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Professor A. Mitchell Polinsky
Professor John J. Donohue III

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4:15 - 5:45 p.m.
Stanford Law School
Room 272

"Corporate Social Responsibility's Political Instability"

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Note: It is expected that you will have reviewed the speaker's paper before the seminar.

For Stanford Law School Law & Econ. Workshop, Oct. 30, 2025

Shareholder-Driven CSR Tries to Outmaneuver the Polity: Its Rise and Fall

Mark J. Roe

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The Political Limit to Shareholder-Driven Pro-Social Effort

Mark J. Roe

Abstract

Pressure from shareholders for more corporate social responsibility—on social issues like climate change, the environment, and justice—became a major feature of the corporate landscape in this century, with much hope for its success. That hope arose because incentives emanating from America's shareholding structure had shifted as firm-by-firm investments evolved to market-wide, across-the-economy investments. Investors with across-the-economy ownership had more reason to make their companies internalize externalities that damaged other parts of their portfolios. And turning from government regulation to private pressure was needed, said many analysts and activists, because of our broken government. The new shareholding structure's incentives would make that private action possible.

Thinking that dysfunctional government by itself lays the foundation for private CSR is as largely unquestioned as it is incorrect. That's because Congress and state legislatures could achieve most CSR goals directly, by regulating pernicious corporate activities, and by directly promoting desired outcomes. If government just lacks the governing capacity to accomplish basic tasks and that dysfunction explains its inaction, then the turn to private action has a good chance of success. But if opposition to such social goals blocked Congress from enacting the CSR agenda, then the political forces that blocked direct action constitute latent forces that could prevent the indirect route through the American corporation—as they largely have.

Those oppositional forces laid dormant when initial CSR pressure was felt. But meaningful—or at least visible—private CSR success can activate that latent opposition, and it did. CSR activism seeks to escape the polity by privately pressing on the corporate economy, seeking transformative change. But CSR activism cannot easily escape the unfavorable political forces that induced CSR proponents to turn from direct political action in the first place. To the extent political forces defeated direct CSR, private action seeking a corporate social transformation cannot range far from that result without generating resistance from those same forces.

True, this hurdle, while real, high, and not yet surmounted, is not insurmountable. In other policy settings, the hurdle arose and was surmounted. Thus far, though, these mitigating forces are rounding errors for the basic thesis here: First, Arrow-type agenda manipulation could yield corporate outcomes that differ from legislative outcomes. But so far it has not. Second, the CSR-through-shareholder-effort might, like social movements such as civil rights, advance as a broad social movement beyond the corporation to change public opinion. Perhaps one day it will. Third, CSR activists can exploit gaps between what Congress does not do and what other decisionmakers—CEOs, boards, states, and courts—could do. But thus far these gaps have not yielded compelling, transformative victories; big victories, even potential big victories, (it seems) activate the very forces that stymied government-induced CSR in the first place. Lastly, CSR proponents could seek winning coalitions inside the corporation. So far they have not. Indeed, corporate players have coopted CSR sentiment for the goals of insider corporate actors, mostly executives.

Overall: shareholder-based CSR thinking has not overcome a basic hurdle, namely that the forces that defeated social legislation are forces that can cut down and reverse private shareholder pressure for corporate social action, and have tended to do so when that private action makes progress.

The New Corporate Social Responsibility's Political Instability: Why the New Corporate Social Responsibility Effort Failed

Mark J. Roe[*]

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INTRODUCTION: HIGH HOPES FOR THE NEW UNIVERSAL OWNER

The strong, shareholder-driven corporate social responsibility efforts of the past decade rest on the political foundation that America's broken government has failed to handle basic societal needs, even when voters support action. Unable to get fixes from a deadlocked government, the CSR and ESG movements turned to shareholder pressure on the corporations for progress. With a new class of shareholders owning stock in most

[*] Professor of Law, Harvard Law School. Thanks for useful discussion of the topic and comments on slides outlining the paper's analysis go to Guy-Uriel Charles, Raffaele Fellicetti, Jesse Fried, Jeffrey Gordon, Caleb Griffin, Howell Jackson, Kobi Kastiel, Aneil Kovalli, Dorothy Lund, Elizabeth Pollman, Vasile Rotaru, James Salzman, Robert Sitkoff, Roy Shapira, Holger Spamann, Roberto Tallarita, Anna Toniolo, Rory Van Loo, and participants at workshops and conferences at Columbia Law School, Harvard Law School, the University of Lucerne Faculty of Law, and the University of North Carolina Law School.

