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Corporate Purpose in a Populist Era

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Stephen M. Bainbridge*

Corporate Purpose in a Populist Era

ABSTRACT

In the wake of the 2016 U.S. presidential election and similar developments in parts of Europe, commentators widely acknowledged the rise of populist movements on both the right and left of the political spectrum that were deeply suspicious of big business. This development potentially has important implications for the law and practice of corporate purpose.

Left-of-center corporate social responsibility campaigners have long advocated the use of “boycotts, shareholder activism, negative publicity, and so on” to pressure corporate managers to act in ways those campaigners deem socially responsible. Right-of-center populists could use the same tactics to induce corporate directors to make decisions they favor. The question thus is whether they are likely to do so based on their historical track record.

Assuming for the sake of argument that right-of-center populists begin focusing on corporate purpose, the question arises whether modifying the shareholder wealth maximization norms to give managers more discretion to take the social effects of their decisions into account would lead to outcomes populists consider desirable. Populists historically have viewed corporate directors and managers as elites opposed to the best interests of the people. Today, right-of-center populists find themselves increasingly at odds with an emergent class of social justice warrior CEOs, whose views on a variety of critical issues are increasingly closer to those of blue state elites than those of red state populists.

Keywords: populism, corporate purpose, corporate social responsibility

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It's a great honor to be with you to give the Roscoe Pound Lecture.¹ Although I can't help wondering whether Pound would have approved of my topic for today. After all, Pound was no fan of populism. But, on the other hand, Pound famously saw the law as a means of attaining a better society, using the law as a means of social engineering in the service of important values. The question I want to pose today is whether modern populists might use the law—specifically the law of corporate purpose—in service of what they regard as important social values.

At the outset, I must warn you that there is not a lot of law in what follows. I take some comfort, however, from the fact that Roscoe Pound's famous 1906 speech on *The Causes of Popular Dissatisfaction with the Administration of Justice* was much more concerned with the political and social roots of that dissatisfaction than with technical legal questions. As I think about it, perhaps I should have entitled my Article *The Causes of Popular Dissatisfaction with the Corporation*.

I. INTRODUCTION

Shortly before the November 2016 presidential election, United Technologies Corporation (UTC) CEO Gregory Hayes defended the firm's decision to close an Indiana furnace factory operated by its Carrier Corporation subsidiary and transfer production to a factory in

1. Professor Bainbridge delivered the annual Roscoe Pound Lecture on March 27, 2019 at the University of Nebraska College of Law. His lecture, *Corporate Purpose in a Populist Era*, was based upon this Article.

Mexico.² In doing so, Hayes was responding to repeated public criticism of the decision by then-presidential candidate Donald Trump.³ Although Hayes claimed the decision had not been taken lightly, the decision was part of Hayes's on-going pursuit of shareholder wealth maximization.⁴ While the Indiana plant was profitable, it simply was not profitable enough to meet Hayes's goals, especially when compared to Carrier's highly profitable Mexican plants.⁵ Once Trump was elected President, Hayes backtracked and agreed to keep the plant open, but continued to insist that, "as for the initial decision to close the plant, 'we did the right thing for the business.'"⁶

Would UTC's board have reached the same initial decision if it had considered the effect it would have on the plant's workers and the community in which they lived? What if the board had been required to do so? Put another way, does the purpose of corporations like UTC really require CEOs like Hayes to do whatever is necessary "to increase shareholder value . . . no matter how difficult"?⁷ If so, should it?

To be sure, the business judgment rule gives directors a substantial amount of discretion with respect to making decisions like the ones made by UTC's board.⁸ Both the original decision to close the plant and the decision to backtrack on the closing doubtless would have been protected by the business judgment rule.⁹ But while the business judgment rule may give the board legal protection, it does

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2. Bryan Gruley & Rick Clough, *Remember When Trump Said He Saved 1,100 Jobs at a Carrier Plant? Well, Globalization Doesn't Give a Damn*, BLOOMBERG (Mar. 29, 2017, 4:00 AM), <https://www.bloomberg.com/news/features/2017-03-29/remember-when-trump-said-he-saved-1-100-jobs-at-a-carrier-plant> [<https://perma.unl.edu/BR3J-UXJT>].
 3. *See id.* ("For months [Trump] blasted Carrier in tweets and at rallies.")
 4. *See id.* ("Whatever we need to do to increase shareholder value, [Hayes said,] we will do those things, no matter how difficult.")
 5. *See id.* (quoting Hayes to the effect that the Indiana plant was less profitable than the Mexican facilities).
 6. *Id.*
 7. *See id.* ("Whatever we need to do to increase shareholder value, [Hayes said,] we will do those things, no matter how difficult."). For discussion of the "Carrier deal," see Steven Davidoff Solomon & David Zaring, *Transactional Administration*, 106 GEO. L.J. 1097, 1110–12 (2018).
 8. *See, e.g.,* Lewis v. Anderson, 615 F.2d 778, 781 (9th Cir. 1979) ("The business judgment rule applies to all discretionary decisions by the board . . ."), *cert. denied*, 449 U.S. 869 (1980); Gaillard v. Natomas Co., 256 Cal. Rptr. 702, 710 (Cal. Ct. App. 1989) ("The common law 'business judgment rule' refers to a judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions.")
 9. *See* Douglas M. Branson, *The Rule That Isn't a Rule—The Business Judgment Rule*, 36 VAL. U. L. REV. 631, 649 (2002) (observing that "the types of decisions ordinarily given business judgment rule protection" include "directors' decisions to make an acquisition or build a new plant"); Omari Scott Simmons, *The Corporate Immune System: Governance from the Inside Out*, 2013 U. ILL. L. REV. 1131, 1159 (2013) ("Most routine operational decisions, such as the decision to build a

not define the scope of the board's fiduciary duty.¹⁰ That task is the job of the law of corporate purpose.

At least in Delaware, the law of corporate purpose is well settled in favor of shareholder wealth maximization.¹¹ Directors have a fiduciary duty to sustainably maximize shareholder wealth over such time horizon as the board deems fit.¹² Numerous Delaware cases have so held.¹³ True, many commentators have sought to explain away or otherwise distinguish these decisions, but as Delaware's sitting Chief Justice has explained in detail, "these commentators essentially argue that Delaware judges do not understand the very law they are applying."¹⁴

foreign production plant or what products to produce, are protected under state law through the business judgment rule." (footnote omitted)).

10. See Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 95–100 (2004) (arguing that the business judgment rule is not a standard of liability but rather an abstention doctrine).
11. See, e.g., Alan J. Meese, *The Team Production Theory of Corporate Law: A Critical Assessment*, 43 WM. & MARY L. REV. 1629, 1702 (2002) ("Delaware, at least, has apparently decided that the principal-agent model, and with it the shareholder primacy norm, is superior to alternative models of corporate governance."); David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181, 184 (2013) ("Delaware demands shareholder primacy in corporate governance."). I have elsewhere insisted not to use the terms "shareholder primacy" and "shareholder wealth maximization" interchangeably because the former encompasses both the latter and a claim that shareholders do (or should) control the corporation. Stephen M. Bainbridge, *Director v. Shareholder Primacy in the Convergence Debate*, 16 TRANSNAT'L LAW. 45, 47 (2002). I therefore agree with David Yosifon's argument that "[w]e should stop using the term 'shareholder primacy' to refer to both purpose and means. It inhibits clear expression and exchange of ideas." DAVID YOSIFON, CORPORATE FRICTION: HOW CORPORATE LAW IMPEDES AMERICAN PROGRESS AND WHAT TO DO ABOUT IT 1 n.1 (2018).
12. See Leo E. Strine, Jr., *Our Continuing Struggle with the Idea That For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 155 (2012) (observing that "corporate law requires directors, as a matter of their duty of loyalty, to pursue a good faith strategy to maximize profits for the stockholders").
13. See, e.g., *In re Tradco Inc. S'holder Litig.*, 73 A.3d 17, 20 (Del. Ch. 2013) ("Directors of a Delaware corporation owe fiduciary duties to the corporation and its stockholders which require that they strive prudently and in good faith to maximize the value of the corporation for the benefit of its residual claimants."); *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010) (stating that "the fiduciary duties and standards that accompany [the corporate] form . . . include acting to promote the value of the corporation for the benefit of its stockholders"); *TW Servs., Inc. v. SWT Acq. Corp.*, No. CIV. A. 10427, 10298, 1989 WL 20290, at *7 (Del. Ch. Mar. 2, 1989) (stating that it is "non-controversial" that, "broadly, directors may be said to owe a duty to shareholders as a class to manage the corporation within the law, with due care and in a way intended to maximize the long run interests of shareholders").
14. Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 766–67 (2015). See also Yosifon, *supra* note 11, at 184 (arguing that "the black letter law of corporate governance is shareholder primacy" and identifying "the missteps that . . . other

The policy arguments cannot be described as well settled, of course, because numerous commentators have staked out positions on every conceivable side of the issue.¹⁵ It is nevertheless fair to say that the policy arguments have been beaten to death. There is a voluminous literature on the subject to which every generation of scholars seems compelled to add their two cents.¹⁶

This longstanding debate, however, could now play out in a radically different political environment. On the right, the rise of the Tea Party began a shift in the Republican party towards populism,¹⁷ which the 2016 election of Donald Trump as President strengthened.¹⁸ On the left, Bernie Sanders's strong performance in the 2016 Democratic presidential primaries and the surging popularity of Senator Elizabeth Warren likewise signaled a populist shift in the Demo-

scholars have made in interpreting that doctrine"). For an extended analysis of Delaware law on the issue, which concludes that shareholder wealth maximization is the legal standard, see YOSIFON, *supra* note 11, at 60–95.

15. See Virginia Harper Ho, "Enlightened Shareholder Value": *Corporate Governance Beyond the Shareholder-Stakeholder Divide*, 36 J. CORP. L. 59, 71 (2010) ("Over the course of the past century, the famous debate between Adolph Berle and Merrick Dodd in the Harvard Law Review over the nature and purpose of the corporation has been traced and retraced in a pendulum swing between two fundamental positions.").
16. See Lyman Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405, 435 (2013) (observing that "the normative debate has gone on for decades and shows no signs of abating").
17. It is important to note the distinction between Populism spelled with a capital "P" and populism spelled with a lower-case "p." See John F. Cooper, *The Citizen Initiative Petition to Amend State Constitutions: A Concept Whose Time Has Passed, or a Vigorous Component of Participatory Democracy at the State Level?*, 28 N.M. L. REV. 227, 230 (1998) ("While Populism with a capital 'P' describes a short-lived American political party that functioned during the last decade of the Nineteenth Century, populism with a lower case 'p' represents an American political movement that owes its maturation to the political beliefs of Thomas Jefferson, but which predates even the American Revolution." (footnote omitted)). This Article is concerned with populism spelled with the lower-case "p." As a definition of the latter, I adopt herein Mark Roe's characterization of it as the "widespread attitude that large institutions and accumulations of centralized economic power are inherently undesirable and should be reduced, even if concentration is productive." MARK J. ROE, *STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE* 29 (1994).

So defined, populism is not an ideology and is not describable as inherently right, left, or center. JOHN B. JUDIS, *THE POPULIST EXPLOSION: HOW THE GREAT RECESSION TRANSFORMED AMERICAN AND EUROPEAN POLITICS* 14 (2016). Instead, populism is a worldview that sees corrupt elites standing in opposition to ordinary people. *Id.* Having said that, however, it is a worldview embraced by people on both sides of the political spectrum and deployed for their various political purposes. See *id.* at 15 (contrasting right-wing and left-wing populism).

18. See MUGAMBI JOUET, *EXCEPTIONAL AMERICA: WHAT DIVIDES AMERICANS FROM THE WORLD AND FROM EACH OTHER* 74 (2017) (criticizing the populism of "the Tea Party and Trump movements").

cratic party.¹⁹ Given these political trends and the underlying economic ills driving them, the question arguably “is no longer *whether* populist pressure will have a strong influence on policy decisions but *how*.”²⁰

In the wake of Trump’s election, *The Economist* magazine’s Schumpeter column provocatively asked whether this new political environment necessitates rethinking corporate purpose:

As they slid down the streets of Davos this week, many executives will have felt a question gnawing in their guts. Who matters most: shareholders or the people? Around the world a revolt seems under way. A growing cohort—perhaps a majority—of citizens want corporations to be cuddlier, invest more at home, pay higher taxes and wages and employ more people, and are voting for politicians who say they will make all that happen.

