to use its capital as a tool to create new union jobs, back unionized companies with investment funds, set up “worker-owner councils” in a few cities to discuss issues with local corporations, and establish mutual funds that channeled union pension plans toward worker-friendly public corporations.<sup>142</sup>

He concludes, however, that “it is difficult to claim that these efforts have done a great deal for organized labor in the United States,” given substantial drops in wages and unionization rates,<sup>143</sup> and that in fact “labor’s financial activism has . . . done more for capital than it has . . . accomplished for labor.”<sup>144</sup>

Following a period of limited, and often labor-oriented, activism in the 1970s and early 1980s, union pension fund activism began to change fundamentally in the mid-1980s following alignment with the Council of Institutional Investors, which strongly emphasized corporate governance reform. “Organized labor had never before promoted governance reform, which has typically included reducing barriers to potential takeovers,” Marens writes, even though some unions had “assisted companies in establishing legal barriers to takeovers during the height of the frenzy in the 1980s, for fear of downsizing or union busting by the raider.”<sup>145</sup> In the early 1990s, then, foreign investments “posed an

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141. See, e.g., Marcel Kahan & Edward Rock, *Symbolic Corporate Governance Politics*, 94 B.U. L. REV. 1997, 2000, 2040–41 (2014) (describing a union shareholder proposal to redeem a poison pill); Prevost et al., *supra* note 137, at 328 (“[T]he dual role of labor unions as collective bargaining agents and as stewards of their members’ pension funds means that they are fraught with an inherent conflict of interest.”); Pendleton & Gospel, *supra* note 31, at 645–46, 649–51 (observing that short-termism among pension funds breeds short-termism among corporate management, and that increased shareholder-centrism leads to lower worker pay and potentially discourages collective bargaining).

142. Marens, *supra* note 4, at 109.

143. *Id.* at 117–18.

144. *Id.* at 110.

145. *Id.* at 113; see also, *History*, COUNCIL INSTITUTIONAL INV., [http://www.cii.org/cii\\_history](http://www.cii.org/cii_history) (last visited June 25, 2018) [hereinafter COUNCIL INSTITUTIONAL INV.] (“Our voting membership has grown to more than 125 public, union and corporate employee benefit plans, endowments and foundations with combined assets that exceed \$3.5 trillion.”); Prevost et al., *supra* note 137, at 333–35 (finding that a “common theme

especially sharp conflict for the labor funds," as union organizations themselves had no interest in "subsidizing the loss of American jobs," yet their pension funds naturally sought strong returns—including abroad—in order to support benefits payments.<sup>146</sup> Overall, however, the "effort and resources they have expended on behalf of organized labor have made it legally and organizationally easier for shareholders to communicate, organize, put forward proposals, and compel management to change its behavior."<sup>147</sup>

*E. Unintended Regulatory Consequences in External Regulation*

It is important to observe that the mere fact of conflicting incentives does not explain why an actor's behavior would break in one or the other direction. Understanding why organized labor's activism has tended so heavily to favor the empowerment and interests of shareholders at the federal level—in stark contrast with their impact, and the traditional conceptualization of their interests, at the level of state corporate law—requires some account of the legal rules and other constraints within which union pension funds operate.

As with many complex phenomena involving the interaction of regulatory constraints and market forces, there is plenty of room for the law of unintended consequences to operate—and that is all the more true at the federal level, where policymakers have to address a much broader array of issues involving a much broader array of constituencies.<sup>148</sup> At least two such instances have arisen at the federal level with the unintended consequence of substantially bolstering the degree of shareholder-centrism prevailing in U.S. corporate governance, one involving tax and the other—perhaps ironically—involving labor regulation intended to protect workers.

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addressed by union-sponsored shareholder proposals is the elimination of antitakeover devices" and that such proposals "met with the greatest degree of success," particularly those addressing poison pills).

146. Allen R. Myerson, *Labor Unions Flex Pension Muscle*, N.Y. TIMES, May 23, 1993, § 3, at 15.

147. Marens, *supra* note 4, at 120.

148. Cf. Roe, *Delaware's Politics*, *supra* note 104, at 2499-504.

On the tax side, in response to perceived excesses in the compensation of public company executives, Congress amended the Internal Revenue Code in 1993 to provide that compensation beyond \$1 million would be deductible for the corporation (as a business expense) only if performance based.<sup>149</sup> The result, however, was not the desired reduction in executive compensation but rather an explosion in the equity-based component of executives' overall compensation packages. This strongly skewed management incentives in large public companies toward a narrow focus on stock price, which in turn (among other things) is thought to have contributed to the climate of excessive risk-taking that led to the recent financial crisis.<sup>150</sup>

The other such instance of unintended regulatory consequences, which is directly pertinent to the political questions addressed here, stems from the Employee Retirement Income Security Act (ERISA),<sup>151</sup> a federal law enacted in 1974 to ensure responsible management of pension assets in private employer-sponsored retirement funds. "ERISA imposed more severe regulatory burdens on [defined-benefit] plans than [defined-contribution] plans," creating a substantial skew toward defined-contribution plans and undermining the bonding effect between labor and management that defined-benefit plans had forged.<sup>152</sup> Additionally, ERISA imposed fiduciary duties upon plan managers<sup>153</sup> that have virtually required them not only to focus intently on maximizing returns to the plan as corporate shareholders but to engage in strong-form activism to enhance the overall degree of shareholder-centrism prevailing in U.S. corporate governance.

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149. See BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD, *supra* note 40, at 173-74.

150. For additional background, see Bruner, *Corporate Governance Reform in a Time of Crisis*, *supra* note 68, at 316-17. Note that the recently enacted "Tax Cuts and Jobs Act" has "remove[d] the exception . . . for qualified performance-based compensation, making it subject to the \$1 million deduction limit for taxable years commencing after Dec. 31, 2017." Joseph E. Bachelder III, *Executive Pay at Public Corporations After Code §162(m) Changes*, N.Y. L.J. (Mar. 22, 2018), <https://www.law.com/newyorklawjournal/2018/03/22/executive-pay-at-public-corporations-after-code-%C2%A7162m-changes/>.

151. See 29 U.S.C. §§ 1001-1461 (2018).

152. Gelter, *The Pension System*, *supra* note 75, at 929-32 (observing that defined-benefit plans incentivized labor to remain with their employer and, to the degree underfunded, deterred "driving a very hard bargain").

153. *Id.* at 956.

ERISA requires pension fund fiduciaries to manage employees' retirement assets prudently and loyally, which, in this context, has been taken to require a single-minded focus on generating returns to pay benefits to pension beneficiaries. "Employee welfare benefit plans" and "employee pension benefit plans"<sup>154</sup> are required to maintain "a written instrument" that "shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan," which authority may be delegated to "an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan."<sup>155</sup> Plan management, then, is subject to fiduciary duties spelled out in the statute. Notably, a plan fiduciary "shall discharge his duties with respect to a plan *solely* in the interests of the participants and beneficiaries" and "for the *exclusive purpose* of . . . providing benefits to participants and their beneficiaries."<sup>156</sup> In other words, the statute requires strict loyalty to plan beneficiaries, an obligation that has come to be understood to require intense focus on maximizing plan assets, as described below. Additionally, a plan fiduciary must act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."<sup>157</sup> This specifically includes "diversifying the investments of the plan so as to minimize the risk of large losses" (unless prudence dictates otherwise).<sup>158</sup> Such fiduciaries must also act "in accordance with the documents and instruments governing the plan."<sup>159</sup> These provisions essentially impose duties of care, loyalty, and obedience similar to those arising in other fiduciary contexts. Consistent with the foregoing, ERISA expressly prohibits various forms of transactions that straightforwardly involve conflicts of

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154. See 29 U.S.C. § 1002(1)-(3) (2012).

155. *Id.* § 1102(a)(1), (c)(3).

156. *Id.* § 1104(a)(1)(A)(i) (emphasis added).

157. *Id.* § 1104(a)(1)(B).

158. *Id.* § 1104(a)(1)(C).

159. *Id.* § 1104(a)(1)(D).



interest, including “use by or for the benefit of, a party in interest, of any assets of the plan”<sup>160</sup>—a provision that would appear straightforwardly to preclude voting securities held by the plan for the benefit of anyone other than beneficiaries. Fiduciaries who breach these duties

shall be personally liable to make good to such plan any losses . . . and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate.<sup>161</sup>

An interesting—and certainly ironic—consequence of the intense focus on maximizing plan assets mandated by ERISA’s fiduciary duties is that interpretations of these statutory requirements promulgated by the U.S. Department of Labor (DOL) over the years have been among the most consequential, and highly shareholder-centric, regulatory documents affecting corporate governance to have arisen in any U.S. legal setting. The DOL has stated in an interpretive bulletin that the “fiduciary act of managing plan assets that are shares of corporate stock includes the voting of proxies appurtenant to those shares of stock”<sup>162</sup>—a position virtually requiring active engagement by pension plans as shareholders of the companies in which they invest. Accordingly, it is unsurprising that there was a spike in “labor-sponsored resolutions that reached a vote” following adoption of this policy position in the 1990s.<sup>163</sup> In exercising such voting powers, then, the DOL interpretive bulletin essentially requires intense focus on profit maximization. The DOL explains that ERISA’s fiduciary duties

require that, in voting proxies, the responsible fiduciary consider those factors that may affect the value of the plan’s investment *and not subordinate the interests of the participants and beneficiaries in their retirement income to unrelated objectives*. . . . The named

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160. *Id.* § 1106(a)(1)(D).

161. *Id.* § 1109(a).

162. 29 C.F.R. § 2509.2016-01(1) (2017) (“Interpretive bulletin relating to the exercise of shareholder rights and written statements of investment policy, including proxy voting policies or guidelines.”); *see also* Larcker & Tayan, *supra* note 138, at 1.