American corporations, optimism arose that this wide ownership gave the stockholding institutions the incentives to better the overall economy and internalize corporate externalities.

Different CSR and ESG players have different goals, but much of their agenda focuses on reversing global warming as a primary goal, and on enhancing the environment, and fostering racial and gender justice, as added goals. Congress, state legislatures, and government administrators could achieve these CSR and ESG goals directly, by regulating pernicious corporate activities and promoting socially desirable results. In the CSR syllogism, the reason government does not do so is that it's broken. In response, CSR proponents go private, turning to institutional shareholders with wide portfolios stretching across the American economy—an investment structure that gives them wider incentives than used to be the case. CSR proponents can thus persuade sympathetic institutional shareholders to promote prosocial corporate action that sidesteps the polity.

But they cannot escape the underlying political gravitational pull just because *they* turned away from government. If governmental brokenness came from interest group opposition or voter doubts, then that same opposition poses a latent problem for stockowner-produced CSR. As soon as CSR proponents make progress using private shareholder pressure, as they did initially, latent political opposition can turn into action, halting and even reversing initial private CSR successes, as it did. It's plausible that private CSR cannot push social results indirectly through the corporation much further than government had pushed them directly. If political opposition to the CSR agenda blocked Congress from marching down the direct route, then that same political opposition is poised to prevent the indirect route through corporate America.

An example: Climate activists seek to cut carbon emissions, and a stiff carbon tax would help do so. But because a carbon tax (the direct action) has been politically unattainable, prosocial shareholders pressure the corporation to emit less carbon, push for corporate carbon impact statements, and seek embarrassing corporate disclosures—the indirect action. But if a polity refuses to enact a carbon tax, is it likely to stand by while institutional shareholders push the corporate sector to become strongly carbon-averse? The oil interests and suburban car drivers that for decades barred the American polity from enacting a direct carbon tax are a latent coalition, one potentially opposed to CSR pressure seeking similar ends.

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Here's the roadmap: In Part I, I call attention to the widely articulated foundation for shareholder-induced CSR—that it is needed to resolve the social challenges of our time because dysfunctional government is not resolving them. This new corporate social responsibility rested on two foundations: one, the new broad-based, across-the-economy ownership structure and the dysfunctionality of government. The first has been the focus of intense, strong corporate academic analysis. The second has been assumed to be in play, but has until now been undertheorized and unexamined for its range of accuracy. True, congressional inability-to-act is surely part of the CSR phenomenon has been a particular focus for CSR proponents. But dysfunctional government, from the arrest-climate-change perspective, can arise from government being intrinsically broken or from political opposition. The implications for CSR differ depending on which type of brokenness dominates. If, as outsiders and some CSR proponents indicate, it's primarily the latter—opposition—that type can render private CSR originating with institutional shareholders more politically unstable than CSR thinking has it. In other words, if congressional CSR passivity lies in interests and ideologies that do *not* want government pushing CSR forward, then that opposition could constitute a latent threat to private CSR.

In Part II, we go deeper into how government's intrinsic *inability* to act can have a CSR impact quite different from government dysfunction due to an *unwillingness* to act. CSR proponents aim to strengthen prosocial pressure on the corporation deter antisocial ones. But government can produce prosocial results directly, via taxes, rules, and fines. The corporate route is mapped out because the direct legislative route is blocked; but in many political configurations, if politics closes the direct route, *it can, and often will, block the indirect route as well*. While accomplishing that analysis, we put aside the possibility that presidential politics promoted CSR activism the Democratic presidencies and stifled it during Republican presidencies—the rise and fall of shareholder-driven CSR maps exactly the opposite way. Something else was happening.

The pro-CSR image is of a private corporate America subject to private prosocial pressures—a relationship lying outside politics. But the corporate system is *inside* the political system that CSR advocates see as having failed. It is subject to most of the same forces that made the government fall short on ESG in the first place. Political forces that stymied direct action become latent forces that could activate once private CSR takes hold—by becoming effective or at least visible. Once activated, they could stymie action through the corporation. Indeed, that kind of political opposition to CSR is *already* stymieing and reversing CSR's early shareholder-induced successes. CSR and ESG activism and successes of the past decade largely fit inside the instability outline of Parts I and II. The core CSR politics of the past decade led that latent opposition to become an active opposition.