. . . Should [corporate managers] fire staff, trim costs and expand abroad—and face the wrath of Donald Trump’s Twitter feed, the disgust of their children and the risk that they’ll be the first against the wall when the revolution comes? Or do they bend to popular opinion and allow profits to fall . . . ?²¹

The columnist proceeded to focus on how directors and managers will respond to the shifting political winds. Yet, because I assume the law both reflects and shapes social norms and attitudes, the column prompted me to wonder whether the populist movement might also impact the debate over the law of corporate purpose, which motivated this Article.

In thinking about the potential legal implications of Schumpeter’s questions, three issues immediately presented themselves. First, what is the populist critique of business and corporations? Second, would populists regard changing the law of corporate purpose as a viable means of operationalizing that critique? Finally, would changing that law prove a useful vehicle for advancing populist goals?²²

A significant obstacle to answering these questions is the lack of deep intellectual thought among modern populists (*pace* Senator Warren). This is especially true of populists on the right, of which anti-intellectualism has become a distinguishing characteristic. Indeed, as leading conservative thinker—and fierce critic of populism—Russell Kirk observed, modern populist movements are “a revolt against the Smart Guys.”²³

19. See STEPHEN B. PRESSER, *LAW PROFESSORS: THREE CENTURIES OF SHAPING AMERICAN LAW* 466 (2017) (discussing whether Sanders and Warren will be able to persuade the public that they are “bona-fide populists”).

20. LUIGI ZINGALES, *A CAPITALISM FOR THE PEOPLE: RECAPTURING THE LOST GENIUS OF AMERICAN PROSPERITY* 115 (2012).

21. *Six Sects of Shareholder Value*, *THE ECONOMIST* (Jan. 21, 2017), <https://www.economist.com/business/2017/01/21/businesses-can-and-will-adapt-to-the-age-of-populism> [<https://perma.unl.edu/TUG2-2Q2J>].

22. Note that these are “is” rather than “ought” questions. My project here is not to decide either whether changing corporate purpose is a good idea or whether the populist agenda has merit.

23. RUSSELL KIRK, *THE POLITICS OF PRUDENCE* 144 (1993).

It was not always so, however. In several prior populist periods, populist intellectuals devoted considerable energy to thinking about the role of business in society, the rise of the corporate form as the dominant form of business organizations, and other topics that bear directly on the debate over corporate purpose.²⁴ It is to those sources that we therefore must turn.²⁵ Even so, however, we know much more about what populists opposed than what they proposed.²⁶ Much of what follows is therefore inferential and conjectural.

Part II of this Article begins with a very brief history of anti-corporate populism, emphasizing the aspects of populist thought pertinent to corporate governance.²⁷ As noted above, populism does not easily map to the traditional left-right schema of American politics.²⁸ Nevertheless, this Article focuses on those populist movements generally identified as being right-of-center, partly because of their 2016 success and partly as a matter of personal interest.²⁹ As a conservative legal academic who focuses on business law, the history of right-of-center populists as leading conservative critics of business has been a matter of considerable interest.

Part III turns to the question of whether a resurgent populist movement is more likely to focus on corporate purpose than to directing its attentions elsewhere. Left-of-center corporate social responsibility campaigners have long advocated the use of “boycotts, shareholder activism, negative publicity, and so on” to pressure corpo-

24. Right-of-center populism differs from the *laissez-faire*, pro-business strands of conservative and libertarian thought in that the latter tends to identify with business elites rather than lower classes such as workers, shopkeepers, the poor, and the middle class. See JUDIS, *supra* note 17, at 15 (describing focus of center-right populism).

25. It must be acknowledged at the outset that many of the populist writers discussed herein held views—especially on race—that are highly repugnant. This is hardly surprising, given that populism was “one of the nastiest of American political movements.” F.H. Buckley, *Conservatism: Trump and Beyond*, MOD. AGE (Spring 2018), <https://isi.org/modern-age/conservatism-trump-and-beyond/> [<https://perma.unl.edu/4RJ3-949S>]. The Southern Agrarians, in particular, held severely retrograde views on race and, albeit to a lesser extent, class. See PETER KOLOZI, *CONSERVATIVES AGAINST CAPITALISM: FROM THE INDUSTRIAL REVOLUTION TO GLOBALIZATION* 83 (2017) (discussing the Southern Agrarian project’s subordination of “poor whites and African Americans”).

26. See CHARLES POSTEL, *THE POPULIST VISION* 5 (2007) (“Our historical understanding of what the Populists thought is largely drawn from what they protested.”).

27. In this Article, I adopt Margaret Blair’s definition of corporate governance as “the whole set of legal, cultural, and institutional arrangements that determine what publicly traded corporations can do, who controls them, how that control is exercised, and how the risks and returns from the activities they undertake are allocated.” MARGARET M. BLAIR, *OWNERSHIP AND CONTROL: RETHINKING CORPORATE GOVERNANCE FOR THE TWENTY-FIRST CENTURY* 3 (1996).

28. See JUDIS, *supra* note 17, at 14.

29. Accordingly, unless otherwise indicated, I use the term “populist” hereinafter to refer to right-of-center populists.

rate managers to act in ways those campaigners deem socially responsible.³⁰ Populists could use the same tactics to induce corporate directors to make decisions they favor. If corporate boards gave way to such campaigns, without a reasonable belief that the acts they take are also in the best interests of the corporation's shareholders, they would violate the fiduciary duties discussed above.³¹ Having said that, however, it must be acknowledged that the business judgment rule gives directors wide discretion in this area.³² In addition, of course, populists could seek to strengthen the nonshareholder constituency statutes in effect in many states (albeit not including Delaware) or even to create a federal version of such a statute, which would expressly authorize directors to pursue corporate purposes other than shareholder wealth maximization.³³ If populists chose to move in this direction, there is plenty of legal room for them to do so. The question thus is whether they are likely to do so based on their historical track record.

Part IV asks whether modifying the shareholder wealth maximization norms to give managers more discretion to take the social effects of their decisions into account would lead to outcomes populists would view as desirable. Populists historically have viewed corporate directors and managers as elites opposed to the best interests of the peo-

30. EVAN OSBORNE, *THE RISE OF THE ANTI-CORPORATE MOVEMENT: CORPORATIONS AND THE PEOPLE WHO HATE THEM* 209 (2009).

31. *See supra* notes 11–14 and accompanying text (describing directors' fiduciary duties).

32. *See, e.g.*, *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 33 (Del. Ch. 2010) (“When director decisions are reviewed under the business judgment rule, this Court will not question rational judgments about how promoting non-stockholder interests—be it through making a charitable contribution, paying employees higher salaries and benefits, or more general norms like promoting a particular corporate culture—ultimately promote stockholder value.”). While it is true that the business judgment rule may sometimes have the practical effect of allowing a board of directors to avoid liability to shareholders for making decisions motivated by concerns other than shareholder wealth maximization, that is not the rule's purpose. *See* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 Nw. U. L. REV. 547, 601–05 (2003) (discussing director discretion under the business judgment rule as it relates to the corporate social responsibility debate). Indeed, a review of “the case law provides no support for [the] argument that the business judgment rule is intended to allow directors to mediate between competing interest groups.” *Id.* at 604.

33. *See* Michael E. DeBow & Dwight R. Lee, *Shareholders, Nonshareholders and Corporate Law: Communitarianism and Resource Allocation*, 18 DEL. J. CORP. L. 393, 415 (1993) (“The United States Congress might, at some point, be tempted to adopt a federal corporate chartering statute that includes mandatory non-shareholder constituency provisions.”). For analyses of these statutes, see Joan MacLeod Heminway, *Shareholder Wealth Maximization as a Function of Statutes, Decisional Law, and Organic Documents*, 74 WASH. & LEE L. REV. 939, 948–50 (2017); Brett H. McDonnell, *Corporate Constituency Statutes and Employee Governance*, 30 WM. MITCHELL L. REV. 1227, 1230–36 (2004).

ple.³⁴ Today, populists find themselves increasingly at odds with an emergent class of social justice warrior CEOs, whose views on a variety of critical issues are increasingly closer to those of blue-state elites than those of red-state populists.³⁵

At the outset, I should acknowledge that the value of my project as an exercise in potential law reform depends on an assumption that the present populist movement will persist for some time, despite the outcome of the 2018 mid-term elections and the historical reality that populist movements have often had brief lives.³⁶ Even if the present populist era proves to be fleeting, however, populism has long played an important role in the regulation of corporate governance and thus remains worthy of study.³⁷ In addition, because corporate purpose is a question of state corporate law, legal change in red states with strong populist movements remains possible.

34. See, e.g., Robert D. Atkinson et al., *How Tech Populism is Undermining Innovation*, INFO. TECH. & INNOVATION FOUND. 2 (Apr. 2015), <http://www2.itif.org/2015-tech-populism.pdf> [<https://perma.unl.edu/W9NE-VXYG>] (“The populist view is that elites, especially big business and big government, will prevent useful rules from being established—or, if those rules are established, will find ways to bypass them at the expense of the broader public.”).

35. See generally JOEL KOTKIN, *THE NEW CLASS CONFLICT* 9–10 (2014) (discussing the leftward shift among richest Americans, especially among elites in the financial and tech sectors). Joel Kotkin divides the elite sector into two groups. At the very top, in terms of wealth and income, are the Oligarchs of finance and technology. See *id.* at 2–7 (describing the oligarch sector). Just below them are the group Kotkin calls the Clerisy, which consists of those individuals at the top of the academic, media, government, and nonprofit sectors. See *id.* at 8 (describing and defining the Clerisy). The Clerisy created and continues to propagate a political worldview that Kotkin aptly named “gentry liberalism,” which has become the prevailing political alignment among both the Clerisy and the Oligarchs. See *id.* (describing gentry liberalism). At the bottom, the working non-elites constitute a class for whom Kotkin revived the old moniker Yeoman. See *id.* at 12–13 (describing the state of the Yeomanry). Herein I will use the terms New Elites for the former two classes and the Yeomanry for the latter. I borrow the term New Elites from Christopher Lasch, who used it to describe “not only corporate managers, but all those professions that produce and manipulate information.” CHRISTOPHER LASCH, *THE REVOLT OF THE ELITES AND THE BETRAYAL OF DEMOCRACY* 5 (1995).

36. See, e.g., JUDIS, *supra* note 17, at 19 (explaining that although American populist movements have tended to be short-lived, they are a recurrent phenomenon that in their totality have had important impacts on American politics); KOLOZI, *supra* note 25, at 103 (“Southern Agrarianism was never a popular political movement and was only a short-lived intellectual movement.”).

37. See Christopher M. Bruner, *Conceptions of Corporate Purpose in Post-Crisis Financial Firms*, 36 SEATTLE U. L. REV. 527, 529 (2013) (“Populism has long exerted substantial influence over U.S. corporate law—including prevailing conceptions of corporate purpose—but has manifested itself in different ways in financial and non-financial contexts, respectively.”).

II. POPULISTS AND THE CORPORATION

Populism in the United States has a long history featuring multiple peaks and troughs.³⁸ Although the composition and goals of populist movements have varied over time, certain recurring themes are characteristic of most such movements.³⁹ Importantly for our purposes, one of the most common of these themes has been a deep suspicion of corporate power.⁴⁰ Our question is whether the populist critique of American business has drilled down to the level of corporate purpose.

A. A Brief History of American Populism

The roots of American populism can be traced back to the Revolutionary and Jacksonian periods, but the template of modern right-wing populism was formed during the late nineteenth century.⁴¹ It began with rural protest movements such as the Grange and the Farmer's Alliance.⁴² These groups represented a reaction to the rapid economic changes American businessmen, workers, and farmers were experiencing.⁴³ "The traditional economic model of small, independent businesses—central to the economic ideology of nineteenth-century America—was rapidly ceding to a new reality of large, integrated corporations, many of which had dominated their industries in the span of only a few short years."⁴⁴ These new and vast business entities

38. Although its origins can be traced in large part to the United States, populism is not a uniquely American phenomenon. See CAS MUDDÉ & CRISTÓBAL ROVIRA KALTWASSER, *POPULISM: A VERY SHORT INTRODUCTION* 21 (2017) ("Conventional wisdom holds that populism emerged in the late 19th Century in Russia and the United States . . ."). Indeed, at least until the election of Donald Trump, populist movements had achieved their greatest political successes outside the United States, particularly in Latin America. See *id.* at 27 ("Latin America is the region with the most enduring and prevalent populist tradition").