163. Marens, *supra* note 4, at 113–14.

fiduciary must carry out this responsibility solely in the interests of the participants and beneficiaries and without regard to its relationship to the plan sponsor.<sup>164</sup>

The categorical nature of this injunction bears emphasizing: the DOL underscores that ERISA fiduciary duties “require” focus on investment value and that the fiduciary cannot “subordinate” investment value to “unrelated objectives.”

The impact of the DOL’s statement goes further, however, effectively requiring active pursuit of greater shareholder-centrism in corporate governance. The DOL interprets ERISA’s fiduciary duties not merely to require engaged proxy voting focusing on “the value of the plan’s investment” but affirmative shareholder activism.<sup>165</sup> In the same interpretive bulletin, the DOL endorses “maintenance . . . of a statement of investment policy” as “consistent with the fiduciary obligations set forth in ERISA[,]”<sup>166</sup> a signal strongly suggesting that the DOL would look askance at failure to maintain such a statement. The bulletin elaborates, then, that “a statement of proxy voting policy would be an important part of any comprehensive statement of investment policy”<sup>167</sup> and indicates that an

investment policy that contemplates activities intended to monitor or influence the management of corporations in which the plan owns stock is consistent with a fiduciary’s obligations under ERISA where the responsible fiduciary concludes that there is a reasonable expectation that such monitoring or communication with management . . . is likely to enhance the value of the plan’s investment.<sup>168</sup>

Lest the significance of this quasi-injunction be lost on plan fiduciaries,<sup>169</sup> in another passage worth quoting at length, the DOL identifies governance-related topics upon which plan fiduciaries

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164. 29 C.F.R. § 2509.2016-01(1) (emphasis added).

165. *Id.* § 2509.2016-01(2).

166. *Id.*

167. *Id.*

168. *Id.* § 2509.2016-01(3) (“Shareholder Engagement”).

169. *Cf.* Strine, *Toward Common Sense*, *supra* note 43, at 5–6 (suggesting that shareholder proposals are pursued instrumentally to demonstrate compliance with ERISA fiduciary duties).

might engage, and even potential means of imposing their views, again with a single-minded focus on profit maximization:

Active monitoring and communication activities would generally concern such issues as the independence and expertise of candidates for the corporation's board of directors and assuring that the board has sufficient information to carry out its responsibility to monitor management. Other issues may include such matters as governance structures and practices, particularly those involving board composition, executive compensation, transparency and accountability in corporate decision-making, responsiveness to shareholders, the corporation's policy regarding mergers and acquisitions, the extent of debt financing and capitalization, the nature of long-term business plans including plans on climate change preparedness and sustainability, governance and compliance policies and practices for avoiding criminal liability and ensuring employees comply with applicable laws and regulations, the corporation's workforce practices (*e.g.*, investment in training to develop its work force, diversity, equal employment opportunity), policies and practices to address environmental or social factors that have an impact on shareholder value, and other financial and non-financial measures of corporate performance. *Active monitoring and communication may be carried out through a variety of methods including by means of correspondence and meetings with corporate management as well as by exercising the legal rights of a shareholder.*<sup>170</sup>

In no uncertain terms, the DOL's guidance conveys to plan fiduciaries that the DOL expects them to engage with management on a host of governance-related issues; that in so engaging, their single-minded focus is to be maximizing plan assets; and that considerable exertion toward this end is expected—not merely through “correspondence and meetings,” but potentially including “exercising the legal rights of a shareholder,”<sup>171</sup> leaving to the imagination whether the DOL has in mind the shareholder franchise, shareholder proposals, lawsuits, or all of the above.

The thrust of this guidance has hardly been lost on the marketplace. The interpretive bulletin described above was

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170. 29 C.F.R. § 2509.2016-01(3) (emphasis added).

171. *Id.*

adopted in late 2016, revising prior guidance on these matters, to encourage further “voting [of] proxies and engaging in other prudent exercises of shareholder rights” (by removing any implication that elaborate “cost-benefit analysis” is required in all instances to justify such action).<sup>172</sup> In adopting these revisions, the DOL stated that the “existence of financial benefits associated with shareholder engagement is suggested by the fact that a growing number of institutional investors are now engaging companies on [environmental, social, or governance] issues,” adding that “[o]ther market developments further substantiate the financial benefits from shareholder engagement.”<sup>173</sup> These statements underscore the DOL’s expectation of affirmative shareholder activism by ERISA fiduciaries, prompting market observers to predict that “[s]hareholder activism could increase this year in the wake of [this] new Labor Department guidance.”<sup>174</sup>

A related area with which the DOL has been concerned, and where the Department’s vacillation over time has reflected some ambivalence regarding the degree to which plan fiduciaries must act as financially driven shareholders, involves the selection of plan investments. The DOL has been particularly unsure how to handle so-called “economically targeted investments” (ETIs), which are “selected for the economic benefits they create apart from their investment return to the employee benefit plan.”<sup>175</sup> Whereas under Republican administrations the DOL had “discouraged, if not forbidden, efforts by pension funds to pursue social goals,” the Clinton administration “generally favor[ed] broader labor rights and the channeling of investments to create jobs.”<sup>176</sup> An interpretive bulletin issued by the DOL in 1994

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172. Interpretive Bulletin Relating to the Exercise of Shareholder Rights and Written Statements of Investment Policy, Including Proxy Voting Policies or Guidelines, 81 Fed. Reg. 95879, 95879–80 (Dec. 29, 2016) (to be codified at 29 C.F.R. pt. 2509) (providing “supplemental views” associated with DOL’s withdrawal of Interpretive Bulletin 2008-2 and adoption of Interpretive Bulletin 2016-1, “which reinstates the language of Interpretive Bulletin 94-2 with certain modifications”); *see also* 29 C.F.R. § 2509.08-2 (repealed 2016).

173. Interpretive Bulletin, *supra* note 172, at 95881.

174. *See* Michael Greene, *DOL Guidance Sparking Corporate Fears of More Activism in 2017*, BLOOMBERG BNA (Jan. 4, 2017).

175. 29 C.F.R. § 2509.2015-01 (2017) (“Interpretive bulletin relating to the fiduciary standard under ERISA in considering economically targeted investments.”).

176. Myerson, *supra* note 146, at 15.

endorsed such investments as long as they generated a competitive return for the plan relative to the risks involved—an apparent effort to square “social investing” with ERISA’s fiduciary duties, which was criticized for potentially creating “inappropriate pressures to make such investments.”<sup>177</sup>

In 2008, this approach was superseded by a new bulletin reflecting “a series of interpretive positions taken by the DOL in individual letters” over intervening years that effectively carved back at ETIs, clarifying that the cases where such investments would be viewed as consistent with ERISA’s fiduciary duties were “very limited.”<sup>178</sup> Plan fiduciaries would have to be prepared to show that the ETI and available alternative investments were “economically indistinguishable,” meaning “truly equal, taking into account a quantitative and qualitative analysis of the economic impact on the plan” before the ETI could be selected.<sup>179</sup> This 2008 bulletin was itself superseded in 2015,<sup>180</sup> however, when the DOL apparently abandoned entirely the concept of having a distinct test or approach to ETIs. The new 2015 guidance simply directs plan fiduciaries to a previously issued regulation on ERISA’s prudence requirements and states that any investment “will not be prudent if it would be expected to provide a plan with a lower rate of return than available alternative investments with commensurate degrees of risk or is riskier than alternative available investments with commensurate rates of return.”<sup>181</sup> The DOL here emphasizes that the “fiduciary standards applicable to ETIs are no different than the standards applicable to plan investments generally.”<sup>182</sup>

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177. Edward A. Zelinsky, *ETI, Phone the Department of Labor: Economically Targeted Investments, IB 94-1 and the Reincarnation of Industrial Policy*, 16 BERKELEY J. EMP. & LAB. L. 333, 347–48 (1995) (observing that “groups expecting to benefit from ETIs have strong incentives to compel such trustees to declare ties,” permitting investment in ETIs under the DOL’s 1994 formulation).

178. Donald P. Carleen et al., *DOL Issues Economically Targeted Investment and Proxy Voting Guidance 1-2* (Oct. 24, 2008), <http://www.friedfrank.com/siteFiles/Publications/998D0DCCAAAE080E1ECAEA4F75A4424.pdf> (quoting the 2008 interpretive bulletin).

179. *Id.* (quoting the 2008 interpretive bulletin).

180. See 29 C.F.R. § 2509.08-1 (repealed 2015).

181. 29 C.F.R. § 2509.2015-01 (2017).

182. *Id.*; see also 29 C.F.R. § 2550.404a-1 (2017) (“Investment duties.”).

In light of the foregoing, we should hardly be shocked to find pension fiduciaries subject to ERISA, and those advising them, advocating strongly shareholder-centric conceptions of corporate governance. This is readily apparent, for example, in proxy voting guidelines promulgated for union pensions. Union pension funds that are “affiliated with the same umbrella organization” typically “synchronize their proxy voting decisions by employing a third-party fiduciary” who “cast[s] votes in consultation with the head officers of the umbrella labor organization under which the individual union funds are associated” – the “AFL-CIO Office of Investment” being a prominent example.<sup>183</sup> In the AFL-CIO’s case, their proxy voting guidelines are expressly aimed at compliance with “fiduciary duties as outlined in [ERISA] and subsequent [DOL] policy statements,” particularly the duty of loyalty and the exclusive purpose rule.<sup>184</sup> The guidelines leave little doubt that the AFL-CIO hears the DOL loud and clear regarding the imperative of focusing exclusively on maximizing plan assets and the de facto expectation that fiduciaries will engage in shareholder activism,<sup>185</sup> and “AFL-CIO union pensions funds are,” in fact, regarded as “some of the most involved shareholder activists.”<sup>186</sup> While the guidelines express regard for the interests of “important corporate constituents such as . . . employees and the communities in which they operate,” and preserve some capacity to support “corporate responsibility or social issue shareholder proposals,” in both instances the guidelines carefully cabin such considerations by reference to “long-term” corporate success.<sup>187</sup> The guidelines indeed express commitment to long-term decision-making throughout,<sup>188</sup> blaming recent corporate scandals and the financial crisis on “executives [who] sacrifice[d] long-term value creation for short-term greed.”<sup>189</sup> Yet the guidelines endorse numerous corporate governance structures that strongly empower

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183. Agrawal, *supra* note 128, at 192-93; *see also* Marens, *supra* note 4, at 115-16.