In Part III, I turn to political economy thinking that counters the preceding analysis. Each counter rounds out the thesis, mitigating and reducing the core thesis here and there, without reversing it. To begin, Arrow-style agenda effects could produce different decisional sequences, and different deciders, in the polity and the corporation, thereby inducing differing CSR outcomes. CEOs, boards, courts, or states could well decide differently than Congress; goals unreachable in one arena can be attainable in another. However, such agenda dynamics have not meaningfully altered the CSR trajectory thus far.

A second amending concept is that a social movement can shift public and political opinion in the long-run, even if failing tactically in the short-run. Other social movements—the civil rights movement of the last half of the twentieth century comes to mind—faced and in time overcame similar hurdles. So-called "Overton windows" of political acceptability open and close. Successful CSR maneuvers in one location could lever open a political opinion window in another. But there's been no Overton CSR success thus far. And, while proponents celebrate small wins, those small wins do not (yet?) portend the transformative societal change that CSR proponents sought from the new broad-based universal owners. So far, they are merely small wins. Worse, some celebrated wins were meaningless window dressing. Others motivated some of the political backlash, helping turn latent into active opposition. In retrospect, an alternate strategy for shareholder-based CSR proponents could have been to fly "under the radar," seeking modest change instead of (at least as a stated goal) more transformative change.

Finally in Part III, I show that the CSR movement has not brought coalition formation into its tactical plans. CSR activists have often fashioned a losing coalition for themselves, or been coopted by other corporate players, rather than forging a potentially winning coalition—one that might still be available.

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Lastly, I conclude. Much CSR and ESG thinking focuses on what's morally or economically right, not on strategically potent factors—namely, CSR's underlying, politically-induced instability that can render even satisfying successes short-lived. Broken, dysfunctional American government—and an American tradition of leaving the private sector alone—makes privately-produced, shareholder-induced CSR appear to be viable, with a fighting chance to push forward privately, even after public political reverses. But the corporation is *not* outside that political system. Consequently, even private CSR efforts must surmount political opposition—the same opposition that blocked direct government action in the first place.

I. Corporate Social Responsibility to Overcome Congressional Paralysis

CSR, ESG, and DEI are now so embedded in corporate governance that the acronyms themselves can dominate discourse—potentially obscuring the underlying terms for newcomers. (For the uninitiated: corporate social responsibility; environmental, social, and governance; and diversity, equity, and inclusion.) Major efforts push the large American corporation to be more responsive to proponents' social goals. Debates over the American corporation's proper purpose (should it be profit maximization or broader social goals, or a mixture?) are prominent in business and political media, and major topics in corporate academic analyses.[1] In the last decade, climate change and respect for the planet seemed to be turning the tide overall,[2] and in American corporate governance, major initiatives held great promise.

Much academic optimism came from the new, 21st century structure of shareholding. Index funds, which own a slice of equity across the stock market (or across a broad stock index) became central to the American stock market, accounting for one-fifth of the entire market.[3] Other institutional investors owned their stock in broadly-

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[1] For some of that academic debate, see sources cited infra note 15.

The terms "CSR" and "ESG" have overlapping meanings and long, subtle histories. ESG developed in United Nations' efforts to tame corporate actions in (mostly) developing nations. CSR grew domestically in the U.S. as a quality sought for American corporations. Over time, the terms evolved beyond their original settings. Sometimes they are used interchangeably, sometimes more precisely. Elizabeth Pollman, *The Making and Meaning of ESG*, 14 HARV. BUS. L. REV. 403, 405 (2024). In this Article, I use them interchangeably to denote corporate behavior that is social-regarding and not necessarily profitable.

[2] E.g., David Wallace-Wells, *The Broken Climate Pact*, N.Y. TIMES MAG., Sept. 21, 2025 ("To many, it looked like the promise of a whole new era, not just for the climate but also for our shared political future . . . .").

[3] Inv. Co. Inst., 2025 Investment Company Fact Book 28-29 (2025).

diversified portfolios as well, giving them market-wide incentives like those of the index funds. Moreover, several wide holdings are concentrated in a handful of fund managers—BlackRock, Vanguard, State Street and Fidelity.