39. See *id.* at 9–19 (reviewing core Populist principles).

40. Joan Williams, *The Rhetoric of Property*, 83 *IOWA L. REV.* 277, 321–22 (1998) ("From Jeffersonian and Jacksonian social critics, to the Populists, and up to the present, this strain of rhetoric attacks corporate power, using language originally designed to attack the luxury and corruption of eighteenth century aristocrats." (footnotes omitted)).

41. See JUDIS, *supra* note 17, at 19 (describing origins of American populism). For an overview of the development of populism in the postbellum period, which culminated in the creation of the People's Party, see ROBERT C. McMATH, JR., *AMERICAN POPULISM: A SOCIAL HISTORY, 1877–1898* (1992).

42. See McMATH, *supra* note 41, at 50–82 (describing evolution of the Grange, the Farmer's Alliance, and related Agrarian protest movements).

43. Camden Hutchison, *Progressive Era Conceptions of the Corporation and the Failure of the Federal Chartering Movement*, 2017 *COLUM. BUS. L. REV.* 1017, 1032 (2017) ("At the end of the nineteenth century, Americans were keenly aware of the economic changes occurring around them.").

44. *Id.* at 1032–33.

were perceived as posing a threat to the liberty and livelihood of the American yeomanry.⁴⁵

In the formative years, these groups tended to be short lived⁴⁶ and geographically dispersed.⁴⁷ By the last decade of the nineteenth century, however, the populist movement was simultaneously coalescing and expanding to include other disaffected groups such as miners and industrial laborers.⁴⁸ In June 1892, the People's Party held its first national convention.⁴⁹ It adopted a platform focused on a bimetallic monetary policy and opposition to monopolies.⁵⁰ Some have regarded the platform as a "major salvo against the worldview of laissez-faire capitalism."⁵¹ In fact, however, the Populists did not favor displacing capitalism with socialism, but rather they favored using government regulation to reform capitalism to make it more humane and friendlier to the workers and farmers who comprised the bulk of the Populist movement at that time.⁵²

Although the Party managed to elect legislators in several states, it was unable to achieve a coherent national movement or to find a leader with national appeal.⁵³ By the end of the 1890s, the Party was moribund.⁵⁴ In the early twentieth century, it thus was

45. *See id.* at 1035 (noting that "a common concern" among populists of that era "was protecting the public from concentrated economic power").

46. *See* McMATH, *supra* note 41, at 71 (noting that the "life expectancy" of Southern farm organizations in the 1880s "was short").

47. *Id.* at 83 ("At the beginning of 1887 . . . the Agrarian movement in America consisted of many separate islands of protest scattered across the South and West.").

48. *See id.* at 116–18 (discussing the example of populist alliances in Colorado in the 1880s).

49. *Id.* at 166.

50. *See id.* at 167 (describing the Omaha platform of 1892).

51. JUDIS, *supra* note 17, at 21.

52. *See, e.g.,* Ignatius Donnelly, *Preamble to the Platform of the People's Party* (1892), <https://www.learner.org/workshops/primarysources/corporations/docs/popplat.html> [<https://perma.unl.edu/4S25-N2JW>] ("We believe that the powers of government—in other words, of the people—should be expanded (as in the case of the postal service) as rapidly and as far as the good sense of an intelligent people and the teachings of experience shall justify, to the end that oppression, injustice, and poverty shall eventually cease in the land.").

53. *See* MUDDE & KALTWASSER, *supra* note 38, at 21 (discussing regional successes of the People's Party). In 1896, an unraveling Party decided to support Democratic presidential candidate William Jennings Bryan, but Bryan declined even to acknowledge his nomination by the Populists. McMATH, *supra* note 41, at 204.

54. McMATH, *supra* note 41, at 206 (describing the Party's descent into irrelevance); ROE, *supra* note 17, at 285 (noting that "[a]nti-finance 'populism' [w]as not what it once was as a political force"). In addition, many former People's Party members began moving away from an approach focused on reforming capitalism and towards a sort of rural socialism, complaining that "the capitalist masters . . . own the full machinery of our government from the justice of the peace up." Jarod Roll, *Agrarian Producerism after Populism: Socialism and Garveyism in the Rural South*, in *POPULISM IN THE SOUTH REVISITED: NEW INTERPRETATIONS AND NEW DEPARTURES* 199, 207 (James M. Beeby ed., 2017).

the Progressive movement that took the lead in reforming business.⁵⁵

In the 1930s, however, a group of intellectuals centered around Vanderbilt University gave rise to a new populist movement known as Southern Agrarianism.⁵⁶ The Agrarians were harsh critics of monopoly capitalism.⁵⁷ At the same time, however, they were also strongly opposed to socialism, which they believed led to revolution and dictatorship.⁵⁸

The Agrarians' hostility to large corporations followed directly from that dialectic because they believed that the relationship between large corporations and a powerful government would evolve from crony capitalism to fascism or communism. Lyle Lanier, for example, wrote that giant corporations had "become the instruments of an economic fascism."⁵⁹ Frank Owsley likewise complained that a relatively few wealthy individuals were able "to control most of the nation's wealth and to regiment virtually the whole population under their anonymous holding companies and corporations."⁶⁰ Yet, their concern was directed more at monopolistic abuses than the corporate form itself.⁶¹ Accordingly, their primary political agenda envisioned recreating an economy comprised mainly of small communities of yeo-

55. See Ann L. Schiavone, *Real Bite: Legal Realism and Meaningful Rational Basis in Dog Law and Beyond*, 25 WM. & MARY BILL RIGHTS J. 65, 82 (2016) ("The progressives of the early twentieth century relied heavily on the evolving concept of police power in the United States, resulting in passage of laws regulating business and the economic systems based on the goals of protecting health, safety, and morals.").

56. See Emily S. Bingham & Thomas A. Underwood, *Introduction*, in *THE SOUTHERN AGRARIANS AND THE NEW DEAL: ESSAYS AFTER I'LL TAKE MY STAND* 1, 2 (Emily S. Bingham & Thomas A. Underwood eds., 2001) (describing the Southern Agrarians as "a group of Southern conservatives who . . . emerged from Nashville's Vanderbilt University").

57. *Id.* at 16–17 (noting that Southern Agrarians were "unremitting critic[s] of monopoly capitalism").

58. *See id.* at 17 (explaining that the Agrarians "abhorred the prospect of mass political movement and the notion of class-based struggle that infused socialist thought").

59. Lyle Lanier, *Big Business in the Property State*, in *WHO OWNS AMERICA? A NEW DECLARATION OF INDEPENDENCE* 18, 18 (Herbert Agar & Allen Tate eds., 1936). *See generally* Hutchison, *supra* note 43, at 1052 (noting that populists "feared any concentration of economic power, even (and perhaps especially) if controlled by the federal government").

60. Frank Lawrence Owsley, *The Pillars of Agrarianism*, in *THE SOUTHERN AGRARIANS AND THE NEW DEAL: ESSAYS AFTER I'LL TAKE MY STAND*, *supra* note 56, at 199, 202.

61. *See id.* at 202 (stating that the Southern Agrarians agreed "that the most desirable objective is to break them [i.e., giant corporations] down into small units owned and controlled by real people").

man farmers and artisans.⁶² As such, it was less a program than a utopian dream that was inherently unrealistic.⁶³ In any case, the movement's association with fascism, anti-Semitism, and racism led to it being discredited, and it had sputtered out by the end of the 1930s.⁶⁴

Some commentators identify various postwar right-wing movements—such as McCarthyism, the George Wallace presidential campaign in 1968, and the Ross Perot presidential campaigns of the 1990s—as populist in nature.⁶⁵ But the most recent outbreak of populist anti-capitalism is properly traced to Pat Buchanan's 1996 campaign for the Republican presidential nomination, a campaign marked by hostility to globalization, in general, and transnational corporations, in particular.⁶⁶ Buchanan's campaign solidified a view among the emergent populist movement that large corporations and crony capitalism were diluting America's exceptional culture and identity through globalization and impoverishing working-class Americans while enriching financial and technology oligarchs.⁶⁷

The Tea Party and the 2016 Trump campaign are of greater import for our purposes. They espoused “an aversion to Wall Street,” opposition to government bailouts of financial firms, and a “strong producerist message.”⁶⁸ They share many attributes with the other major twenty-first century American populist movement—Occupy Wall Street—including an antagonism towards corporate power.⁶⁹

62. See James A. Gardner, *Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument*, 76 TEX. L. REV. 1219, 1243 (1998) (“The Southern Agrarians, of course, placed the Agrarian life at the heart of Southernism”); see also Steven J. Eagle, *The Really New Property: A Skeptical Appraisal*, 43 IND. L. REV. 1229, 1275 n.342 (2010) (“Southern Agrarians especially stressed individual property ownership as necessary to a culture of family self-reliance.”).

63. See WILLIAM P. HUSTWIT, JAMES J. KILPATRICK: SALESMAN FOR SEGREGATION 183 (2013) (noting “the impracticability of the Vanderbilt Agrarians’ economic positions in an industrialized America” and “the mythic aspects of their vision”).

64. See KOLOZI, *supra* note 25, at 103 (discussing reasons Southern Agrarianism proved “a short-lived intellectual movement”).

65. See JUDIS, *supra* note 17, at 28–53 (discussing populist movements following the demise of the People’s Party); MUDDE & KALTWASSER, *supra* note 38, at 24–25 (discussing postwar populist movements).

66. See JUDIS, *supra* note 17, at 51–52 (discussing Buchanan campaign).

67. See OSBORNE, *supra* note 30, at 9 (discussing the impact of the Buchanan campaign on the development of populist thinking).

68. MUDDE & KALTWASSER, *supra* note 38, at 26–27. Producerism is a thesis widely shared by populists arguing “that only those who created wealth in tangible, material ways (on and under the land, in workshops, on the sea) could be trusted to guard the nation’s piety and liberties.” MICHAEL KAZIN, *THE POPULIST PERSUASION: AN AMERICAN HISTORY* 13 (1995).

69. See David G. Yosifon, *The Social Relations of Consumption: Corporate Law and the Meaning of Consumer Culture*, 2015 BYU L. REV. 1309, 1339 (2015) (noting that “corporate antagonists ranging from the Tea Party members to activists in

There were signs of a reemerging populist suspicion of big business and the corporation even before the financial crisis of 2007. A 2004 University of Chicago poll, for example, found that seven out of eleven nonbusiness social institutions were more respected than “major businesses.”⁷⁰ A 2005 Harris Poll found that “big business” was the social institution that the largest number of respondents identified as having too much political power.⁷¹ Big business, moreover, was one of only two social institutions for whom the percentage of respondents identifying it as having too much power had risen since 1994.⁷²

It was the financial crisis, however, that gave rise to modern populism. Specifically, the Tea Party emerged largely in reaction to the federal government bailouts of the financial and automobile industries,⁷³ which were perceived as favoring Wall Street over Main Street,⁷⁴ although concerns about globalization and wealth inequalities were also contributing factors.⁷⁵ Unlike traditional pro-business Republicans, the Tea Party wing of the GOP opposed what they called corporate welfare.⁷⁶

the Occupy movement [] speak in desperate terms about the role of corporations in our society”). But while Tea Party leaders sharply criticized establishment Republicans for being too close to big banks, the Tea Party is neither anti-capitalist nor pro-socialist. See JUDIS, *supra* note 17, at 57–58 (discussing the origins and goals of the Tea Party). Tea Party members are typically staunch defenders of the free market system, which they believe has been corrupted by crony capitalism that benefits large businesses as the expense of the people. See MUDDE & KALTWASSER, *supra* note 38, at 13.

70. See OSBORNE, *supra* note 30, at 197.

71. See *id.*

72. *Id.*

73. See Robert Quigley, *The Impulse Towards Individual Criminal Punishment After the Financial Crisis*, 22 VA. J. SOC. POL'Y & L. 103, 128 n.149 (2015) (arguing the Tea Party movement emerged in a wave of populist outrage over the 2008 bank bailouts).