184. AFL-CIO, AFL-CIO PROXY VOTING GUIDELINES: EXERCISING AUTHORITY, RESTORING ACCOUNTABILITY 1, 31-35 (2012).

185. *See id.* at 26-32, 35.

186. Agrawal, *supra* note 128, at 193.

187. AFL-CIO, *supra* note 184, at 5, 20-21.

188. *See id.* at 1, 4, 11-17.

189. *Id.* at 1.

shareholders<sup>190</sup>—a tendency widely associated with union activism, and short-termism, in the literature.<sup>191</sup>

While state and municipal employee pension funds are regulated by applicable state laws, “ERISA fiduciary principles often are found in state law as well,”<sup>192</sup> prompting similar responses. This is vividly illustrated by the California Public Employees’ Retirement System (CalPERS), “the nation’s largest public pension fund,”<sup>193</sup> which is subject to very similar fiduciary duties under California state law and has adopted proxy voting guidelines that resemble those adopted by the AFL-CIO in pertinent respects.<sup>194</sup> California’s constitution states that “the retirement board of a public pension or retirement system shall have . . . fiduciary responsibility for investment of moneys and administration of the system” and requires fund management “in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries.”<sup>195</sup> As under ERISA, this provision states that plan assets “are trust funds and shall be held for the exclusive purposes of providing benefits to participants . . . and their beneficiaries.”<sup>196</sup> Duties of loyalty and care resembling ERISA duties apply, including an obligation to manage the plan “solely in the interest of, and for the exclusive purposes of providing benefits to, participants and their beneficiaries” and to do so “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these matters

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190. *See id.* at 3–20.

191. *See, e.g.,* Agrawal, *supra* note 128, at 193–94 (“[L]abor union activists support proposals that further increase shareholder powers . . . .”); Gelter, *The Pension System*, *supra* note 75, at 957–58 (“[U]nion activism has to a large degree helped the cause of shareholder primacy.”); Pendleton & Gospel, *supra* note 31, at 645–46 (associating pensions’ need to generate “short-term returns” with short-termism in corporate governance).

192. AFL-CIO, *supra* note 184, at 23, 26.

193. CAL. PUB. EMPS.’ RET. SYS. (CALPERS), GLOBAL GOVERNANCE PRINCIPLES 7 (updated Mar. 14, 2016) [hereinafter CALPERS, GOVERNANCE PRINCIPLES].

194. While “fiduciary status and responsibilities with respect to state and local governmental funds are determined primarily by the states and common law of the 50 states,” in litigation “the state courts can and do look to ERISA standards and federal court decisions for guidance in interpreting and applying common-law trust principles.” AFL-CIO, *supra* note 184, at 26.

195. CAL. CONST., art. XVI, § 17 (2016).

196. *Id.*

would use in the conduct of an enterprise of a like character and with like aims.”<sup>197</sup> State statutes accordingly prohibit conflict transactions<sup>198</sup> and reiterate the duty to manage the plan “solely in the interest of the participants and beneficiaries” for “the exclusive purpose of . . . [p]roviding benefits.”<sup>199</sup>

As at the federal level, these requirements have predictably impacted CalPERS’s plan documents, which again aim first and foremost to ensure compliance with fiduciary duties.<sup>200</sup> As under ERISA, California’s state-law fiduciary duties are interpreted to embrace proxy voting and various “engagement strategies,” with the “primary performance objective” being “long-term target risk-adjusted return.”<sup>201</sup> Limited capacity to consider social and environmental issues is squared with applicable fiduciary duties, principally through reference to long-term sustainability and risk-management considerations.<sup>202</sup> Yet once again a number of highly shareholder-centric corporate governance structures are advocated<sup>203</sup>—governance structures perhaps reflecting the fact that, as CalPERS itself emphasizes, their investments “fund around two-thirds of [their] pension payments every year,” placing a particular premium on “ensuring that [their] investments . . . generate the highest possible returns.”<sup>204</sup> Their discussion of “engagement strategies” conveys that they are more than willing to assert themselves in order to achieve this imperative, including not only “[d]irect engagement” with corporate management but also “director nominations, filing shareowner proposals, proxy

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197. *Id.*

198. See CAL. GOV’T CODE §§ 20150, 20153 (West 2017).

199. *Id.* § 20151.

200. See CAL. PUB. EMPS.’ RET. SYS. (CALPERS), STATEMENT OF INVESTMENT POLICY FOR GLOBAL GOVERNANCE 1 (2015) [hereinafter CALPERS, STATEMENT OF INVESTMENT POLICY].

201. *Id.* at 1–3; see also CALPERS, GOVERNANCE PRINCIPLES, *supra* note 193, at 9–10.

202. See CALPERS, STATEMENT OF INVESTMENT POLICY, *supra* note 200, at 1; CALPERS, GOVERNANCE PRINCIPLES, *supra* note 193, at 7, 23–26, 33–36, 41.

203. See CALPERS, GOVERNANCE PRINCIPLES, *supra* note 193, at 12–20, 26–33.

204. *Id.* at 7; see also Millon, *Shareholder Social Responsibility*, *supra* note 46, at 930–33 (discussing the pressures placed upon corporate managers to focus on short-term returns emanating from public pension funds’ current payment obligations); Pendleton & Gospel, *supra* note 31, at 645–46.



solicitations, director withhold vote campaigns, and strategic investor collaboration.”<sup>205</sup>

### *F. National Party Politics*

The foregoing discussion of the evolution of organized labor’s interests, and how they have been impacted by regulatory developments in federal labor law, help explain why this critical stakeholder group would have come to favor decidedly shareholder-centric corporate governance structures. This does not in itself, however, explain how and why such preferences have found such a congenial home in the national politics of the U.S. center-left, or how and why a larger political coalition committed to such views—or at least finding them a convenient component of a larger political platform—would have taken shape over recent decades. This final section of Part III takes up that question.

As a threshold matter, it is quite striking that shareholder-centric corporate governance reforms have—across a range of countries including the United States—been prompted by center-left parties.<sup>206</sup> This is surprising because one would expect shareholder-centric corporate governance structures “to conflict with traditional left-wing political commitments to working-class and low-income constituencies.”<sup>207</sup> Moreover, compelling theoretical work in comparative corporate governance has associated left-leaning politics with stakeholder-oriented corporate laws and right-leaning politics with shareholder-oriented corporate laws.<sup>208</sup> Yet in cases as diverse as the United States, Germany, France, and Italy, Cioffi and Höpner find that over recent decades “center-left political parties were the driving force behind corporate

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205. CALPERS, STATEMENT OF INVESTMENT POLICY, *supra* note 200, at 3; *see also* CALPERS, GOVERNANCE PRINCIPLES, *supra* note 193, at 9-10. This posture is broadly representative of institutional investors generally. *See* COUNCIL INSTITUTIONAL INV., *supra* note 145 (observing that the organization was formed by institutions that “felt that by pooling their resources, institutional investors could use their burgeoning proxy power to hold companies accountable”).

206. *See generally* CIOFFI, *supra* note 28; Cioffi & Höpner, *supra* note 27.

207. Cioffi & Höpner, *supra* note 27, at 464.

208. *See generally* MARK J. ROE, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE: POLITICAL CONTEXT, CORPORATE IMPACT (paperback ed. 2006). *See also* BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD, *supra* note 40, at 119-23 (discussing Roe’s social democracy theory).

governance reform and the institutional adjustment to finance capitalism.”<sup>209</sup> They also found that associated “political actors” have themselves “taken the lead in advancing corporate governance reform” (as opposed to “unions, shareholders, or other interest groups”), suggesting a strong imperative emanating from broader party politics.<sup>210</sup> These findings are difficult to square with the broader theoretical work noted above, and with the views that traditional political affiliations would lead us to expect—although it has been suggested in more recent work, building on such comparative analyses, that the key to reconciling them may be to focus on political shifts over time. In particular, Thibault Darcillon has observed that shareholder-centric reforms have correlated with rightward shifts in party politics, including rightward shifts among left-leaning parties toward the center of the political spectrum.<sup>211</sup> This trend, Darcillon finds, is observable across various OECD (Organisation for Economic Co-operation and Development) countries,<sup>212</sup> rendering the striking association of center-left parties with shareholder-centric corporate governance reforms at least broadly compatible with research that correlates stockholding with more right-leaning politics.<sup>213</sup> Such shifts over time may also help explain some of the more notable disjunctures described above—say, labor’s support of state-level anti-takeover laws in the 1980s and their more recent support for efforts to dismantle takeover defenses starting in the 1990s.

Indeed, the trends discussed above appear clearly to have been operative in the United States, where the period of intensely shareholder-centric reforms since the 1990s maps coherently onto the rise of the so-called “New Democrats”—a movement, closely associated with the ascendance of President Bill Clinton, that decidedly shifted the Democratic Party toward the political center.<sup>214</sup> The rise of the New Democrats reflected a strong pivot

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209. Cioffi & Höpner, *supra* note 27, at 464 (emphasis omitted).