Law review analyses showed that these market-wide holdings changed the incentives of the owners and fund managers—they now had a stake in all (or much) of the American economy. For the 20th-century firm, one firm's externality became another firm's cost. That profited the classical 20th-century owners of the first firm, giving them little economic incentive to avoid the externality, such as that coming from the firm's pollution or other social damage. The first firm's owners reaped the profits, and the 20th-century second firm's owners (and ordinary citizens) suffered the costs. But in the 21st century, stockholders and fund managers owned and managed stakes in *both* firms. They profited from the first firm's pollution, but suffered when that pollution damaged the second firm.[4]

The ideas did not just circulate in the academy. The most major, visible shift happened when America's biggest institutional shareholders picked up the CSR cudgel—the focus here—and sought to transform the American public corporation into a prosocial part of American, particularly on climate and environmental issues. Academics were optimistic in the 2010s that the engagement of large universal investors with across-the-board stakes in the American economy could lead to powerful public-oriented change. With about half of the private economy flowing through the public corporation, shareholder-led change could have been transformative.[5]

It's that intersection that I study here: the new universal owners climate (and social) activism, their structural importance, and the sense that they could accomplisdh much that a broken government could not, or would not.

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[4] For two insightful probes into the new incentives and their potential uses, see Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1, 5 (2020); Jeffrey Gordon, *Systematic Stewardship*, 72 J. CORP. L. 495 (2022). For more academic optimism, see infra note 15. The basic concept is, again, that universal owners' self-interest could, if properly harnessed, mitigate or reverse socially imperiling corporate externalities.

[5] See sources cited supra note 4 and infra note 15, as well as [Michal Barzuza, Quinn Curtis & David Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243 (2020). Not everyone was optimistic about the prosocial implications of the portfolio-induced incentives. See, e.g., John C. Coffee, Jr., *The Future of Disclosure: ESG, Common Ownership, and Systematic Risk*, 2021 COLUM. BUS. L. REV. 387 (2021); Marcel Kahan & Edward Rock, *Systemic Stewardship with Tradeoffs*, 48 J. CORP. L. 497, 505–08 (2023); Roberto Tallarita, *The Limits of Portfolio Primacy*, 76 VAND. L. REV. 511 (2023); Marcel Kahan & Edward Rock, *Systemic Stewardship with Tradeoffs*, 48 J. CORP. L. 497, 505–08 (2023); Roberto Tallarita, *The Limits of Portfolio Primacy*, 76 VAND. L. REV. 511 (2023). Reservations arose as to how easily traditional corporate law could adapt and other implementation issues. Still, the insight that the incentives of the universal owner map more closely to overall social values than do firm-by-firm incentives persists, even if adjustments to traditional concepts are needed to implement. Jeffrey N. Gordon, S*ystematic Stewardship: It's Up to the Shareholders—A Response to Profs. Kahan and Rock*, 48 J. CORP. L. 26 (2023).] I shared that early optimism and still do, as a matter of what the new corporate economy is capable of doing: incentives matter, even if they cannot have an impact without structural adjustments, and the widely-diversified investor's incentives differ from those of the focused investor. But incentives and their limited are not this paper's focus. The analysis here is that these efforts to remake the corporation through its new universal shareholder base must surmount inherent political hurdles. Thus far they have not.

A. Reigning Reservations to CSR Efficacy Today

While legal scholarship often justifies shareholder-driven CSR and seeks to improve it, a small but significant body of analyses doubts it can work. Some doubters prefer that neither government nor the corporation pursue CSR goals. Others support CSR goals, or some of them, but see shareholders and corporations as unlikely to get there, due to the their profit-making nature, structure, and ethos. That profit-making nature[6] cannot readily be recalibrated to work toward corporate social responsibility ends. CSR advocates reply: then let's restructure the corporation to make it more CSR-friendly, by weakening its profit-focused parts and strengthening its pro-social ones.

The second major reservation to CSR's effectiveness centers on externalities. Most CSR efforts call on profit-making public firms to reduce external harms, like pollution and carbon emission. But even if CSR pressures restrain one public corporation's emissions, the unwanted social harm often persists. Either nonpublic firms pick up the pernicious but profitable behavior, or the carbon-burning activity migrates to another country to continue warming the planet.

In this paper, I ask us to consider a distinct hurdle that's as high as those already prominent hurdles: the political economy reality behind owner-driven private CSR activity can stymie, and already is stymieing, much stockholder-driven CSR. The American political configuration often could reach CSR goals directly but *does not want to*. When it does not support *direct* regulatory action, it largely will not support *indirect* action through the large corporation. It may even roll back successes CSR proponents achieve via private shareholder pressure on public corporations.