74. See Michael A. Livingston, *Robespierre Meets the Foreign Tax Credit: Reflections on Piketty's "Capital in the Twenty-First Century" and the Contemporary Tax Policy Debate*, 40 ACTEC L.J. 181, 182 (2014) (book review) (“Even the Tea Party, while conservative on social issues, has adopted an anti-elitist tone, complaining of corporate bailouts and demanding more attention to the average voter.”).

75. See OSBORNE, *supra* note 30, at 197 (discussing the impact of these factors on rising populist sentiment); Julia Azari & Marc J. Hetherington, *Back to the Future? What the Politics of the Late Nineteenth Century Can Tell Us About the 2016 Election*, 667 ANNALS AM. ACAD. POL. & SOC. SCI. 92, 101–02 (2016) (noting that “economic inequality has become a central theme of twenty-first-century politics . . . with these questions animating themes in the 2016 election on both the Left and Right” (citation omitted)).

76. See Richard A. Epstein, *Citizens United v. FEC: The Constitutional Right That Big Corporations Should Have but Do Not Want*, 34 HARV. J.L. & PUB. POL'Y 639, 660–61 (2011) (observing that the Tea Party “tends to be opposed to both parties and to large corporations that seek their favor”); Ilya Shapiro & Carl G. DeNigris, *Occupy Pennsylvania Avenue: How the Government's Unconstitutional Actions Hurt the 99%*, 60 DRAKE L. REV. 1085, 1097 (2012) (“The understandable outrage

Thus, the failures of corporate governance gave rise, at least indirectly, to the Tea Party rebellion. A substantial body of post-crisis research suggests that equity-based performance pay practices and, more generally, the greater emphasis on shareholders' interests evident in the 2000s resulted in greater risk-taking by financial firms.⁷⁷

In the wake of the 2012 presidential election, it was often suggested that the Republican party would need to accommodate this emergent movement by shifting in a more populist direction.⁷⁸ This prediction came true during the 2016 Republican presidential nomination campaign as the populist trend manifested itself in Donald Trump's successful run for the nomination. Trump's core supporters were not part of the usual Republican coalition of free market libertarians and social issue conservatives. Instead, they more closely resembled classic economic populists.⁷⁹ As a result, Trump's election confirmed that a more populist stance was a winning formula.⁸⁰ This resulted in the emergence of a substantial power bloc within the Republican Party that directs its anger not only at traditional GOP enemies, like big government, but also towards financial and corporate executives.⁸¹ As *The Economist's* Schumpeter columnist observed, it is this combination of political power and anti-business animus that raises the question of corporate purpose.⁸²

[provoked by corporate bailouts during the Obama administration], voiced through the Tea Party and Occupy movements, has called into question not just the policy rationales behind such corporate welfare, but the legal authority supporting it.”); R. Ryan Staine, *Crez II, Coming Soon to a Windy Texas Plain Near You?: Encouraging the Texas Renewable Energy Industry Through Transmission Investment*, 93 TEX. L. REV. 521, 547 (2014) (“The Tea Party and libertarian movements have emerged as powerful forces in the Republican Party, and those groups have expressed opposition to anything that could be seen as ‘corporate welfare.’”).

77. See Christopher M. Bruner, *Corporate Governance Reform in a Time of Crisis*, 36 J. CORP. L. 309, 317 (2011) (reviewing the evidence in question).

78. See Daniel A. Farber, *The Conservative as Environmentalist: From Goldwater and the Early Reagan to the 21st Century*, 59 ARIZ. L. REV. 1005, 1042 (2017) (“After the 2012 election, a prescient voting analyst argued that the GOP would need to abandon ‘some of its more pro-corporate stances’ and become more ‘America first’ on trade and immigration, and more populist on economic issues.” (quoting E.J. DIONNE, JR., WHY THE RIGHT WENT WRONG: CONSERVATISM—FROM GOLDWATER TO THE TEA PARTY AND BEYOND 383 (2016))).

79. See JUDIS, *supra* note 17, at 77.

80. See Farber, *supra* note 78, at 1042 (noting that populist economic “positions became the centerpieces of Donald Trump’s victorious campaign for the Republican nomination”).

81. See Steven McNamara, *Financial Markets Uncertainty and the Rawlsian Argument for Central Counterparty Clearing of OTC Derivatives*, 28 NOTRE DAME J.L. ETHICS & PUB. POL’Y 209, 277 (2014).

82. See *supra* text accompanying note 21.

B. Populists Versus the Corporation

As suggested by the history reviewed in the preceding section, populist critiques of the corporation generally target abuses of the form rather than the corporate form itself. Some populists were simply doubtful of the corporation's fitness for purpose, disputing its utility as a way of organizing production.⁸³ More often, however, right-wing populists objected to the separation of ownership and control inherent in the corporate form, arguing that it separated ownership from responsibility.⁸⁴ This concern was not driven by populist sympathy for investors, as most modern scholars contend, but rather with the lack of social accountability inherent in dispersed and distant ownership.⁸⁵ The Agrarians believed modern corporate capitalism had created a new class of absentee owners that had broken down older systems in which owners and laborers had recognized their mutual obligations.⁸⁶ The Agrarians thus echoed Berle's contemporaneous complaint that the ownership structure of modern corporations divorced ownership and control,⁸⁷ but added the complaint that the public corporate form divorced a business' owners from the firm's workers and the local communities within which the firm did business.⁸⁸

83. See, e.g., Richard B. Ransom, *Corporate and Private Persons, in WHO OWNS AMERICA? A NEW DECLARATION OF INDEPENDENCE*, *supra* note 59, at 68, 70 ("The total usefulness of corporate forms seems to me to be overrated, and much of the efficiency of the large corporation is either illusory or highly questionable.").

84. See EUGENE D. GENOVESE, *THE SOUTHERN TRADITION: THE ACHIEVEMENT AND LIMITATIONS OF AN AMERICAN CONSERVATISM* 80–81 (1994) (discussing the Agrarian critique of the corporation); see, e.g., Anderson Nelson Lytle, *The Hind Tit, in I'LL TAKE MY STAND: THE SOUTH AND THE AGRARIAN TRADITION* 201, 243 (La. State Univ. Press, reprinted 2006) ("Mortgage companies, insurance companies, banks, and bonding-houses that are forced to take over the land of free men . . . what will be the social relationship? What can an abstract corporation like an insurance company . . . know of a farmer's life?" (first alteration in original)).

85. See Hutchison, *supra* note 43, at 1035 ("Rather than viewing the corporate form as an enabling mechanism for private enterprise—the mainstream academic view of corporations today—many at the time continued to view corporations as quasi-public instruments of the state, whose legal privileges were predicated upon provision of a public benefit.").

86. See KOLOZI, *supra* note 25, at 87.

87. See Kenneth Lipartito & Yumiko Morii, *Rethinking the Separation of Ownership from Management in American History*, 33 *SEATTLE U. L. REV.* 1025, 1059 n.44 (2010) (noting that contemporaneous reviewers of Berle and Means's work concluded it "had demonstrated the dangers resulting from the divorce of ownership from control").

88. See KOLOZI, *supra* note 25, at 87. Put another way, the Southern Agrarians believed that the development of the modern public corporation, with its separation of ownership and control, transformed economic activity from personal to impersonal exchanges. *Id.* at 89–90.

The Agrarian ideal was small farms and businesses owned by those in the local community.⁸⁹ Whether it was ever practicable to restore such a bucolic utopia—assuming one ever existed—in a modern industrial economy is highly doubtful.⁹⁰ But even if it were, what the Agrarians—among others—failed to understand is that the separation of ownership and control in the corporation is a feature and not a bug.⁹¹ Only the very smallest and most highly localized businesses could exist without separating ownership from control.⁹²

In time, however, most populists came to recognize that the problem was not the corporate form as such because they recognized that even locally owned and operated business could advantageously use the corporate form.⁹³ The problem thus was not the form itself

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89. See, e.g., Allen Tate, *Notes on Liberty and Property*, in WHO OWNS AMERICA? A NEW DECLARATION OF INDEPENDENCE, *supra* note 59, at 80, 92–93 (discussing Agrarians' desire to reunite ownership and control); Herbert Agar, *But Can it be Done?*, in WHO OWNS AMERICA? A NEW DECLARATION OF INDEPENDENCE, *supra* note 59 at 94, 104–05 (advocating a system of “[d]ecentralized factories producing for local use . . . owned by the people directly concerned with them”).
90. Cf. YOSIFON, *supra* note 11, at 204–05 (“Nobody wants to return to the ‘penurious self-sufficiency of the household system,’ much less the dreary, limited cultural life it contained. The depravities of abundance are preferable to the banality of deprivation.” (footnote omitted) (quoting D.H. ROBERTSON, *THE CONTROL OF INDUSTRY* 104 (1923))).
91. See, e.g., Howard M. Friedman, *The Silent LLC Revolution—The Social Cost of Academic Neglect*, 38 CREIGHTON L. REV. 35, 43 (2004) (“Corporate law developed both mandatory and default rules designed to protect geographically dispersed passive investors from the shirking, self-dealing and incompetence of those managing the pooled funds originally invested by shareholders.”); Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1682 (1988) (citing A. CHANDLER JR., *THE VISIBLE HAND* 9–10 (1977)) (“The separation of ownership and control was essential to the modern business corporation’s ability to command its resources efficiently.”). See generally Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 628 (2006) (arguing that “the separation of ownership and control mandated by U.S. corporate law has . . . a strong efficiency justification”).
92. See Thomas A. Smith, *The Passion of Professor Fischel: Defending Milken’s Financial Revolution*, 22 LAW & SOC. INQUIRY 1041, 1042 (1997) (“Ownership and control have always been separated in businesses of any size, and this separation is no worse now than it was when Berle and Means wrote [in 1932].”).
93. See, e.g., John Batt, *American Legal Populism: A Jurisprudential and Historical Narrative, Including Reflections on Critical Legal Studies*, 22 N. KY. L. REV. 651, 702 (1995) (explaining that, in the 1830s, “newly elected Jacksonians followed the lead of their legal populist president and passed incorporation statutes that allowed small business people the advantages of the corporate form of doing business”). In an important analysis, Stephen Presser contends that the expansion of the availability of the corporate form in the mid-nineteenth century was an outgrowth of populist democratic theory. Stephen B. Presser, *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics*, 87 NW. U. L. REV. 148, 155–56 (1992). The nineteenth century legislators who first adopted limited liability as a central feature of corporate law did so, Presser contends, to encourage small and impecunious entrepreneurs to start and grow new businesses. Without the shield of limited liability, only very wealthy persons would

but rather the massive power wielded by the very largest corporations.⁹⁴

Size and the resulting potential for concentrated economic power are thus the chief recurring themes in the populist critique of the corporation. Late nineteenth century populists thought that the growing power of corporations was a significant threat to their economic and political liberty.⁹⁵ The Southern Agrarians likewise believed, as Lyle Lanier observed, that “the corporate form of our economic system makes possible a scale of exploitation unheard of in history.”⁹⁶ In particular, the Agrarians saw large corporations as leviathans trampling on their employees. The labor corporations provided lacked security. Workers toiled under dehumanizing conditions. Yet, the law protected it by enshrining the rights of corporations into the Constitution.⁹⁷ The Southern Agrarians further believed that the concentration of economic power in large corporations had created “a plutocratic corporate capitalist class” that effectively ruled the country and thus stood ready to fully exploit their power over farmers and workers.⁹⁸

Much the same set of concerns motivates many Tea Party members. In response to the *Citizens United* decision,⁹⁹ for example, Tea Party co-founder Dale Robertson complained that “[c]orporations are not like people. Corporations exist forever, people don’t. Our founding fathers never wanted them; these behemoth organizations that never

incorporate their businesses. It seems probable that such considerations, coupled with a closely related desire to promote capital formation and economic growth, drove (and still drive) the political support for limited liability. *See id.* at 163.