210. *Id.* at 491.

211. See Darcillon, *supra* note 35, at 661–69, 686–93; see also Roe, *supra* note 109, at 89–90.

212. See Darcillon, *supra* note 35, at 673–84.

213. See Nessler & Davis, *supra* note 125, at 5, 12–13.

214. See generally FROM, *supra* note 25 (providing a history of the New Democrats, with a foreword by Bill Clinton). See also Cioffi & Höpner, *supra* note 27, at 491; Darcillon, *supra* note 35, at 668–69; Andrew Leigh, *The Rise and Fall of the Third Way*, 75 AQ:

toward the center-left in the late 1980s and the 1990s, responding to the party's near inability to win national elections in the 1970s and 1980s.<sup>215</sup> The "Democratic Leadership Council," formed in 1985 outside the formal party apparatus,<sup>216</sup> viewed itself as "the venue for redefining the Democratic Party"<sup>217</sup>—a posture that brought with it more right-leaning policies, such as promotion of international trade, creating tensions with labor unions.<sup>218</sup> The core themes animating this pivot toward the center were "opportunity, responsibility, and community,"<sup>219</sup> and policies pursued under this banner drew from both traditionally liberal and traditionally conservative ideas. This effectively wedded commitment to civil rights and civil liberties with both rejection of outcomes-based social welfare policy and pursuit of deficit reduction and trade liberalization as means of achieving economic growth.<sup>220</sup> This shift toward the center has been credited with helping propel Bill Clinton to victory in the 1992 presidential race,<sup>221</sup> and these themes are clearly reflected in Democratic Party platforms since the early 1990s.<sup>222</sup> They have also inspired similar

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AUSTRALIAN Q., Mar.–Apr. 2003, at 10, 12; Graham K. Wilson, *Clinton, Bill*, in 1 THE OXFORD COMPANION TO AMERICAN POLITICS 203, 203 (David Coates ed., 2012).

215. See FROM, *supra* note 25 at 5–6 (observing that Jimmy Carter lost forty-four states in the 1980 election, that Walter Mondale lost forty-nine states in the 1984 election, and that Michael Dukakis's loss in 1988 "marked the fifth Democratic defeat in six presidential cycles, a losing streak interrupted only by Jimmy Carter's narrow victory in 1976 in the wake of the Watergate scandal"); Flavio Romano, *Clinton and Blair: The Economics of the Third Way*, 10 J. ECON. & SOC. POL'Y 1, 3 (2006) (describing such a shift from the left toward the center as an electoral imperative). These difficulties have been variously attributed to the party's loss of Southern Democrats following the civil rights movement, weakening of the anticommunism consensus following the Vietnam conflict, and mistrust among middle class voters on issues including defense and the economy. See, e.g., FROM, *supra* note 25, at 8–10, 102–05; Marjorie Randon Hershey, *Democratic Party*, in 1 THE OXFORD COMPANION TO AMERICAN POLITICS 262, 265–66 (David Coates ed., 2012); Nicol C. Rae, *Republican Party*, in 2 THE OXFORD COMPANION TO AMERICAN POLITICS 275, 275–76 (David Coates ed., 2012).

216. See FROM, *supra* note 25, at 53.

217. *Id.* at 110.

218. See *id.* at 68, 146–48, 204–09; see also THOMAS FRANK, LISTEN, LIBERAL: OR, WHAT EVER HAPPENED TO THE PARTY OF THE PEOPLE? 44–51 (2016).

219. FROM, *supra* note 25, at 148.

220. See *id.* at 128–29; see also FRANK, *supra* note 218, at 30–33.

221. See generally FROM, *supra* note 25.

222. For background on party platforms, see generally AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/index.php> (last visited June 25, 2018) (compiled by John T. Woolley and Gerhard Peters and hosted by the University of California, Santa Barbara). For the Democratic Party's platforms from 1992 to 2012 (in chronological order), see the

shifts toward the center among left-leaning parties in other countries, often referred to collectively as representing “Third Way” politics—a particularly noteworthy example being Tony Blair’s “New Labour” strategy in the United Kingdom.<sup>223</sup>

Given the nature of this shift away from what are often regarded as paradigmatic left-wing commitments, it is hardly surprising that “Third Way” politics have given rise to heated debates—notably regarding whether this shift in fact amounts to a

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following: Democratic Party, *A New Covenant with the American People* (July 13, 1992), <http://www.presidency.ucsb.edu/ws/print.php?pid=29610> (1992 Democratic Party Platform emphasizing themes of “opportunity,” “responsibility,” and “community,” and “reject[ing] both the do-nothing government of the last twelve years and the big government theory that says we can hamstring business and tax and spend our way to prosperity”); Democratic Party, *Today’s Democratic Party: Meeting America’s Challenges, Protecting America’s Values* (Aug. 26, 1996), <http://www.presidency.ucsb.edu/ws/index.php?pid=29611> (1996 Democratic Party Platform emphasizing similar themes and praising deficit reduction, “open and fair trade,” and “national welfare reform”); Democratic Party, *2000 Democratic Party Platform* (Aug. 14, 2000), <http://www.presidency.ucsb.edu/ws/print.php?pid=29612> (2000 Democratic Party Platform similarly emphasizing “our basic American values of hard work, community, embracing diversity, faith, family, and personal responsibility,” with similar policy prescriptions); Democratic Party, *2004 Democratic Party Platform* (July 27, 2004), <http://www.presidency.ucsb.edu/ws/print.php?pid=29613> (“The simple bargain at the heart of the American Dream offers opportunity to every American who takes the responsibility to make the most of it.”); Democratic Party, *Renewing America’s Promise* (Aug. 25, 2008), <http://www.presidency.ucsb.edu/ws/print.php?pid=78283> (“Today, we pledge a return to core moral principles like stewardship, service to others, personal responsibility, shared sacrifice and a fair shot for all . . .”); Democratic Party, *Moving America Forward* (Sept. 3, 2012), <http://www.presidency.ucsb.edu/ws/print.php?pid=101962> (2012 Democratic Party Platform advancing “the simple principle that in America, hard work should pay off, responsibility should be rewarded, and each one of us should be able to go as far as our talent and drive take us”).

223. For additional background on the spread of “Third Way” politics from Clinton’s Democratic Party to self-styled center-left parties elsewhere, see generally Niall Dickson, *What is the Third Way?*, BBC NEWS (Sept. 27, 1999), <http://news.bbc.co.uk/2/hi/458626.stm>; Andrew Gamble, *The Meaning of the Third Way*, in THE BLAIR EFFECT 2001–5, at 430, 430 (Anthony Seldon & Dennis Kavanagh eds., 2005); ANTHONY GIDDENS, THE THIRD WAY AND ITS CRITICS (2000) [hereinafter GIDDENS, CRITICS]; Anthony Giddens, *The Third Way Revisited*, POL’Y NETWORK (June 28, 2010), [http://www.policy-network.net/pno\\_detail.aspx?ID=3868&title=The+Third+Way+revisited](http://www.policy-network.net/pno_detail.aspx?ID=3868&title=The+Third+Way+revisited) [hereinafter Giddens, *The Third Way Revisited*]; John Judis, *Is the Third Way Finished?*, AM. PROSPECT (June 17, 2002), <http://prospect.org/article/third-way-finished>; James Petras, *The Third Way: Myth and Reality*, 51 MONTHLY REV. 10 (Mar. 1, 2000), <http://monthlyreview.org/2000/03/01/the-third-way/>; Romano, *supra* note 215. See also Lewis Baston & Simon Henig, *The Labour Party*, in THE BLAIR EFFECT 2001–5, at 112, 120–21 (Anthony Seldon & Dennis Kavanagh eds., 2005); FROM, *supra* note 25, at 239–48.

clever repackaging of neoliberalism.<sup>224</sup> The proposition is certainly contestable,<sup>225</sup> but there appears to be little doubt that New Democratic politics in the United States have involved a concerted effort to appeal to the elite, highly educated professional class—including financial professionals. As Cioffi observes, in the 1990s “the Democrats in the United States . . . embraced much of the ascendant neoliberal conception of finance capitalism as the route to economic modernization and growth.”<sup>226</sup> He elaborates, “The promise of faster economic growth and innovation fostered by rapid capital formation and reallocation via well-developed financial markets and facilitated by financially driven corporate restructuring appealed . . . in an era marked by chronic budget constraints and the limits of industrial policy.”<sup>227</sup> This shift went hand-in-hand with growing rhetorical and policy emphasis on the importance of education, which tended to legitimize the shift away from outcomes-based social welfare policy—the idea being, in Thomas Frank’s words, “You get what you deserve, and what you deserve is defined by how you did in school.”<sup>228</sup> At the same time, it implicitly exalted highly educated professionals, including financial professionals, who are often socially liberal and, of course, wealthy potential donors. Courting the professional class placed a positive face on policy shifts that might otherwise be regarded as callous toward the less affluent, through a constituency that appeared to mediate capital and labor insofar as they are not obviously assignable to one or the other category.<sup>229</sup>

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224. See, e.g., Gamble, *supra* note 223, at 434–37; Petras, *supra* note 223; Romano, *supra* note 215, at 1, 12; see also FRANK, *supra* note 218, at 89–97.

225. In response, see Tony Blair, *Third Way, Again*, CTR. FOR AM. PROGRESS (Mar. 11, 2016), <https://www.americanprogress.org/issues/democracy/reports/2016/03/11/132492/third-way-again/> (arguing that Third Way politics are “not about abandoning principle” but rather about balancing growth with social protection); Giddens, *The Third Way Revisited*, *supra* note 223 (rejecting this characterization and arguing that social democracy had to evolve to survive); Judis, *supra* note 223 (characterizing Third Way politics as “the only politically viable alternative to laissez-faire conservatism and the populist right, as well as to socialist or social-democratic politics of the old left”).