B. Broken Government: CSR's Intellectual Foundation

Much CSR shareholder effort rests on a political economy keystone: that American government is broken. If it functioned properly, it would enact the needed social legislation. But since it's broken, civil society instead must press the corporation for socially responsible results. Not as effective as direct government action, yes, but better than doing nothing.

1. Decades of government degradation. For nearly a month in 2023, Congress could not elect a Speaker of the House. Without a Speaker, the House of Representatives cannot function. Basic legislative action stalled; Washington could not function. While the Speaker impasse was an unusually vivid picture of broken government, it speaks to a broad pattern of degradation of American government over the recent decades. Basic problems go unaddressed; partisan divide cripples action; and polarized politics renders lawmakers unable to talk civilly, much less act constructively. Congress is gridlocked, the public disillusioned, and consensus elusive.[7]

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[6] Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2609 (2021); Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91 (2020).

[7] See, e.g., FRANCIS FUKUYAMA, POLITICAL ORDER AND POLITICAL DECAY: FROM THE INDUSTRIAL REVOLUTION TO THE GLOBALIZATION OF DEMOCRACY 488–505 (2014) (Madisonian checks and balances combine

2. The American political tradition. CSR thinking could (but does not) also emanate from America's longstanding anti-statist political culture that leaves the private sector alone.[8] Such thinking, found in classics of American political thought from de Tocqueville to Hartz, prefers a weak state, individualism, autonomy, and a hands-off attitude that leaves market dealings to private ordering.

3. Therefore, go for the second-best option: corporate action. Against this background of government dysfunction and an anti-statist political culture, CSR proponents turn to private shareholder action.[9]

It's with government dysfunction that much current corporate social responsibility deep thinking begins. As Oliver Hart and Luigi Zingales, prominent economists, state in an influential, widely-read article: "Like many people these days . . . , we are not that sanguine about the efficiency of the political process . . . . If political change is hard to achieve, *action at the corporate level is a reasonable substitute*."[10] Timothy Besley and Maitreesh Ghatak state similarly: "at a basic level, [Milton] Friedman['s] . . . argument [for no corporate CSR] needs to be reassessed when government works imperfectly... . CSR [can reduce] distortions in government preferences."[11] Similarly, other analysts assert that with government "ineffective in addressing societal challenges such as climate change, due in part to political system

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with polarization to freeze government); STEVEN LEVITZKY & DANIEL ZIBLATT, THE TYRANNY OF THE MINORITY: WHY AMERICAN DEMOCRACY REACHED THE BREAKING POINT 101–25 (2023); THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM xiii–xiv (2012); Richard H. Pildes, *The Age of Fragmented Politics*, 32 J. DEMOCRACY 146, 146–47 (2021

[8] The, or a, classic statement of respect for private action is LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION 3–10, 55–56 (1955). For other classic invocations of America's preference for a limited Jeffersonian state and a robust private sector, see 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 581–89 (Arthur Goldhammer, trans. 1835, 2004): SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD 18–24, 61–63 (1996); and SAMUEL HUNTINGTON, AMERICAN POLITICS: THE PROMISE OF DISHARMONY 34–39 (1981).

[9] *See* sources infra notes 9–15 and accompanying text, and Larry Fink, *2022 Letter to CEOs: The Power of Capitalism*, BlackRock (Jan. 17, 2022), www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter; PAUL POLMAN & ANDREW WINSTON, NET POSITIVE: HOW COURAGEOUS COMPANIES THRIVE BY GIVING MORE THAN THEY TAKE (2021); MARIANA MAZZUCATO, THE VALUE OF EVERYTHING: MAKING AND TAKING IN THE GLOBAL ECONOMY (2018); REBECCA HENDERSON, REIMAGINING CAPITALISM IN A WORLD ON FIRE 62 (2020) ("Purpose-driven [corporate] leadership is essential . . . [to] create shared value [and] a strong society"); Ben & Jerry's, *Issues We Care About*, https://www.benjerry.com/values/issues-we-care-about (last visited Mar. 21, 2025); B Lab, *About B Corps*, https://bcorporation.net/about-b-corps (last visited Mar. 21, 2025).