94. *See* Martha T. McCluskey, *The Substantive Politics of Formal Corporate Power*, 53 *BUFF. L. REV.* 1453, 1479 (2006) (arguing that “the populist effort to control big business by popularizing the corporate form ended up facilitating the rise of corporate robber barons”).
95. *See* William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 *MICH. L. REV.* 1, 43 (1999) (explaining that “farmers and working people” believed their rights “as citizens were in jeopardy because of corporate power”); Hutchison, *supra* note 43, at 1035 (noting that “a common concern” among late nineteenth century populists “was protecting the public from concentrated economic power”).
96. Lyle H. Lanier, *A Critique of the Philosophy of Progress*, in *I’LL TAKE MY STAND: THE SOUTH AND THE AGRARIAN TRADITION*, *supra* note 84, at 122, 141. Southern Agrarian Frank Lawrence Owsley likewise argued that the people’s common enemy was “a system which allows a relatively few men to control most of the nation’s wealth and to regiment virtually the whole population under their anonymous holding companies and corporations, and to control government by bribery or intimidation.” Owsley, *supra* note 60, at 202.
97. *See, e.g.*, Henry Clay Evans, Jr., *Liberty Under the Old Deal*, in *WHO OWNS AMERICA? A NEW DECLARATION OF INDEPENDENCE*, *supra* note 59, at 295 (discussing conditions of work in large corporations during the Depression).
98. KOLOZI, *supra* note 25, at 93; *see also* Forbath, *supra* note 95, at 43 (explaining that populists believed “corporate power had combined with an overweening judiciary and corrupt party system to shatter the sovereign people’s control of the state and federal governments that were meant to carry out their will”).
99. *Citizens United v. Fed. Election Comm’n.*, 558 U.S. 310 (2010).

die. . . . It puts the people at a tremendous disadvantage.”¹⁰⁰ Tea Party activists also tend to be uncomfortable with business’s political agenda and business’s lack of support for Tea Party social issues.¹⁰¹ The inability or unwillingness of large corporations to assist in addressing “the political alienation and economic instability” felt by many gave rise to “both left- and right-wing populism” and helped elect Donald Trump.¹⁰²

C. Populist Regulatory Proposals

In response to their various concerns about corporations, populists have long believed that corporations “should be controlled ‘as we control steam and electricity, which are also dangerous if not carefully managed, but of wonderful usefulness if rightly harnessed to the car of progress.’”¹⁰³ Although state corporate law is the font of our corporate governance system,¹⁰⁴ populists have long believed that state law is too lax in regulating large corporations.¹⁰⁵ In the 1920s, for example,

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100. Greg Coleridge, *The System Isn’t Broken, It’s Fixed: Ending Big Money and Corporations in Our Elections*, 44 U. TOL. L. REV. 541, 557 (2013) (alteration in original) (quoting *The SCOTUS ‘Corporate Cash for Candidates’ Decision: Left, Right and Tea*, REID REPORT (Jan. 21, 2010), <http://blog.reidreport.com/2010/01/supco-campaign-cash-decisionreactions/> (blog no longer active)).
101. See Ann Southworth, *Elements of the Support Structure for Campaign Finance Litigation in the Roberts Court*, 43 LAW & SOC. INQUIRY 319, 347 (2018) (“Advocates for business interests, such as the Chamber of Commerce, tend to be uncomfortable with the issue agendas of some of the social conservative and Tea-Party-affiliated groups, and vice versa.”).
102. Richard C. Schragger, *The Political Economy of City Power*, 44 FORDHAM URB. L.J. 91, 95 (2017). In a New York Times op-ed, Sarah Smarsh explained that her white, working class father is angry not at minorities but “at bosses who exploit labor and governments that punish the working poor—two sides of a capitalist democracy that bleeds people like him dry. ‘Corporations,’ Dad said. ‘That’s it. That’s the point of the sword that’s killing us.’” Sarah Smarsh, *Liberal Blind Spots Are Hiding the Truth About ‘Trump Country’*, N.Y. TIMES (July 19, 2018), <https://www.nytimes.com/2018/07/19/opinion/trump-corporations-white-working-class.html> [<https://perma.unl.edu/8A56-6MNL>].
103. Hutchison, *supra* note 43, at 1040 (quoting William Wirt Howe, New Orleans Bd. of Trade, Address to Chicago Conference on Trusts (Sept. 16, 1899), in CHICAGO CONFERENCE ON TRUSTS: SPEECHES, DEBATES, RESOLUTIONS, LIST OF DELEGATES, COMMITTEES, ETC. 383 (Civic Fed’n of Chi. ed., 1900)).
104. See, e.g., *Burks v. Lasker*, 441 U.S. 471, 478 (1979) (“‘Corporations are creatures of state law,’ and it is state law which is the font of corporate directors’ powers.” (citation omitted) (quoting *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977); *Cort v. Ash*, 422 U.S. 66, 84 (1975))).
105. See Hutchison, *supra* note 43, at 1035 (“Given the liberalization of state corporate law and the rapid growth of national combinations, many [populist attendees at an 1899 conference] feared that individual state governments had abandoned their responsibility to the public interest.”); *id.* at 1071 (explaining that, “at the conference, Judge Peter Grosscup of the Seventh Circuit . . . claimed that several state governments allowed the formation of corporations without any oversight whatsoever”).

the state laws that allowed dual class stock, which “permitted investors with a relatively small financial investment to control the voting shares of the company[,] aroused populist ire . . . and led to a stock exchange ban.”¹⁰⁶ The same sort of populist dissatisfaction with state law also led to the adoption of the federal securities laws in the 1930s.¹⁰⁷

Instead, as the latter example suggests, populists typically have looked to federal law to regulate large corporations. As one might expect, given their concern with size and concentrated economic power, populist regulatory proposals typically focus on “limiting the size and scope of corporations themselves.”¹⁰⁸ Herbert Agar, for example, argued that society could achieve the Southern Agrarian program of decentralizing business through “two forms of [government] intervention: differential taxation, and control of new capital issues.”¹⁰⁹ In addition to other measures, such as antitrust limits on the size of corporations and increased corporate taxes, the Agrarians favored public ownership of utilities and eliminating the corporation’s status as a corporate person.¹¹⁰

Richard Ransom offered the most detailed regulatory proposal of the Southern Agrarian era. Ransom proposed federal rather than state incorporation “of all corporations subject to federal regulation,”¹¹¹ which obviously cuts a rather broad swath. He further proposed a graduated scale of federal supervision ranging from oversight of corporate charters and debt issuances by corporations engaged in interstate commerce to “complete Federal administration or owner-

106. Robert B. Thompson, *Corporate Federalism in the Administrative State: The SEC’s Discretion to Move the Line Between the State and Federal Realms of Corporate Governance*, 82 NOTRE DAME L. REV. 1143, 1158 (2007) (footnote omitted). Interestingly, dual class stock capital structures have seen a resurgence, especially among the oligarchs of Silicon Valley. See Lucian A. Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 VA. L. REV. 585, 591 (2017) (noting that, “since Google decided to use a dual-class structure for its 2004 IPO, a significant number of ‘hot’ tech companies have followed its lead”).

107. See JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE* 42 (1982) (“Roosevelt committed himself to the long-held populist and progressive goal of superseding lax state corporation laws with more stringent federal standards.”).

108. Hutchison, *supra* note 43, at 1085–86.

109. Agar, *supra* note 89, at 105.

110. See KOLOZI, *supra* note 25, at 97 (summarizing the Southern Agrarians’ political platform with respect to regulation of big business). Some modern populists in the Tea Party likewise favor eliminating the corporation’s status as a constitutional person. See JEDEDIAH PURDY, *That We Are Underlings: The Real Problems in Disciplining Political Spending and the First Amendment*, 30 CONST. COMMENT 391, 395 (2015) (arguing that the Tea Party “may like stripping corporate personhood of constitutional significance”).

111. Ransom, *supra* note 83, at 76.

ship” of corporations so affected with a public interest that “their national ownership is highly probable.”¹¹² Third, he endorsed a regime of personal liability for shareholders under which they could be held liable for “an amount at least equal to twice” their investment. He believed this would promote “greater personal responsibility of the shareholders for the conduct of the business,”¹¹³ an idea that presumably came as a response to the populist complaint about the separation of ownership and control. In addition, Ransom supported the usual populist proposals for more rigorous antitrust enforcement and “heavy selective inheritance taxation on the transfer of corporate shares or assets.”¹¹⁴

III. THE POPULISTS’ REGULATORY AGENDA

Perhaps because of the skepticism about the effectiveness of state regulation or their lack of concern with the interests of investors as opposed to those of farmers and laborers, the Southern Agrarians devoted little attention to corporate governance. Other generations of populists, however, did devote some attention to governance issues.¹¹⁵ Populist politics came into play during the 1955 bank holding company hearings, the mid-1960s Patman report on banks, the SEC’s 1960s crackdown on mutual fund control of portfolio companies, and the 1980s antitakeover legislative efforts at both the federal and state levels.¹¹⁶

A. Populists and Corporate Purpose

When one turns to the specific issue of corporate purpose, however, there is relatively little discussion in the populist literature. One important exception was the early twentieth century work of Thorstein Veblen, who argued that the corporate separation of ownership and control allowed managers discretion to pursue socially responsible activities at the expense of profit maximization.¹¹⁷ In addition, a number of Southern Agrarians criticized corporate directors and managers

112. *Id.*

113. *Id.* at 77.

114. *Id.* at 75.

115. See ROE, *supra* note 17, at 29 (explaining that although populism’s influence on the development of antitrust law is well known, populism also had less widely acknowledged impact on corporate governance, albeit primarily indirectly through regulation of financial institutions).

116. See *id.* at 32 (discussing role of populist rhetoric in those events).

117. See RENGINEE PILLAY, THE CHANGING NATURE OF CORPORATE SOCIAL RESPONSIBILITY 70–71 (2015) (discussing Veblen). Although some question whether Veblen should be classed as a populist, his work is fairly regarded as being influenced by populist ideas. See Jan Toporowski, *Old Populism and the New Ideas of Michal Kalecki*, AM. AFFAIRS, Summer 2018, at 35, 39 (assessing that a “lasting intellectual legacy of the populists is found in the work of Thorstein Veblen”).

for failing to be socially responsible, especially with respect to the rights of workers.¹¹⁸ In particular, Lyle Lanier endorsed the view that corporate managers should “be induced to operate them with greater regard for the public welfare.”¹¹⁹

Beyond these few examples, however, populist literature is largely bare of discussion of corporate purpose. Indeed, other than some scattered Tea Party opposition to the corporation’s constitutional status as a legal person,¹²⁰ today’s populists have shown little interest in the sort of legal reforms advocated by their predecessors. Unlike left-of-center populists and progressives, neither Tea Party nor Donald Trump’s supporters have shown interest in encouraging voluntary corporate social responsibility.¹²¹

This is somewhat surprising. Neither the Tea Party nor the Trump administration are as committed to big business as were Republican voters and politicians in the past.¹²² They also have good reason to

118. See, e.g., John Crowe Ransom, *What Does the South Want?*, in WHO OWNS AMERICA? A NEW DECLARATION OF INDEPENDENCE, *supra* note 59, at 178, 184 (“Under Big Business and limited liability the spirit of *noblesse oblige* has disappeared from the working habits of the rulers of society.”); Tate, *supra* note 89, at 85 (observing that the corporation consisted of “a system of property rights in which responsibility to labor is on principle irrelevant”).

119. Lanier, *supra* note 59, at 27.

120. See *supra* note 100 (discussing Tea Party objections to corporate personhood).

121. David Yosifon pointed out that “the whole Carrier episode, the continuing NFL episode, the constant tweeting about specific firms, is all about encouraging ‘voluntary’ corporate social responsibility. There is an implicit threat of regulation (or worse) if firms do not comply.” E-mail from David Yosifon to author (Aug. 14, 2018, 10:48 PDT) (on file with author).

Steve Bradford likewise commented that:

Doing what Trump (or any other populist) wants could be perfectly consistent with profit maximization. In fact, where I think Trump and perhaps Warren differ from some of the traditional populists is in their attempt to make their goals the profit-maximizing choice. There’s an implicit threat that, if you don’t do what we want, we will impose higher taxes, take away your government contracts, etc. In Trump’s case, that threat is sometimes even explicit. When an American manufacturer changes its mind and chooses not to move outside the United States, it’s at least arguable that changing its mind was the profit-maximizing solution. The corporation is not doing it to save American jobs, but to avoid the negative consequences threatened by Trump.

E-mail from Steve Bradford to author (July 25, 2018, 12:31 PDT) (on file with author).