226. CIOFFI, *supra* note 28, at 9.

227. *Id.*; FRANK, *supra* note 218, at 68.

228. FRANK, *supra* note 218, at 69 (emphasis removed).

229. See *id.* at 20–25, 68–73, 129–30; see also Romano, *supra* note 215, at 5–6.

The New Democrats' embrace of finance over recent decades clearly paid dividends in the form of campaign funds.<sup>230</sup> The very close ties between Bill Clinton's administration and Wall Street leaders are well known. This period also saw substantial deregulation of finance – with noteworthy examples including the lifting of restrictions on interstate banking and the repeal of the Depression-era Glass-Steagall Act, which had previously separated investment banking from commercial banking.<sup>231</sup> Over recent years, Democratic presidential candidates have generally done very well in raising campaign funds from financial donors. In the 2008 election, Barack Obama raised more money than any other candidate from commercial banks, hedge funds and private equity donors, real estate donors, and the securities and investment industry, and came in a close second with insurance donors.<sup>232</sup> In the 2012 election, Mitt Romney outdid Obama in all of these categories,<sup>233</sup> perhaps reflecting distaste for Obama's post-

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230. Data on the sources of campaign funds are collected and made available by the Center for Responsive Politics, a "[n]onpartisan, independent and nonprofit" organization that "track[s] money in U.S. politics and its effect on elections and public policy." Ctr. for Responsive Politics, *Our Vision and Mission: Inform, Empower & Advocate*, OPENSECRETS.ORG, <http://www.opensecrets.org/about/> (last visited June 25, 2018). Its website, OpenSecrets.org, "is the most comprehensive resource for federal campaign contributions, lobbying data and analysis available." *Id.*

231. See FRANK, *supra* note 218, at 97-105; Bruner, *Conceptions of Corporate Purpose*, *supra* note 4, at 549-50.

232. See Ctr. for Responsive Politics, *Finance/Insurance/Real Estate Sector Totals to Candidates*, OPENSECRETS.ORG, <http://www.opensecrets.org/pres08/sectors.php?sector=F> (last visited June 25, 2018) (2008 presidential campaign donations data); Ctr. for Responsive Politics, *Presidential Candidates: Selected Industry Totals, 2008 Cycle: Commercial Banks*, OPENSECRETS.ORG, <http://www.opensecrets.org/pres08/select.php?ind=F03> (last visited June 25, 2018) (2008 presidential campaign donations data); Ctr. for Responsive Politics, *Presidential Candidates: Selected Industry Totals, 2008 Cycle: Hedge Funds & Private Equity*, OPENSECRETS.ORG, <http://www.opensecrets.org/pres08/select.php?ind=F27> (last visited June 25, 2018) (2008 presidential campaign donations data); Ctr. for Responsive Politics, *Presidential Candidates: Selected Industry Totals, 2008 Cycle: Insurance*, OPENSECRETS.ORG, <http://www.opensecrets.org/pres08/select.php?ind=F09> (last visited June 25, 2018) (2008 presidential campaign donations data); Ctr. for Responsive Politics, *Presidential Candidates: Selected Industry Totals, 2008 Cycle: Real Estate*, OPENSECRETS.ORG, <http://www.opensecrets.org/pres08/select.php?ind=F10> (last visited June 25, 2018) (2008 presidential campaign donations data); Ctr. for Responsive Politics, *Presidential Candidates: Selected Industry Totals, 2008 Cycle: Securities & Investment*, OPENSECRETS.ORG, <http://www.opensecrets.org/pres08/select.php?ind=F07> (last visited June 25, 2018) (2008 presidential campaign donations data).

233. See Ctr. for Responsive Politics, *Finance/Insurance/Real Estate Sector Totals to Candidates*, OPENSECRETS.ORG, <http://www.opensecrets.org/pres12/sectors.php?sector=F> (last visited June 25, 2018) (2012 presidential campaign donations data); Ctr. for Responsive

crisis financial regulatory initiatives, as well as Mitt Romney's greater appeal among these donors as a former private equity investor himself.<sup>234</sup> In the 2016 election, however, Hillary Clinton topped all other candidates in several of these categories, including commercial banks, hedge funds and private equity donors, real estate donors, and the securities and investment industry.<sup>235</sup>

To be sure, there is ample evidence that, overall, financial sector campaign contributions are bipartisan and typically follow

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Politics, *Selected Industry Totals: Commercial Banks*, OPENSECRETS.ORG, <http://www.opensecrets.org/pres12/select.php?ind=F03> (last visited June 25, 2018) (2012 presidential campaign donations data); Ctr. for Responsive Politics, *Selected Industry Totals: Hedge Funds & Private Equity*, OPENSECRETS.ORG, <http://www.opensecrets.org/pres12/select.php?ind=F27> (last visited June 25, 2018) (2012 presidential campaign donations data); Ctr. for Responsive Politics, *Selected Industry Totals: Insurance*, OPENSECRETS.ORG, <http://www.opensecrets.org/pres12/select.php?ind=F09> (last visited June 25, 2018) (2012 presidential campaign donations data); Ctr. for Responsive Politics, *Selected Industry Totals: Real Estate*, OPENSECRETS.ORG, <http://www.opensecrets.org/pres12/select.php?ind=F10> (last visited June 25, 2018) (2012 presidential campaign donations data); Ctr. for Responsive Politics, *Selected Industry Totals: Securities & Investment*, OPENSECRETS.ORG, <http://www.opensecrets.org/pres12/select.php?ind=F07> (last visited June 25, 2018) (2012 presidential campaign donations data).

234. See William D. Cohan, *Why Wall Street Loves Hillary*, POLITICO (Nov. 11, 2014), <http://www.politico.com/magazine/story/2014/11/why-wall-street-loves-hillary-112782> ("During the 2012 presidential election, Wall Street felt burned by Obama's rhetoric and regulatory positions and overwhelmingly supported with their money Republican candidate Mitt Romney, co-founder of private-equity firm Bain Capital.").

235. See Ctr. for Responsive Politics, *Sector Totals to Candidates: Finance/Insurance/Real Estate*, OPENSECRETS.ORG, <https://www.opensecrets.org/pres16/select-sectors?sector=F> (last visited June 25, 2018) (2016 presidential campaign donations data); Ctr. for Responsive Politics, *Selected Industry Totals: Commercial Banks*, OPENSECRETS.ORG, <https://www.opensecrets.org/pres16/select-industries?ind=F03> (last visited June 25, 2018) (2016 presidential campaign donations data); Ctr. for Responsive Politics, *Selected Industry Totals: Hedge Funds & Private Equity*, OPENSECRETS.ORG, <https://www.opensecrets.org/pres16/select-industries?ind=F27> (last visited June 25, 2018) (2016 presidential campaign donations data); Ctr. for Responsive Politics, *Selected Industry Totals: Insurance*, OPENSECRETS.ORG, <https://www.opensecrets.org/pres16/select-industries?ind=F09> (last visited June 25, 2018) (2016 presidential campaign donations data); Ctr. for Responsive Politics, *Selected Industry Totals: Real Estate*, OPENSECRETS.ORG, <https://www.opensecrets.org/pres16/select-industries?ind=F10> (last visited June 25, 2018) (2016 presidential campaign donations data); Ctr. for Responsive Politics, *Selected Industry Totals: Securities & Investment*, OPENSECRETS.ORG, <https://www.opensecrets.org/pres16/select-industries?ind=F07> (last visited June 25, 2018) (2016 presidential campaign donations data); see also Cohan, *supra* note 234 ("The bottom line for Wall Street . . . is that Clinton understands that America's much-maligned financial industry wants to be part of the solution to the country's problems.").

the power,<sup>236</sup> and much of Hillary Clinton's support in the 2016 race came from a small number of ultra-rich donors.<sup>237</sup> Nevertheless, it remained clear that she had "deep and lasting relationships with banking and investment titans" extending back to her husband's presidency, which were reinforced during her service as a senator for New York, where Wall Street was a vital constituency.<sup>238</sup>

In discerning the relevance of the foregoing to the issues and subject matter at the heart of this article—the politics of corporate governance—it is critical to recognize that Democratic Party operatives need not necessarily care about these issues in and of themselves and, indeed, may know little about them. From a narrow instrumental perspective, it is entirely plausible that their goal is simply to assemble a stable coalition that can finance a national electoral strategy—and if that coalition favors shareholders, then we should not expect these party officials to concern themselves with ensuring the coherence of such policies with state-level "progressive" preferences regarding substantive corporate law.

An indirect indication that such dynamics may be operative arises from intra-party tensions over the perception that the "New" Democratic Party has excessively retreated from their traditional strong-form commitment to the pursuit of equality and improving the lot of working people.<sup>239</sup> Over recent years, there has been a growing impression, as Steven Hayward puts it, that "the 'malefactors of great wealth' have become the benefactors of today's liberalism, and Democrats have become the party of the

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236. See, e.g., Press Release, Wall Street Watch, \$5 Billion in Political Contributions Bought Wall Street Freedom from Regulation, Restraint, Report Finds (Mar. 4, 2009), <http://wallstreetwatch.org/soldoutreport.php> (observing that from 1998 to 2008 "about 55 percent of [Wall Street] political donations went to Republicans and 45 percent to Democrats, primarily reflecting the balance of power over the decade"); see also Ctr. for Responsive Politics, *Banking: Data Snapshot*, OPENSECRETS.ORG, <http://www.opensecrets.org/news/issues/banking/data.php> (last visited June 25, 2018) (2011–12 data on the banking, securities, and insurance industry's campaign finance and lobbying activity).