A substratum shows that, despite weakened incentives, a well-informed corporation, if motivated, could remedy local problems better than the regulator. See Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 NYU L. REV. 733, 740 (2005); Holger Spamann & Jacob Fisher, *Corporate Purpose: Theoretical and Empirical Foundations/Confusions*, *in* CORPORATE PURPOSE, CSR, AND ESG 55 (Jens-Hinrich Binder, Klaus Hopt & Thilo Kuntz, eds. 2024) (a global corporation could better solve some issues than non-global governments).

[10] Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCT. 247, 249 (2017) (emphasis added) (a "first and clearly relevant motivation is that government may itself fail"); Roland Bénabou & Jean Tirole, *Individual and Corporate Social Responsibility*, 77 ECONOMICA 1, 2 (2010).

The broken government rationale is widespread. For its extent, see sources cited infra note 15.

[11] Timothy Besley & Maitreesh Ghatak, *Retailing Public Goods: The Economics of Corporate Social Responsibility*, 91 J. PUB. ECON. 1645, 1656–57 (2007).

shortcomings, . . . financial markets [have] become more involved" and many seek shareholder action to "fill the void of a *dysfunctional regulatory system*."[12]

True, the corporation is not a natural ally for those pursuing progressive causes.[13] But, the thinking goes, with government broken, it's become the only game in town. And with the American boardroom's political center-of-gravity moderating over the years,[14] the corporate venue could be more receptive than it was in, say, the era of Ralph Nadar's Unsafe at Any Speed. In short, because we've come to "lack[] confidence in the government's ability. . . . This new corporate [governance] welfarism thus looks to corporations to internalize externalities, and promote social welfare, directly."[15]

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[12] Robin Döttling, Doron Levit, Nadya Malenko & Magdalena Rola-Janicka, Voting on Public Goods: Citizens vs Shareholders 1, 2 (NBER Working Paper No. w32605, Mar. 2025), www.ssrn.com/abstract=4856533 (emphasis supplied). See also Patricia Crifo & Vanina D. Forget, *The Economics of Corporate Social Responsibility: A Firm-Level Perspective*, 29 J. ECON. SURV. 112, 116 (2015) ("CSR might also complement regulations in cases of government failures . . ."); Matteo Gatti, *Corporate Governing: Understanding Corporations as Agents of Socioeconomic Change*, 50 J. CORP. L. 149, 152, 170 (2024) ("corporations perform quasi-governmental roles when the actual government cannot (because of its dysfunction) or does not want to (because of its political credo)" and "the failure of traditional politics" drives much CSR).

[13] Mariana Pargendler, *The Corporate Governance Obsession*, 42 J. CORP. L. 359, 359, 366 (2016).

[14] Reilly S. Steel, *The Political Transformation of Corporate America, 2001–2022*, __ AM. POL. SCI. REV. __ (forthcoming, 2025).