I take their points, but I nevertheless see little, if any, evidence of a sustained and organized effort to promote voluntary corporate social responsibility on the part of right-of-center populists.

122. See, e.g., Marcia Narine Weldon, *Corporate Governance, Compliance, Social Responsibility, and Enterprise Risk Management in the Trump/Pence Era*, 19 TRANSACTIONS 275, 276–77 (2017) (observing that President Trump “has, in some instances, issued executive orders and proposed legislation that completely contravenes much of what his former business peers have advocated for over the years” (footnote omitted)).

demand a higher degree of social responsibility on the part of business, especially with respect to workers. As we have seen, since the Buchanan campaigns in the 1990s, populists believe that large corporations and crony capitalism are undermining America's exceptionalism and America's national identity through globalization, while simultaneously impoverishing the working class and enriching the financial and technology oligarchs.¹²³ As we have also seen, this concern reached a peak in response to the post-financial crisis bailouts.¹²⁴

At a deeper level, the globalization of big business and related economic trends have left many modern populists behind. The top third of Americans, who are skilled, college-educated workers and managers in successfully globalized industries such as finance, technology, and electronics, have done well.¹²⁵ The bottom two-thirds are low-skilled workers whose jobs have been lost or threatened by globalization and technology.¹²⁶ Foreign trade, foreign direct investment, immigration, and declining union participation have also played a role in their declining fortunes.¹²⁷ Neither the government nor big business have seemed able or even very interested in addressing their concerns, which contributed importantly to the rise of the Tea Party and the success of the Trump campaign.¹²⁸

It is then surprising that modern populists confronted with cases like the Carrier fight discussed at the outset have not insisted on corporate directors and managers behaving in ways populists regard as socially responsible. As we have seen, current law mandates that directors adopt shareholder wealth maximization as their exclusive maximand, but the business judgment rule's insulative effect gives directors substantial discretion to pursue other interests in most cases.¹²⁹ As such, while UTC's board faced minimal risk of individual liability if they had considered issues like patriotism and solidarity with American workers when making the Carrier decision, they would—at least technically—be skirting, if not violating, the law. To

123. See OSBORNE, *supra* note 30, at 9.

124. See *supra* notes 73–76 and accompanying text.

125. See Thomas Ferguson et al., *Industrial Structure and Party Competition in an Age of Hunger Games: Donald Trump and the 2016 Presidential Election* 25–26 (Inst. for New Econ. Thinking, Working Paper No. 66, 2018) (discussing Peter Temin's analysis of the polarization of income and wealth in the contemporary United States).

126. *Id.*

127. See *id.* at 27 (discussing factors pushing workers into the bottom sector).

128. Schragger, *supra* note 102, at 95 (“Neither the nation-state nor the transnational corporation seem able to address the political alienation and economic instability felt by many citizens in the U.S. and elsewhere. This felt instability has given rise to both left- and right-wing populism, often tainted by xenophobia and nationalism. In the United States, Donald Trump’s presidential victory is illustrative of the latter.”).

129. See *supra* notes 11–14 and accompanying text (discussing current law).

encourage directors to take such factors into consideration, populists might seek to change current law to expressly authorize directors to do so. Indeed, one might even expect them to follow the lead of their left-of-center populist and progressive counterparts and insist that the law mandate such behavior. To date, however, no such effort has been forthcoming.¹³⁰

The problem may simply be one of getting the issue on their radar screen. As Randy Barnett has observed of the Tea Party's constitutional agenda:

Genuine mass movements do not develop innovative or concrete policies. Instead, they demand that those in the political and intellectual classes produce ideas that the movement will then vet. In other words, the Tea Party is not the *producer* of ideas for social change, nor should that be expected. Rather, it is an emerging political *market* for such ideas. When it comes to the Constitution, I no more expect Tea Partiers to produce detailed critiques of current constitutional practice or develop a reform agenda than I expect the readers of these Remarks collectively to design the iPods, iPhones or iPads they love, the cars they drive, or the clothes they wear. Just as consumers are the ultimate judges of whether they like or are indifferent to any particular device, so too will Tea Partiers be the judges of which reform ideas appeal to them and which leave them cold and unsatisfied.¹³¹

The same may be true of corporate governance reform.

B. Prospects for Legal Change

Let us assume that populists turn their attention to corporate purpose. As we have seen, current law does not contemplate corporate executives putting the interests of domestic U.S. stakeholders ahead of those of shareholders. What prospects are there for a Tea Party-driven change in that law?

In the first instance, corporate purpose is mostly judge made law¹³² and the courts that matter most—the Delaware Supreme and

130. Some observers likely will explain the lack of attention to corporate purpose by modern populists by arguing that the Tea Party and the Trump campaign are “astroturf” political campaigns covertly advancing the interests of big business. See Ryan D. Murphy, *Tea Party Constitutionalism: Does the “Astroturf” Have Roots in the History of the Constitution?*, 40 HASTINGS CONST. L.Q. 187, 188 (2012) (noting that some critics view “the organic nature of the Tea Party movement as a myth” and claim that when one looks closer “you will see that the grassroots are actually ‘astroturf’”). There may be some truth to that argument, but, in fact, “the Tea Party is not astroturf directed by Kansas billionaires, . . . it is not a product of Fox News, . . . it is not an adjunct of the Republican Party,” but rather “is a genuinely grassroots movement of millions of people.” Randy Barnett, *The Tea Party, the Constitution, and the Repeal Amendment*, 105 NW. U.L. REV. COLLOQUY 281, 282 (2011) (emphasis omitted).

131. Barnett, *supra* note 130, at 282.

132. As René Reich-Graefe observed, “[O]ver thirty states have adopted so-called non-shareholder constituency statutes as part of their respective state corporate statutes, thereby amending the existing statutory fiduciary duty framework for corporate directors.” René Reich-Graefe, *Deconstructing Corporate Governance:*

Chancery courts—are firmly wedded to shareholder wealth maximization.¹³³ To be sure, some scholars believe judges are more likely to be receptive to anti-business arguments than legislators and regulators.¹³⁴ The Delaware courts, however, seem an unlikely vehicle for a right-wing populist revolt against shareholder wealth maximization.¹³⁵

Absolute Director Primacy, 5 *BROOK. J. CORP. FIN. & COM. L.* 341, 377 (2011). Neither Delaware nor the Model Business Corporation Act has incorporated such a statute, however. See Joan MacLeod Heminway, *Shareholder Wealth Maximization as a Function of Statutes, Decisional Law, and Organic Documents*, 74 *WASH. & LEE L. REV.* 939, 949 (2017) (noting the absence of such provisions in those statutes). Only one state ever adopted a statute mandating that directors consider interests other than those of shareholders when making corporate decisions, however, and that statute was never enforced. See Robert M. Ackerman & Lance Cole, *Making Corporate Law More Communitarian: A Proposed Response to the Roberts Court's Personification of Corporations*, 81 *BROOK. L. REV.* 895, 998 (2016) (discussing former Connecticut statute). Moreover, in a twenty-year period from 1983–2013 there were only forty-seven reported decisions discussing such statutes. See Christopher Gezy et al., *Institutional Investing When Shareholders Are Not Supreme*, 5 *HARV. BUS. L. REV.* 73, 105 (2015) (summarizing results of a study of the statutes). The bottom line thus seems to be that these statutes have had a very modest impact on the law.

Importantly, states typically adopted nonshareholder constituency statutes not to promote corporate social responsibility but rather as part of a package of anti-takeover laws intended not to regulate but to protect local corporations. See Janette Meredith Wester, *Achieving a Proper Economic Balance: Nonshareholder Constituency Statutes*, 19 *STETSON L. REV.* 581, 616 (1990) (“States have enacted antitakeover statutes, including nonshareholder constituency statutes, with the clear aim of protecting local corporations.”). Instead of being a grass roots phenomenon, the rise of nonshareholder constituency statutes is attributable mainly to lobbying by corporate executives. See Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 *STETSON L. REV.* 23, 31–36 (1991) (explaining that corporate managers promoted nonshareholder constituency statutes); see generally ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 57–59 (1993) (explaining that state anti-takeover statutes were supported by corporate managers). The nonshareholder constituency statutes thus do not provide a model for populist legal change.

133. See *supra* notes 11–14 and accompanying text.

134. In reviewing Simon Lazarus’ book, *THE GENTEEL POPULISTS*, John Ferren wrote that:

Lazarus argues that federal judges are more likely than agency commissioners to support a variety of interests against business because judges are inevitably more independent. Only a portion of their job involves business regulation, and an even smaller amount of their time concerns a specific industry. Moreover, unlike agency commissioners, they are not likely to be appointed at the behest of a particular commercial interest or to develop “excessively cordial relationships” with industry representatives after appointment to the bench (p. 247).

John M. Ferren, *The Genteel Populists*, 88 *HARV. L. REV.* 666, 672 (1975).

135. See Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 *VAND. L. REV.* 1573, 1576 (2005) (explaining that Delaware

As for the chances for legislative action at the federal level, populists tend to have the greatest political successes through legislative action in the immediate aftermath of economic crises:¹³⁶

[T]he federal role in corporate governance appears to be a case of what Robert Higgs identified as the ratchet effect. Higgs demonstrated that wars and other major crises typically trigger a dramatic growth in the size of government, accompanied by higher taxes, greater regulation, and loss of civil liberties. Once the crisis ends, government may shrink somewhat in size and power, but rarely back to pre-crisis levels. Just as a ratchet wrench works only in one direction, the size and scope of government tends to move in only one direction—upwards—because the interest groups that favored the changes now have an incentive to preserve the new status quo, as do the bureaucrats who gained new powers and prestige. Hence, each crisis has the effect of ratcheting up the long-term size and scope of government.

We now observe the same pattern in corporate governance [T]he federal government rarely intrudes in this sphere except when there is a crisis.¹³⁷

Unless there is another major financial crisis, the prospects of a federal statute mandating that corporations adopt a purpose broader than shareholder wealth maximization seems dim.

IV. POPULISTS AND SOCIALLY RESPONSIBLE CORPORATE ELITES

Let us assume that the Tea Party and Trump base opt to embrace corporate social responsibility as a tool for achieving their agenda. They insist on enlarging corporate purpose to include protection of American jobs from the forces of globalization, an embrace of national patriotism,¹³⁸ defense of traditional cultural and social mores, and the like. If the law allows directors to consider interests other than shareholder wealth maximization, however, there is no guarantee that they would actually do so. Even if law reform went further and mandated that directors consider interests other than shareholders, there is no guarantee that directors' decisions would meet with populist approval.¹³⁹

has adopted “a classical or 19th century common law model of lawmaking,” under “legal change is slow, standard-based, and incremental”).

136. ROE, *supra* note 17, at 49 (observing that populist political successes in the corporate governance context have “required a catalyst” such as a major economic crisis).

137. STEPHEN M. BAINBRIDGE, *CORPORATE GOVERNANCE AFTER THE FINANCIAL CRISIS* 269–70 (rev. ed. 2012).

138. For an interesting analysis of corporate patriotism, albeit from a progressive perspective, see YOSIFON, *supra* note 11, at 96–120.

139. Herein I assume for the sake of the argument that corporate social responsibility can be an effective means of achieving social change. In fact, however, there is good reason to be very skeptical of that assumption. For an excellent argument that legal rules promoting corporate social responsibility have limited effect because “the existence of powerful product markets, capital markets, and managerial labor markets restricts the options” available to corporate decision makers,

The Southern Agrarians likely would have dismissed reliance on the goodwill of corporate executives out of hand. Lyle Lanier spoke for many when he argued that corporate owners and managers have “no feeling of responsibility even for the physical welfare of individuals dependent for a living upon the caprice of modern industry.”¹⁴⁰ Richard Weaver believed large corporate bureaucracies could easily merge with government to create a fascist or socialist economy.¹⁴¹ Richard Ransom contended that restraints on such large corporations cannot be accomplished through codes of ethics.¹⁴² The Agrarians would tell modern populists that, even if we empowered corporate directors and executives to consider the social effects of their decisions, the very nature of the enterprise they serve eradicates feelings of benevolence and empathy.¹⁴³

Since the 1930s, there have been two further changes that make it even less likely that the benevolence of corporate directors and managers can be mobilized to advance the populist agenda and protect the interests of those in the movement. First, there has been a dramatic set of economic changes that have fundamentally altered not only how large American corporations relate to the American people as workers but also how they relate to them as investors and consumers. Second, there has been a crucial divide in the worldviews, value systems, and beliefs of the elites and the people. Taken together, these changes put corporate elites solidly in opposition to populists, especially those right of center.