237. See Matea Gold et al., *Clinton Blasts Wall Street, but Still Draws Millions in Contributions*, WASH. POST (Feb. 4, 2016), [https://www.washingtonpost.com/politics/clinton-blasts-wall-street-but-still-draws-millions-in-contributions/2016/02/04/05e1be00-c9c2-11e5-ae11-57b6aeab993f\\_story.html](https://www.washingtonpost.com/politics/clinton-blasts-wall-street-but-still-draws-millions-in-contributions/2016/02/04/05e1be00-c9c2-11e5-ae11-57b6aeab993f_story.html) (reporting that approximately half of Clinton's donations from the financial sector came from George Soros and S. Donald Sussman).

238. *Id.*

239. See generally FRANK, *supra* note 218.



rich.”<sup>240</sup> This perception reflects the fact that even though “labor unions (along with trial lawyers) still provide the majority of the Democratic Party’s campaign funds and organizational muscle on election day,” the “super rich of Silicon Valley and Wall Street . . . command the priority attention of Democratic Party leaders these days.”<sup>241</sup> A more direct indication that such dynamics may be operative arises, then, from the fact that the inherent, substantive implications of “New Democratic” or “Third Way” political principles for corporate governance remain far from clear. A brief perusal of Democratic Party platforms since the early 1990s, for example, reveals that corporate governance has received scant attention, prompting at most an occasional, oblique reference with no substantive discussion of any sort.<sup>242</sup>

Meanwhile, it is quite clear that Democrats have, over recent decades, sought to forge a coalition of financial and labor interests.<sup>243</sup> “Third Way” parties of the center-left have broadly

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240. Steven F. Hayward, *How Did the Democrats Become the Party of the Rich?*, FORBES (Jan. 8, 2014), <http://www.forbes.com/sites/stevenhayward/2014/01/08/how-did-the-democrats-become-the-party-of-the-rich/print/>.

241. *Id.*; see also CIOFFI, *supra* note 28, at 19 (observing that the United States now has “two pro-business parties”).

242. For examples (in chronological order), see Democratic Party, *A New Covenant with the American People* (July 13, 1992), *supra* note 222 (endorsing collective bargaining and pay-for-performance among corporate executives, without substantial discussion); Democratic Party, *Today’s Democratic Party: Meeting America’s Challenges, Protecting America’s Values* (Aug. 26, 1996), *supra* note 222 (calling for “long-term” corporate investment and “opportunities for greater involvement in company decision making and ownership,” without substantial discussion); Democratic Party, *2000 Democratic Party Platform* (Aug. 14, 2000), *supra* note 222 (making no straightforward mention of topics related to corporate governance); Democratic Party, *2004 Democratic Party Platform* (July 27, 2004), *supra* note 222 (endorsing “requiring honesty in corporate accounting[,] effective corporate governance, [and] a fair shake for small investors and worker pension funds,” without substantial discussion); Democratic Party, *Renewing America’s Promise* (Aug. 25, 2008), *supra* note 222 (endorsing say-on-pay votes and “innovation in corporate responsibility,” without substantial discussion); Democratic Party, *Moving America Forward* (Sept. 3, 2012), *supra* note 222 (associating shareholder wealth maximization and recklessness on Wall Street with Republicans, without substantial discussion). For similarly vague discussions of corporate governance in the context of “Third Way” political discussions outside the United States see, for example, GIDDENS, *CRITICS*, *supra* note 223, at 118–19 (endorsing pay-for-performance and corporate social responsibility, without substantial discussion) and at 149–52 (endorsing “employee share ownership schemes” and rejecting both strong-form shareholder-centrism and stakeholder-centrism, without identifying a favored alternative).

243. See Hershey, *supra* note 215, at 266.

been criticized for seeking “to construct a bogus coalition between the haves and the have nots,”<sup>244</sup> and whether or not this is a fair characterization, it bore fruit as a matter of electoral politics<sup>245</sup>—at least for a time. Regardless of the quite marginal nature of corporate governance in larger strategic thinking about electoral coalitions and the overall party platform, it is equally undeniable that this shift has had significant effects on how the left positions itself on corporate governance issues as a matter of national party politics. At its most elemental level, in corporate governance terms, a coalition of financial and labor interests effectively allies shareholders and employees against management—and the potency of this coalition has been fully apparent in reform efforts over recent years. Notably, the highly shareholder-centric reforms adopted in the wake of the financial crisis (described above) have, both rhetorically and substantively, focused intensely on the interests and perceived vulnerabilities of the “middle class.” This amorphous concept has “come generally to stand for the investment-related and social welfare-related goals and concerns of the average working family,” creating “a conceptual bridge between the incentives and interests of ‘employees’ and ‘shareholders’” due to the market and legal dynamics described in prior sections.<sup>246</sup>

The political power of this framing is rooted in such market and legal dynamics.<sup>247</sup> In understanding the political dynamics, however, it remains critical to bear in mind that intellectual coherence in the theory and practice of corporate governance need not be (and likely is not) of central concern to any relevant actor at the federal level. Simply put, electoral imperatives trump all, and pursuit of these imperatives requires taking the foregoing market trends, legal developments, and political realities as they are and

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244. Dickson, *supra* note 223; see also FRANK, *supra* note 218, at 58; GIDDENS, CRITICS, *supra* note 223, at 22–23; Romano, *supra* note 215, at 12–13; Wilson, *supra* note 214, at 203.

245. See, e.g., Judis, *supra* note 223 (observing that “Clinton was the first Democrat re-elected since Roosevelt” and that “Blair was the first Labour prime minister ever to succeed himself”).

246. BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD, *supra* note 40, at 278–86; see also Bruner, *Conceptions of Corporate Purpose*, *supra* note 4, at 553–55; Bruner, *Corporate Governance Reform in a Time of Crisis*, *supra* note 68, at 336–39.

247. See, e.g., CIOFFI, *supra* note 28, at 9–10, 26, 37, 113–14, 232, 240–41; Gelter, *The Pension System*, *supra* note 75, at 912–15.

endeavoring to forge an effective coalition using the tools and opportunities at hand.

To be sure, while these dynamics have remained important to the Democratic Party's electoral strategy since the 1990s, the finance-driven coalition described above remains highly controversial and unstable, reflecting the fact that core intellectual and ideological tensions in the platform of the U.S. center-left persist.<sup>248</sup> In the 2016 primary, for example, Hillary Clinton's "deep ties to the financial sector . . . emerged as one of her biggest obstacles," and as of February 2016 she had already "earned more than \$3.7 million for delivering paid speeches to banks and other financial services firms since leaving the State Department in 2013."<sup>249</sup> Her strained efforts to reintroduce more traditional left-wing themes, while at the same time maintaining a bridge to finance, led some to criticize such toggling between the "reform wing" and the "Wall Street wing" of the Democratic Party.<sup>250</sup> Perhaps tellingly, even when she made "forays into fiery rhetoric" to match Sanders, Wall Street bankers by and large "dismiss[ed] it quickly as political maneuvers. None of them [thought] she really mean[t] her populism."<sup>251</sup> As of this writing, it remains unclear whether the New Democratic coalition and associated electoral strategy can survive Clinton's loss to her fundamentally populist Republican opponent, Donald Trump<sup>252</sup>—an unexpected defeat

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248. Cf. CIOFFI, *supra* note 28, at 32, 250 (observing that the shareholder-employee coalition "is founded on the narrowest of grounds and should prove the most unstable" due to the numerous "areas of conflict" between them, including "takeover law, norms of shareholder primacy, stakeholder rights and employee representation, and distributional issues").

249. Gold et al., *supra* note 237; see also Cohan, *supra* note 234.

250. See Gold et al., *supra* note 237; see also Thomas Frank, *The Issue Is Not Hillary Clinton's Wall St Links but Democrats' Core Dogmas*, GUARDIAN (Feb. 16, 2016), <http://www.theguardian.com/global/2016/feb/16/the-issue-is-not-hillary-clintons-wall-st-links-but-her-partys-core-dogmas> (observing that Sanders's surge in the primary was not due to voters rejecting "Hillary the Capable," but rather "the party whose leadership faction she represents as well as the direction in which our modern Democrats have been travelling for decades").