A. The Changing Nature of Work, Investment, and Consumption

We have already touched on the ways in which the changing nature of work and the economy have been important factors in the populist revival.¹⁴⁴ Increasingly, elites and non-elites hold very different types of jobs in very different industries, assuming the latter have jobs

see D. Gordon Smith, *Response: The Dystopian Potential of Corporate Law*, 57 EMORY L.J. 985, 989 (2008).

140. KOLOZI, *supra* note 25, at 90 (quoting Lanier).

141. GENOVESE, *supra* note 84, at 81 (describing Weaver’s hostility to the “modern corporate state”). Although Weaver technically was not a member of the Southern Agrarians, he was a close and near-contemporaneous student of their work. See generally RICHARD M. WEAVER, THE SOUTHERN ESSAYS OF RICHARD M. WEAVER (George M. Curtis, III & James J. Thompson, Jr. eds., 1987) (exploring the intellectual contributions of the Agrarians).

142. Ransom, *supra* note 83, at 70 (arguing that restraining large corporations could not “be safely entrusted to the same legal sanctions and to the same codes of ethics which may quite adequately control private enterprises and private persons”).

143. See *id.* (discussing the Agrarian critique of business).

144. See *supra* notes 123–128 and accompanying text.

at all.¹⁴⁵ Modern oligarchs employ fewer people (especially fewer Americans due to outsourcing) and hire mainly from the managerial and knowledge classes.¹⁴⁶ All of this has “elicited only derision, not concern” from the elites.¹⁴⁷

Changing investment patterns are also widening the divide between the working and managerial classes. Publicly held companies and the widespread availability of retail investing made it possible for working and middle-class Americans to invest in major corporations. As *The Economist* has pointed out, however, the decline of IPOs and the growing number of firms going dark means “fewer chances for ordinary people to put their money into a future Google.”¹⁴⁸

Finally, consumption patterns are making elites less dependent on non-elites. Traditional business leaders depended on the middle and working classes as both consumers and employees, which gave them a certain shared community of interests.¹⁴⁹ Today’s oligarchs in finance and tech are not so dependent. Not only are non-elites marginalized as employees “in the new technocracy,”¹⁵⁰ as we have seen, but the new oligarchs are less dependent on the middle and working classes as consumers.¹⁵¹

B. Divergent Views

The values of the elites (the Oligarchs and Clerisy, as Kotkin calls them) and those of the non-elites have been diverging for several decades. In his 1995 classic, *The Revolt of the Elites*, Christopher Lasch identified the emergent split between what he called the New Elites and the rest of society.¹⁵² Lasch identified several trends that have accelerated in subsequent years. First, he argued, American elites had become increasingly global, rejecting nationalism and patriotism, and refusing to maintain ties to places or people.¹⁵³ Today we refer to those elites, as well as their global counterparts and those who aspire to join them,¹⁵⁴ as Davos Man:

145. KOTKIN, *supra* note 35, at 70 (noting that some observers “propose that the American middle and working classes have become economically passé”).

146. *See id.* at 7 (describing this phenomenon).

147. *Id.* at 71.

148. *The Endangered Public Company: The Rise and Fall of a Great Invention, and Why It Matters*, THE ECONOMIST (May 19, 2012), <https://www.economist.com/leaders/2012/05/19/the-endangered-public-company> [https://perma.unl.edu/L9X9-PS4F].

149. KOTKIN, *supra* note 35, at 7 (describing these developments).

150. *Id.*

151. *See id.* (arguing that “the new Oligarchs [do not] actually require a large and thriving middle class”).

152. LASCH, *supra* note 35, at 5 (describing the new elites).

153. *See id.* at 35 (arguing that the loyalties of modern elites are international rather than regional, national, or local).

154. As Samuel Gregg notes:

January is when the World Economic Forum (WEF) holds its annual conference at a Swiss mountain resort to “improve the state of the world.” More than a business meeting for 2,500-plus globetrotting academics, executives, politicians, and lobbyists, it is a tribal celebration for leaders who worship a holy trinity of ideas: capitalism, globalization, and innovation. In a 2004 essay, Samuel Huntington, who popularized the term “Davos Man,” described this breed of humans as “view[ing] national boundaries as obstacles that thankfully are vanishing.” (And, yes, more than 80 percent of attendees at the WEF conference are male.)¹⁵⁵

As *The Economist’s* Schumpeter columnist observed in 2013, “[o]rdinary folk trust Davos Man no more than they would a lobbyist for the Worldwide Federation of Weasels.”¹⁵⁶ This distrust took on considerable political weight in the 2016 presidential campaign, as the populists who voted for Trump recognized that a minority comprised of “people from ‘anywhere’” ruled the majority of people who came from “somewhere.”¹⁵⁷

The first group . . . holds “achieved” identities based on educational and professional success. Anywheres value social and geographical mobility. The second group is characterised [sic] by identities rooted in a place, and its members value family, authority and nationality.

Whereas Anywheres, whose portable identities are well-suited to the global economy, have largely benefited from cultural and economic openness in the West, he argues, the Somewheres have been left behind—economically, but mainly in terms of respect for the things they hold dear. The Anywheres look down on them, provoking a backlash.¹⁵⁸

The disdain in which elites now hold non-elites was another critical emergent trend Lasch identified. As Christopher Lasch explained, “the new elites, the professional classes in particular, regard the masses with mingled scorn and apprehension.”¹⁵⁹ Many of Lasch’s new elites dismissed the masses’ values as “mindless patriotism, relig-

Davos Man isn’t limited to business titans, heads of multinational corporations, and people who work in financial markets. He also takes the form of transnational officials who work in institutions such as the United Nations or the European Commission in Brussels as well as people employed by international NGOs. Nor will anyone be surprised to learn that Davos Man enjoys the company of actors and celebrities.

Samuel Gregg, *Davos Man, Globalism, and the Case for Free Trade*, ACTON.ORG (Feb. 8, 2017), <https://acton.org/pub/commentary/2017/02/08/Davos-Man-globalism-and-the-case-for-free-trade> [https://perma.unl.edu/6VMM-WHTE].

155. Gillian Tett, *Davos Man Has No Clothes*, FOREIGNPOLICY.COM (Jan. 16, 2017), <https://foreignpolicy.com/2017/01/16/davos-man-has-no-clothes-globalization/> [https://perma.unl.edu/5H6T-29CW].

156. *Davos Man and His Defects: The Global-Leadership Industry Needs Re-Engineering*, THE ECONOMIST (Jan. 26, 2013), <https://www.economist.com/business/2013/01/26/davos-man-and-his-defects> [https://perma.unl.edu/D87H-VNS6].

157. *The New Political Divide, and a Plan to Close It*, THE ECONOMIST (Mar. 25, 2017), <https://www.economist.com/books-and-arts/2017/03/25/the-new-political-divide-and-a-plan-to-close-it> [https://perma.unl.edu/Q84M-RZ3T] (describing a survey of populism by David Goodhart).

158. *Id.*

159. LASCH, *supra* note 35, at 28.

ious fundamentalism, racism, homophobia, and retrograde views of women.”¹⁶⁰

Middle Americans, as they appear to the makers of educated opinion, are hopelessly shabby, unfashionable, and provincial, ill informed about changes in taste or intellectual trends, addicted to trashy novels of romance and adventure, and stupefied by prolonged exposure to television. They are at once absurd and vaguely menacing—not because they wish to overthrow the old order but precisely because their defense of it seems so deeply irrational [to the new elites] . . .¹⁶¹

This tension was perhaps nowhere more pronounced than with respect to religion. When Lasch wrote over two decades ago, he opined that “[a] skeptical, iconoclastic state of mind is one of the distinguishing characteristics of the knowledge classes. . . . The elites’ attitude to religion ranges from indifference to active hostility.”¹⁶²

If anything, today’s elites have become even more hostile to religious values. As Samuel Gregg observes, the Davos Man’s moral creed is “a mélange of social liberalism, environmentalism, and a new order of a borderless world. . . . [R]eligion is considered the refuge of fanatics and anyone stupid enough to be skeptical of gender ideology and techno-utopianism.”¹⁶³

In contrast, modern right-wing populists are highly religious. According to a 2011 Pew Research Center analysis, for example, Tea Party members were “much more likely than registered voters as a whole to say that their religion is the most important factor in determining their opinions on . . . social issues.”¹⁶⁴ Likewise, a subsequent Pew analysis found that “white born-again or evangelical Christians and white Catholics[] strongly supported Donald Trump.”¹⁶⁵

Today’s elites thus hold non-elites in at least as much disdain as did the elites of Lasch’s period. The Clerisy, in particular, scarcely bothers to conceal its disdain for the traditional middle and working classes.¹⁶⁶ This disdain manifests itself in a variety of ways, perhaps most notably through the increasing separation between the working class and the elites.

160. *Id.* at 29.

161. *Id.*

162. *Id.* at 215.

163. Gregg, *supra* note 154.

164. *The Tea Party & Religion*, PEWFORUM (Feb. 23, 2011), <http://www.pewforum.org/2011/02/23/tea-party-and-religion/> [<https://perma.unl.edu/L4GM-LT3T>].

165. Jessica Martínez & Gregory A. Smith, *How the Faithful Voted: A Preliminary 2016 Analysis*, PEWRESEARCH (Nov. 9, 2016), <http://www.pewresearch.org/fact-tank/2016/11/09/how-the-faithful-voted-a-preliminary-2016-analysis/> [<https://perma.unl.edu/VP6T-362F>].

166. KOTKIN, *supra* note 35, at 71 (“Contempt for the middle orders is often barely concealed among those most comfortably ensconced in the emerging class order.”).

The increasing geographical separation between the elites, on the one hand, and the working class, on the other, with the former migrating to the coasts and large cities and the latter remaining in rural areas, has been widely remarked.¹⁶⁷ Even when they live in relative geographical proximity, however, the elites are increasingly walling themselves off from non-elites. As Joel Kotkin observed, for example, “large sections of the [San Francisco] Bay Area . . . resemble a ‘gated’ community, where those without the proper academic credentials, and without access to venture funding are forced into a kind of marginal nether-existence.”¹⁶⁸

C. The Probable Direction of Corporate Elite Social Activism

Whether out of personal belief or as a marketing tool, the elites are increasingly embracing a progressive world view.¹⁶⁹ Oligarchs like Salesforce.com CEO Marc Benioff, for example, promote “social activ-

167. See, e.g., Josh Kron, *Red State, Blue City: How the Urban-Rural Divide Is Splitting America*, THE ATLANTIC (Nov 30, 2012), <https://www.theatlantic.com/politics/archive/2012/11/red-state-blue-city-how-the-urban-rural-divide-is-splitting-america/265686/> [https://perma.unl.edu/Q7NF-FWKf] (“The new political divide is a stark division between cities and what remains of the countryside.”).

168. KOTKIN, *supra* note 35, at 45.

169. See Aaron K. Chatterji & Barak D. Richman, *Understanding the “Corporate” in Corporate Social Responsibility*, 2 HARV. L. & POL’Y REV. 33, 34 (2008) (arguing that “corporations can be pressured to invest their resources to advance progressive causes, and progressive activists deserve praise for their several successes in extracting socially desirable behavior from these profit-maximizing organizations”); Daniel Gross, *Jamie Dimon Steps in It*, SLATE (May 17, 2017), http://www.slate.com/articles/business/moneybox/2017/05/jamie_dimon_steps_in_it.html [https://perma.unl.edu/WFR7-GWV8] (“As a group, Fortune 500 companies today are socially liberal, especially on areas surrounding diversity, gay rights, and immigration; they are unabashedly in favor of free trade and globalization, express concern about climate change, and embrace renewable energy.”); R.R. Reno, *The Spirit of Democratic Capitalism*, FIRST THINGS, Oct. 2017, at 63, 65 (“Today, large-scale global companies scramble to position themselves as agents of social change.”); Kevin D. Williamson, *Why Corporate Leaders Became Progressive Activists*, NAT’L REV. (Mar. 13, 2017), <https://www.nationalreview.com/2017/03/corporate-leaders-progressive-activists/> [https://perma.unl.edu/HNP3-KPWF] (“Far from being agents of reaction, our corporate giants have for decades been giving progressives a great deal to celebrate.”).

Popular culture critic Jordan B. Peterson has opined that:

It’s staggering to me to watch the corporate elite types kowtow to the radical Marxists. They do it to virtue signal or because they’re feeling guilty or maybe because they’re facing genuine pressure and don’t want to stand up against it. But they’re playing a game that will punish them intensely.

Rita Panahi, *Jordan Peterson on Corporate Virtue Signaling*, HERALDSUN (Mar. 14, 2018), <https://www.heraldsun.com.au/blogs/rita-panahi/jordan-peterson-on-corporate-virtue-signalling/news-story/ffa37e3615980f5f0641d4dcb6864c6b> [https://perma.unl.edu/WT37-P84F].

ism among American chief executives.”¹⁷⁰ As the *Wall Street Journal* reported:

Mr. Benioff is among CEOs of companies, including Apple Inc., Bank of America Corp., Walt Disney Co., Intel Corp. and International Business Machines Corp., that have begun pressuring lawmakers on social issues, often with a warning: Change laws or risk losing business.

What sets apart the new activist CEOs is how they use their names and corporate muscle to campaign directly against specific laws governing social issues, often on short notice, sometimes by threatening to withhold business.¹⁷¹

In an important contribution to the legal literature on corporate activism, Tom Lin discusses in detail the widespread hostile reaction by major corporations to North Carolina’s so-called “Bathroom Law” and various early Trump administration initiatives.¹⁷² They serve as leading examples of what he calls “unprecedented contemporary corporate social activism.”¹⁷³

What is driving this shift? An important factor is pressure from major investors. Institutional investors have long offered funds that focus on corporations perceived as socially responsible,¹⁷⁴ which generally has been understood to mean companies pursuing progressive goals.¹⁷⁵ A growing number of major institutional investors, however, have embraced social activism in support of progressive goals with respect to the funds they manage.¹⁷⁶ BlackRock, for example, encour-

170. Monica Langley, *Salesforce’s Marc Benioff Has Kicked off New Era of Corporate Social Activism*, WALL ST. J. (May 2, 2016), <https://www.wsj.com/articles/sales-forces-marc-benioff-has-kicked-off-new-era-of-corporate-social-activism-1462201172> [https://perma.unl.edu/F2DG-4LAV].

171. *Id.*

172. Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1547–54 (2018).

173. *Id.* at 1537. Lin argues that corporate social activism is not necessarily partisan. *See id.* at 1558 (arguing that “it is important to note that the new corporate social activism is a nonpartisan phenomenon” as it “can affect causes on both the Left and the Right” of the political spectrum). But most of the examples of corporate activism he cites are in support of progressive social causes, and Lin himself states that his “Article aspires to provide an early, hopeful, and workable framework for thinking about, speaking about, and acting on the new corporate social activism and its role in changing our businesses, our laws, and our communities.” *Id.* at 1605.

174. *See* George Djurasovic, *The Regulation of Socially Responsible Mutual Funds*, 22 J. CORP. L. 257 (1997) (discussing such funds).

175. *See* Harwell Wells, *A Long View of Shareholder Power: From the Antebellum Corporation to the Twenty-First Century*, 67 FLA. L. REV. 1033, 1083 (2015) (noting the development of “funds specially organized to engage in socially responsible investing” that “use shareholder proposals for broader progressive ends”).

176. *See* Frederick H. Alexander, *Whose Portfolio Is It, Anyway?*, 47 STETSON L. REV. 311, 327–28 (2018) (“There has certainly been movement in the institutional investor community to focus more on ‘environmental, social, and governance’ issues, ‘corporate social responsibility,’ and ‘socially responsible investing.’”).

ages companies to pursue excellence in environmental and social, as well as governance, areas.¹⁷⁷ BlackRock CEO Laurence Fink sent a letter in 2018 to CEOs of the firm's portfolio companies, in which he posited that companies need to be responsive to stakeholders, including consumers and communities, as well as investors, and pursue environmental, social, and governance goals to achieve "sustainable growth."¹⁷⁸ But this simply pushes the question further up the corporate finance food chain since it fails to explain why investment fund managers like Fink are pursuing that agenda.

To some extent, corporate executives may also be responding to perceived consumer and labor demand. In particular, millennials apparently prefer to work for and purchase from companies that are perceived as socially and environmentally responsible.¹⁷⁹ "To attract promising young employees in many parts of America and to woo today's customers, the argument goes, companies must project a corporate ethos that goes beyond profit."¹⁸⁰ Even Walmart is embracing socially progressive stances, despite the risk of "alienating its core customers, who often live in more conservative-leaning rural and suburban communities."¹⁸¹ Social media clearly has been a factor in this development, as it has given tech-savvy activists unprecedented ability to mobilize pressure on recalcitrant corporations.¹⁸² But this raises two new questions. First, why have so many millennials embraced corporate social activism? Second, why are corporations catering to their preferences as opposed to those of the Yeomanry?

177. See Michael R. Siebecker, *Political Insider Trading*, 85 *FORDHAM L. REV.* 2717, 2731 (2017) (quoting BlackRock's statement on ESG factors).

178. Laurence Fink, *2018 Letter to the CEOs: A Sense of Purpose*, BLACKROCK (Jan. 17, 2018), <https://www.blackrock.com/corporate/en-us/investor-relations/larry-fink-ceo-letter> [https://perma.unl.edu/5JPS-5GGV].

179. Sarah Landrum, *Millennials Driving Brands to Practice Socially Responsible Marketing*, *FORBES* (Mar. 17, 2017), <https://www.forbes.com/sites/sarahlandrum/2017/03/17/millennials-driving-brands-to-practice-socially-responsible-marketing/#16beba3d4990> [https://perma.unl.edu/RWB7-D3YS] ("Millennials prefer to do business with corporations and brands with pro-social messages, sustainable manufacturing methods and ethical business standards."); *Why Millennials Choose CSR*, *MORNING FUTURE* (Aug. 16, 2017), <https://www.morningfuture.com/en/article/2017/08/16/millennials-csr-companies-responsible/60/> [https://perma.unl.edu/8WQD-QCCD] ("92.1% of those surveyed think that working for an environmentally and socially responsible company is important. So important that CSR has become one of the criteria considered when applying for the right job. More than 50% of respondents are willing to give up 20% of their salary to work for a company that makes corporate social responsibility (CSR) efforts.")

180. Langley, *supra* note 170.

181. Sarah Nassauer, *Walmart Takes a Stand on Guns, Gay Rights to Get People to Like It More*, *WALL ST. J.* (July 5, 2018), <https://www.wsj.com/articles/walmart-takes-a-stand-on-guns-gay-rights-to-get-people-to-like-it-more-1530805106> [https://perma.unl.edu/A5A4-UFW6].

182. Lin, *supra* note 172, at 1543–47.

Finally, thought leadership on this issue emanates from the Clerisy, a group that has embraced using corporate social activism to drive progressive causes. Progressive corporate law professors, for example, have long advocated corporate social responsibility.¹⁸³ More generally, progressive lawyers and activists have joined forces to advance social goals through corporate law reform and internal corporate governance battles.¹⁸⁴ Again, however, the question of why the Clerisy has done so remains unanswered.

The most probable explanation is the divergence in values between the New Elites and the members of the Tea Party and the Trump base.¹⁸⁵ The New Elites—and those who aspire to join them—have increasingly embraced progressive policy preferences, especially on environmental and social issues.¹⁸⁶ No Fortune 100 CEOs contributed to Donald Trump’s 2016 presidential campaign, for example, but eleven gave to Hillary Clinton.¹⁸⁷ More generally, “liberal groups ac-

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183. See, e.g., Douglas M. Branson, *Corporate Governance “Reform” and the New Corporate Social Responsibility*, 62 U. PITT. L. REV. 605, 640 (2001) (“The ‘new’ corporate social responsibility, or progressive corporate law, movement promises to grow and occupy center stage in the coming decade.”); Kellye Y. Testy, *Linking Progressive Corporate Law with Progressive Social Movements*, 76 TUL. L. REV. 1227, 1228–29 (2002) (“Under various labels, including ‘progressive corporate law,’ ‘good governance,’ ‘social disclosure,’ and ‘socio-economics,’ a diverse group of legal academics has trained its attention on problems perceived to be related to corporations’ lack of attention to interests other than short-term maximization of shareholder profits.”).
184. See Adam Winkler, *Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History*, 67 L. & CONTEMP. PROBS. 109, 120 (2004) (“Some progressive corporate lawyers and activists sought to reward these constituencies—employees, consumers, or the larger public—by reforming the internal mechanisms of corporate governance through codetermination, or exerting their voice through politically motivated proxy fights in corporate elections.”).
185. See *supra* section IV.B (discussing that divergence). Tom Lin explains the expansion of corporate social activism results “in large part” from “a confluence of three larger, interconnected changes in business, law, and society. More specifically, the convergence of government and private enterprise, the maturation of corporate social responsibility efforts, and the expansion of corporate political rights have all advanced the growth of contemporary corporate social activism.” Lin, *supra* note 172, at 1573. The difficulty with that explanation is that it fails to account for the increasingly partisan nature of corporate social activism.
186. See Jonathan Chait, *Poison Penn*, NEW REPUBLIC (May 5, 2010), <https://newrepublic.com/article/74833/poison-penn-0> [<https://perma.unl.edu/9V4G-ULR9>] (“The parties are more responsive to their elites, who lean more socially liberal and economically conservative than the voters.”); KOTKIN, *supra* note 35, at 9 (noting that progressive “tendency now relies on an alliance between the new Oligarchs, increasingly concentrated in places like Silicon Valley and Wall Street, and their Clerical allies”).
187. Rebecca Ballhaus & Brody Mullins, *No Fortune 100 CEOs Back Republican Donald Trump*, WALL ST. J. (Sept. 23, 2016), <https://www.wsj.com/articles/no-fortune-100-ceos-back-republican-donald-trump-1474671842> [<https://perma.unl.edu/D3CG-DFR2>]. On the other hand, as the authors note, about a third of Fortune 100 CEOs donated to Mitt Romney’s 2012 presidential campaign. *Id.*

counted for eight of the top ten ideological causes of the ultra-rich, and seven of the ten congressional candidates most dependent on money from such people were Democrats.”¹⁸⁸ Even one of the progressive movement’s favorite whipping boys—David Koch—publicly self-identifies as “a social liberal.”¹⁸⁹

None of this is likely to surprise right-wing populist activists. Their paleoconservative counterparts have long identified “the members of the material elite [who] control the nation’s largest corporations” as being among “the primary purveyors of the assault on America’s national and cultural identity.”¹⁹⁰ Instead of depending on the kindness of the new elites, workers will more likely shift into a mode of active resistance to the Oligarchy and the Clerisy. This resistance will inevitably find legal expression outside the bounds of corporate law. Instead, it likely will look more like the Southern Agrarian program as articulated by Ransom.¹⁹¹

V. CONCLUSION

This Article was motivated by the Schumpeter column raising the question of whether rising populist sentiment would lead to changes in corporate purpose. I conclude that significant change in the law of corporate purpose is unlikely. The right-of-center populist movement seems more likely to pursue changes in general regulation than in the legal rules governing corporate social responsibility. Moreover, as corporate social activism becomes more common it will likely trend towards support of progressive rather than populist policies, encouraging populist efforts to regulate corporations directly rather than encouraging them to rely on the good will of corporate managers.

188. KOTKIN, *supra* note 35, at 10.

189. Scott Wong, *Koch Brother: I’m a “Social Liberal”*, THE HILL (Dec. 14, 2014), <http://thehill.com/blogs/ballot-box/227091-koch-brother-im-a-social-liberal> [https://perma.unl.edu/5NDH-X8A7].

190. KOLOZI, *supra* note 25, at 173–74. *See also* Reno, *supra* note 169, at 5 (opining that “the corporate tsunami that recently swept through Indiana after it passed a Religious Freedom Restoration Act made clear the link between global capitalism and progressive clear-cutting of traditional religious culture and morality”).

191. *See supra* notes 110–14 and accompanying text (describing Ransom’s program).