251. Cohan, *supra* note 234.

252. See, e.g., Aaron Blake, *The Top 15 Democratic Presidential Candidates for 2020, Ranked*, WASH. POST (Dec. 22, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/12/22/the-top-15-democratic-presidential-candidates-for-2020-ranked/?utm\\_term=.bae7685a4a40](https://www.washingtonpost.com/news/the-fix/wp/2017/12/22/the-top-15-democratic-presidential-candidates-for-2020-ranked/?utm_term=.bae7685a4a40) (observing that, as of December 2017, the "field appears certain to be extremely big and wide open"); see also Chris Cillizza, *The Next Generation of Democratic*

attributed in part to Clinton's inability "to make a persuasive case for herself as a champion of the economically downtrodden."<sup>253</sup> Her loss was widely interpreted as "a historic rebuke of the Democratic Party from the white blue-collar voters who had formed the party base from the presidency of Franklin D. Roosevelt," costing the party the support of Midwest "industrial towns once full of union voters."<sup>254</sup>

Undoubtedly, post-crisis reform efforts favoring shareholders—even though short-term risk-seeking is thought to have driven the crisis—reflect just how thoroughly bound up the Democratic Party became with the financial sector and their interests. The fact that corporate governance reforms suddenly received such emphasis, rather than meaningful financial sector reform, illustrated the power of "[i]nterest group alignments and coalitional dynamics."<sup>255</sup> Financial institutions "fiercely resisted broader financial system reforms," and their "[m]uted opposition to the progress of corporate governance reforms . . . may have reflected a political and legal bet by financial sector managers that enhanced shareholder powers within corporate governance would likely prove less constraining and threatening than other items on the postcrisis reform agenda."<sup>256</sup> In this light, it was hardly surprising that Hillary Clinton's financial policy ideas in the 2016 election were thought to have come straight from Wall

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*Leaders Is, Um, Nonexistent*, WASH. POST (Nov. 16, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/11/16/the-next-generation-of-democratic-leaders-is-um-nonexistent/?utm\\_term=.956ae499736b](https://www.washingtonpost.com/news/the-fix/wp/2016/11/16/the-next-generation-of-democratic-leaders-is-um-nonexistent/?utm_term=.956ae499736b); Sam Frizell, *Democrats Elevate Bernie Sanders and Elizabeth Warren as Party Plots Comeback*, TIME (Nov. 16, 2016), <http://time.com/4573592/bernie-sanders-elizabeth-warren-democrats/>; Ed Kilgore, *The End of the Clinton Era of Democratic Politics*, N.Y. MAG. (Nov. 10, 2016), <http://nymag.com/daily/intelligencer/2016/11/the-end-of-the-clinton-era-of-democratic-politics.html>; Jonathan Martin & Alexander Burns, *Democrats at Crossroads: Win Back Working-Class Whites, or Let Them Go?*, N.Y. TIMES (Dec. 15, 2016), <http://www.nytimes.com/2016/12/15/us/politics/democrats-joe-biden-hillary-clinton.html?ref=politics&r=0>.

253. Matt Flegenheimer & Michael Barbaro, *Donald Trump Is Elected President in Stunning Repudiation of the Establishment*, N.Y. TIMES (Nov. 9, 2016), <http://www.nytimes.com/2016/11/09/us/politics/hillary-clinton-donald-trump-president.html?action=click&pgtype=Homepage&clickSource=story-heading&module=span-abc-region&region=span-abc-region&WT.nav=span-abc-region>.

254. *Id.*

255. See CIOFFI, *supra* note 28, at 214.

256. See *id.* at 209–17; see also Robert B. Reich, *Wall Street's Democrats*, ROBERT REICH (Dec. 8, 2014), <http://robertreich.org/post/104684097130>.

Street. These included resistance against reinstating the Glass-Steagall Act, endorsement of initiatives to promote long-term investment, and “clos[ure of] the carried-interest tax loophole through which private equity, venture capital, real estate and hedge fund investors are able to pay lower taxes on certain investment profits” (a proposal opposed by private equity investors but endorsed by many other Clinton supporters).<sup>257</sup> Such ideas reflected “a likely osmosis of ideas from years of interaction with people interested in finance,”<sup>258</sup> aptly summarizing the manner in which the Democratic Party has absorbed ideas and campaign contributions from financial sector donors. These dynamics, in turn, have amplified the political rationale driving the Democrats toward the political center and dovetailing with the market and legal dynamics described above. These are powerful economic, legal, and political forces indeed—and the compatibility of their impacts with theoretical approaches and policies favored by “progressive” commentators on state-level corporate law simply is not part of the equation.

#### IV. PROSPECTS FOR STATE/FEDERAL CONVERGENCE

In light of the complex and surprising manner in which the disjuncture between the corporate governance policy preferences of the political left at the state and federal levels has arisen, it remains to consider what the prospects for convergence might be. While a possibility for convergence exists, it is difficult to imagine the gap closing entirely, and the principal modes of potential convergence are not necessarily to be found where many might have expected them to arise.

In theory, direct linkages between federal and state law affecting corporate governance might develop. At the extreme, Congress retains authority under the Commerce Clause to take over the field of corporate law as and when it likes.<sup>259</sup> Federalizing corporate law was proposed at various points in the

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257. See Anupreeta Das, *Hillary Clinton No Stranger to Wall Street's Thinkers*, WALL STREET J. (Feb. 8, 2016, 4:59 PM), <https://blogs.wsj.com/washwire/2016/02/08/hillary-clinton-no-stranger-to-wall-streets-thinkers/>.

258. *Id.*

259. See *supra* note 66.

twentieth century, though such efforts went nowhere,<sup>260</sup> and nothing in the way of recent developments would tend to suggest that such a possibility has become any more likely. More modestly, linkages might be forged directly between relevant federal and state actors—one noteworthy example being the process by which the SEC can submit questions of corporate law directly to the Delaware Supreme Court.<sup>261</sup> This mechanism has remained little used, however, and as a general matter, federal lawmakers and regulators obviously need not consult Delaware if they do not care (or do not think they will like) what Delaware has to say<sup>262</sup>—a distinct possibility that follows directly from the sorts of distinctions drawn throughout this article.

Another potential mode of federal and state coordination in this area, which has arisen in unexpected ways over recent years, involves pronouncements on the nature and purposes of corporations from none other than the U.S. Supreme Court itself. Just as Congress can legislatively impact corporate governance, the U.S. Supreme Court can judicially impact it, and this has been vividly illustrated in recent years by two decisions with substantial implications for the sorts of dynamics discussed here—the 2010 *Citizens United* decision<sup>263</sup> and the 2014 *Hobby Lobby* decision.<sup>264</sup>

In *Citizens United*, the Supreme Court struck down a provision of the McCain-Feingold Act that had prevented corporations from making independent political campaign expenditures from the corporate treasury, concluding that “the Government may not suppress political speech on the basis of the speaker’s corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”<sup>265</sup> Even though the opinion was “the product of the five more conservative judges on the Court,” its reasoning is, as Leo Strine and

260. See *supra* notes 66–67 and accompanying text.

261. See Bruner, *Managing Corporate Federalism*, *supra* note 68, at 16–20, 36–38, 42–51 (providing background on this process).

262. Cf. Roe, *Delaware’s Competition*, *supra* note 67, at 600–06 (arguing that, if anything, due to the omnipresent threat of federal intervention, Delaware corporate law consists of “only what the federal authorities like or tolerate”).

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

264. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

265. *Citizens United*, 558 U.S. at 365–66 (striking down § 203 of the McCain-Feingold Act); see also Kesten, *supra* note 137, at 163–75; Strine & Walter, *supra* note 4, at 359–62.

Nicholas Walter emphasize, clearly “inconsistent with conservative corporate theory,” in that the Court legitimated unlimited expenditures by reference to shareholder-imposed constraints, notwithstanding the widespread conservative view that shareholders are poorly positioned to monitor management.<sup>266</sup> Furthermore, they observe, the conceptual and moral argument in favor of shareholder wealth maximization is effectively undermined by corporations’ newfound ability to engage in unlimited political spending.<sup>267</sup> The expectation that corporations will spend corporate resources to preclude or eliminate costly regulation undermines reliance upon extra-corporate regulation as a means of forcing corporations to absorb the costs of externalities that flow directly from the single-minded pursuit of shareholder wealth.<sup>268</sup> Strine self-identifies as “an unabashed New Deal Democrat,”<sup>269</sup> who apparently favors shareholder wealth maximization as a corporate law rule, combined with robust external regulation to contain its excesses.<sup>270</sup> He acknowledges (in his work with Walter), however, that shareholder wealth maximization looks quite unappealing when corporations have such extraordinary latitude to interfere directly in the processes that generate the rules purportedly constraining them—and that stakeholder-oriented theories of the corporation and corporate law comparatively look more appealing.<sup>271</sup>

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266. See Strine & Walter, *supra* note 4, at 337–40, 363–65.

267. See *id.* at 363–65.

268. See *id.* at 342–46, 350–59, 381–89; see also Kesten, *supra* note 137, at 182, 221.

269. David Marcus, *Leo Strine’s Marvelous Adventures*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Oct. 2, 2008), <https://corpgov.law.harvard.edu/2008/10/02/leo-strines-marvelous-adventures/>; see also Strine, *Toward Common Sense*, *supra* note 43, at 2 (describing his work as “counsel and policy director” to Governor Thomas Carper, a “New Democrat”); Strine, *The Dangers of Denial*, *supra* note 58, at 761 (implicitly identifying with “the center-left of American politics”).

270. See Strine, *The Dangers of Denial*, *supra* note 58, at 768, 786–93.

271. See Strine & Walter, *supra* note 4, at 389–90. I have argued elsewhere that the weakness of extra-corporate protections for non-shareholders (particularly employees) in the United States has effectively inhibited U.S. corporate law from adopting the more shareholder-centric governance structures that one finds in jurisdictions offering more robust social welfare protections, including the United Kingdom, Australia, and Canada. See generally BRUNER, *CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD*, *supra* note 40.

It is interesting, and perhaps ironic, that progressive corporate law theory would be bolstered in this oddly indirect manner by the conservative justices of the U.S. Supreme Court, but this is not the only instance in which this has occurred. Corporate law theorists of a progressive bent can similarly find Supreme Court authority to bolster their views in the *Hobby Lobby* decision, where the Court held that closely held for-profit corporations with religious owners can invoke free exercise protections under the Religious Freedom Restoration Act (RFRA), that the contraceptive mandate in the Affordable Care Act (ACA) substantially burdened the free exercise rights of such corporations, and that the mandate could not be justified as “the least restrictive means of serving a compelling government interest.”<sup>272</sup> In so doing, the Supreme Court—again, through its conservative justices<sup>273</sup>—articulated a “vision of corporations [that] is highly consistent with liberal visions of the corporation,” notably in rejecting the notion that shareholder wealth maximization represents the sole legitimate aim of corporation decision-making.<sup>274</sup> Strict commitment to shareholder wealth maximization, to the exclusion of all other goals, might tend to imply that for-profit corporations should not have standing to pursue free exercise complaints under the RFRA,<sup>275</sup> yet the Court outright rejected such a narrow conception of the for-profit corporation’s legitimate aims:

Some lower court judges have suggested that RFRA does not protect for-profit corporations because the purpose of such corporations is simply to make money. This argument flies in the face of modern corporate law. . . . 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

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272. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759–60 (2014); see also Lyman Johnson & David Millon, *Corporate Law After Hobby Lobby*, 70 BUS. LAW. 1, 1–2 (2014). While the opinion expressly did not address public companies, “the majority’s reasoning” might well apply beyond the context of closely held companies. See Johnson & Millon, *supra*, at 25–26.

273. Justice Alito’s opinion was joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas (with Kennedy filing a concurring opinion). *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2759; see also McDonnell, *supra* note 4, at 778 (“Conservatives celebrated, while liberals expressed outrage.”).

274. See McDonnell, *supra* note 4, at 778–83.

275. See *id.* at 789–91.



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. . . . If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well.<sup>276</sup>

As Brett McDonnell observes, this conception of the corporation's legitimate purposes "works as a ringing endorsement of the stakeholder conception of the corporation that many liberals and progressives prefer" and "certainly denies the existence of an immutable duty to only consider the financial interests of shareholders."<sup>277</sup>

To be sure, the political left has hardly celebrated the opinion. While Democrats supported enactment of the RFRA (during the Clinton administration, at a time when Democrats controlled both houses of Congress), the ACA is by and large quite important to many on the left, who "may not identify with the sorts of religious commitments one finds in this case."<sup>278</sup> It is indeed striking that state corporate law progressives not only would encounter hostility toward their views on corporate law among the Democratic Party establishment and central components of the modern Democratic electoral coalition, but that they would find their most powerful federal allies (at least in corporate governance terms) among the conservative justices of the U.S. Supreme Court.<sup>279</sup> As Lyman Johnson, a conservative communitarian scholar, and David Millon, a left-leaning scholar, observe together in their analysis of the *Hobby Lobby* decision, however, the majority's "decidedly pluralistic view of corporate purpose" naturally—and perhaps necessarily—facilitates pursuit of both

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276. *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2770-71.

277. McDonnell, *supra* note 4, at 804; *see also* Johnson & Millon, *supra* note 272, at 10 (characterizing the government's argument "that business corporations lack the lawful authority to do anything other than pursue financial gain" as a view that "resonates with the claims of conservative corporate law academics who assert that corporate law mandates profit maximization").

278. McDonnell, *supra* note 4, at 808; *see also id.* at 784-85, 808-11, 820.

279. It should be noted that this disjuncture reflects an inconsistency among political conservatives as well, in terms of overall normative preferences in corporate governance—notably between libertarian and communitarian brands of conservatism. *See supra* notes 18-21 and accompanying text.

religiously motivated corporate goals, predominantly (though not exclusively) resonating with those on the right, and “such avowed goals as social justice, environmental concerns, and employee welfare,” predominantly (though not exclusively) resonating with those on the left.<sup>280</sup> This is an important dimension of the opinion “that critics have overlooked.”<sup>281</sup>

The Supreme Court’s *Citizens United* and *Hobby Lobby* decisions illustrate that, as among the political left, views regarding the desirability or inevitability of strict shareholder-centrism vary considerably among the political right—and that conservative communitarianism and social liberalism can more easily find common cause in debates regarding corporate purpose than is typically acknowledged. Ultimately, however, it is unlikely that such developments will go very far in rendering the overall U.S. corporate governance system any more conceptually coherent than it is today. Generally speaking, it has to be conceded that the U.S. Supreme Court is hardly the forum to which one looks for top-shelf corporate legal theory.<sup>282</sup> (The same, of course, could be said of Congress.<sup>283</sup>) And when it comes to corporate purpose-related issues not involving a federal constitutional dimension, state courts and legislatures—who remain the authors of corporate law—will not be bound by U.S. Supreme Court analyses in any event.<sup>284</sup> Netting all of this out, and given the extraordinary range of political views and commitments driving these divergent federal trends—as well as the fact that the substantive integrity and overall coherence of U.S. corporate governance hardly looms large for any relevant federal actor—there is little reason to believe that the state/federal divide described in this article will substantially close in the foreseeable future.

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280. Johnson & Millon, *supra* note 272, at 22.

281. *Id.* at 31.

282. See, e.g., McDonnell, *supra* note 4, at 802–03, 806 (“Supreme Court justices are not chosen for their expertise in corporate law, and it shows.”).

283. See generally Bainbridge, *Dodd-Frank*, *supra* note 90 (critiquing the Dodd-Frank Act as “quack” corporate governance legislation); Romano, *supra* note 75 (similarly critiquing the Sarbanes-Oxley Act as “quack” corporate governance legislation).

284. See Johnson & Millon, *supra* note 272, at 24 (observing that in such a case “the Delaware Court of Chancery would presumably treat the *Hobby Lobby* opinion as highly persuasive, but the Delaware Supreme Court would not be bound to follow *Hobby Lobby*’s reading of the breadth of corporate purpose”).

## V. CONCLUSION

The fact that left-leaning actors, whom one might reasonably have expected to arrive at similar views on the desirability of shareholder-centric policies, have pursued diametrically opposed normative agendas at the state and federal levels, reflects the extraordinary legal, institutional, and political complexities of corporate governance in the United States. This article has argued that a widespread and fundamental reorientation of the Democratic Party toward decidedly centrist national politics over recent decades fundamentally altered the role of corporate governance, and related issues, in the project of assembling a competitive electoral coalition. It has argued further that the legal, economic, and cultural trends that conditioned and incentivized this shift are critical to understanding the state/federal divide regarding what the “progressive” corporate governance agenda ought to be. As we have seen, several trends have prompted a center-left politics of corporate governance at the federal level bearing no relation whatsoever to the progressive agenda for corporate law at the state level. Such trends include the reorientation of labor unions away from traditional organizing activities and toward pension management; the intense (and ironic) focus of applicable labor regulation on generating returns for pensioners, including fiduciary obligations interpreted to require pensions to engage in activism aimed at forcing corporate managers to focus intently on maximizing returns to shareholders; and the increasingly centrist Democratic Party’s efforts to capitalize on these pro-shareholder trends by assembling an anti-manager “middle class” coalition of workers and financial institutions.

I have suggested that this state/federal divide is unlikely to close in the foreseeable future, but that certainly does not mean the landscape will remain static. To the contrary, many of the legal, economic, and cultural trends described above continue to evolve. Ongoing developments affecting the power base, the interests, and the identity of organized labor—as well as the electoral strategy of the Democratic Party—will have a major impact on how U.S. corporate governance develops over years to come. It bears emphasizing that, just as flagging membership has prompted a shift from traditional organizing activities toward pension management as private-sector unions’ constituencies age,

so we can expect that the political and market salience of these institutions will wane as today's smaller active membership becomes tomorrow's smaller base of pension beneficiaries.<sup>285</sup> As such developments unfold (potentially over the course of decades), other forms of institutional investors may enjoy proportionately greater salience in electoral politics.<sup>286</sup> It remains entirely conceivable, however, that labor might politically reassert itself in some new institutional configuration—or return to a more central position in the Democratic coalition and electoral strategy following Hillary Clinton's unexpected 2016 loss<sup>287</sup>—with consequences that are difficult to foresee. All that can be predicted with any certainty is that electoral imperatives will remain paramount in the formulation of federal corporate governance policy, and that the center-left's federal corporate governance politics will accordingly move in whatever direction the prevailing wind blows.

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285. Cf. Dunn & Walker, *supra* note 128, at 8 (“In 2015, union membership rates were highest among workers ages 45 to 64—13.6 percent for those ages 45 to 54 and 14.3 percent for those ages 55 to 64. Nearly half of all union members were between 45 and 64 years old in 2015. . . . The lowest union membership rate was among workers ages 16 to 24 (4.4 percent).”) Meanwhile, a 2013 survey of “leaders from 102 of the largest US Taft-Hartley pension funds, representing \$150 billion in assets under management,” found “a stirring level of doubt among plan leaders that the existing multiemployer system is sustainable” due in part to “a pronounced demographic shift.” See PYRAMIS GLOBAL ADVISORS, *supra* note 133, at 1. Pyramis explains that “[a]n increasing number of retirees are now drawing their retirement and fewer active members are factored in to the contribution math, creating an unbalanced formula.” *Id.* Accordingly, “[n]early 40% do not believe the current multiemployer system is sustainable,” and “[n]early four out of every five (79%) indicated that a new system would likely be in place” ten years out. *Id.* at 1, 6.

286. Cf. Dunn & Walker, *supra* note 128, at 1, 3–4 (reporting that, in contrast with private-sector pensions, “union membership rates in the public sector . . . have held fairly steady since the early 1980s” and that as of 2015 “public-sector workers had a union membership rate of 35.2 percent, more than five times higher than that of private-sector workers (6.7 percent)”; Millon, *Shareholder Social Responsibility*, *supra* note 46, at 930–34 (discussing “various institutional investors fac[ing] differing pressures to pursue short-term investment strategies”).

287. See, e.g., Ian McKendry, *Trump's Surprise Victory Changes the Game for Financial Services*, AM. BANKER (Nov. 9, 2016), <http://www.americanbanker.com/news/law-regulation/trumps-surprise-victory-changes-the-game-for-financial-services-10923351.html?zkPrintable=true> (speculating that “Hillary Clinton's losses in traditionally Democratic states like Wisconsin will likely embolden the progressive wing of the party” and observing in the immediate aftermath that “Democrats anxious about a Trump victory were calling on [Elizabeth] Warren to run for president in 2020”); see also *supra* note 252.