[15] Marcel Kahan & Edward Rock, *Corporate Governance Welfarism*, 15 J. LEGAL ANALYSIS 108, 110 (2023). The broken government view is widely held. For a representative range, see Franklin Allen, Adelina Barbalau & Federica Zeni, Reducing Carbon Using Regulatory and Financial Market Tools 4 (World Bank Pol. Rsch. Working Paper no. 10539, 2023) (since "there is no [political] support for a carbon tax, [supporting] financial market[] [instruments can] circumvent[] the political constraint . . ."); STEPHEN BELL & ANDREW HINDMOOR, RETHINKING GOVERNANCE: THE CENTRALITY OF THE STATE IN MODERN SOCIETY 20 (2009) ("the state is [often] depicted as ineffective, fiscally constrained, weakened by globalisation and increasingly unable to respond to the demands placed upon it. In response, [it's said,] states have off-loaded substantial responsibility onto alternative modes of governance."); Pamela N. Danzier, *When Corporate Social Responsibility Veers into Political Action: Safe or Sorry?* FORBES, Mar. 12, 2018 ("Because the gaping political divide is creating government gridlock, corporations have a responsibility to step in and provide leadership on important social issues."); Alex Edmans, *What Social Responsibilities Should Companies Have: A New Approac*h, WALL ST. J, Oct. 1, 2023 ("where the government has failed, [business] has a comparative advantage in solving, and [some] shareholders are willing to sacrifice returns to] fill[] some of those gaps.); Jennifer S. Fan, *Woke Capital: The Role of Corporations in Social Movements*, 9 HARV. BUS. L. REV. 441, 452, 471 (2019) (government "failure has created a vacuum which corporations are now filling"); MATTEO GATTI, CORPORATE POWER AND THE POLITICS OF CHANGE 74 (2025) ("Polarization and gridlock[, having] made meaningful reform difficult . . . [, has, in the view of many,] corporations increasingly position[ing] themselves as agents of change, stepping in where political institutions fail to act."); Fox & Patel, supra note 6 ("as faith in the curative abilities of the political process has waned"); Zohar Goshen, Asaf Hamdani & Alex Raskolnikov, *Poor ESG: Regressive Effect of Climate Stewardship*, 2023 BYU L. REV. (forthcoming, 2025) ("Where Congress failed, ESG will succeed"); Dorothy S. Lund, *Asset Managers as Regulators*, 171 U. PA. L. REV. 77, 95 (2023) ("asset managers have begun to tackle issues traditionally addressed by governmental bodies, including board diversity and climate change risk"); Kahan & Rock, *Systemic Stewardship*, supra note 5, at 538 ("[P]olitical dysfunction in the face of climate change threatens investors' entire portfolios . . . and creates an imperative to respond"); Aneil Kovvali, *Stark Choices for Corporate Reform*, 123 COLUM. L. REV. 693, 728 (2023) ("political actors are paralyzed or actively unhelpful", inducing businesses to "give the public what it wants"); Ann M. Lipton, *Reviving Reliance*, 86 FORDHAM L. REV. 91, 126 (2017) ("disenchantment with direct government regulation as a mechanism for curbing corporate externalities. . . [has led] reformers [to seek] to curb corporate externalities by manipulating the balance of power within the corporate form itself."); Carl Rhodes & Peter Fleming, *Forget Political Corporate Social Responsibility*, 27 ORGANIZATION 943, 946 (many assert "that democratic governments are broken beyond repair and citizens now demand 'strong' leadership from the business elite . . ."); Leo E. Strine, Jr., *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy*, 76 BUS. LAW. 397, 423 (2021) (with "external regulation to protect society . . . less effective [,] advocates for workers, consumers, and the environment . . . demand reforms to corporate law

C. Political Degradation v. Unwillingness: Three Types of Broken Government

The simple phrase, "broken government" contains more than it first seems. Government can be broken in different ways. And these different ways affect the efficacy of private CSR differently.

1. Broken or unwilling? "Broken government" could mean that the machinery of government no longer functions. Levers slip, gears crack, wires fray, and lawmaking halts: The House of Representatives cannot elect a Speaker. Members of Congress give up on legislating in favor of media grandstanding to win the next election. Partisan polarization corrodes historic, patriotic norms of compromise. Gridlock takes over. Call this Type 1 broken government—pure institutional collapse. Or, if we moderate the rhetoric: it's become very, very hard to get things done in Washington.

2. Interest group power: undemocratic outputs. That's not the only way that legislation fails and yields a broken government. Powerful interests override democratic preferences. Or veto players are lodged throughout Congress and the regulatory state, blocking action.[16] In one popular view—to be examined below—an American majority wants to handle climate change, but the oil industry blocks the popular will.

Call this Type 2 broken government—interests and veto players thwart democracy. CSR advocates would call this broken government too, but it differs as a category from Type 1. Type 2 is less about "can't get anything done" and more about unwillingness to do it.

3. Misguided democracy. Or, government could be broken in a third sense: A voting majority opposes governmental action. That blind majority fails to see that mitigating climate change is crucial to civilization's survival. CSR activists see this as broken government as well. Even though the machinery of government could turn as a matter of mechanical strength, misguided public opinion stops Congress from moving the levers.[17] Call this Type 3 brokenness: democracy fails because the public does not (yet!) grasp what CSR people know to be essential truths.

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From the activist's perspective, each type of "brokenness" justifies ratcheting up shareholder pressure on corporations for more CSR, because the path through Congress is impassable. Yet, each type has a different probability of CSR success.

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itself") (Strine served as Delaware's Chancellor and then as Chief Justice, two courts that traditionally shape much U.S. state-level corporate law); Tim Wu, *The Goals of the Corporation and the Limits of the Law*, CLS Blue Sky Blog (Sept. 3, 2019), https://clsbluesky.law.columbia.edu/2019/09/03/the-goals-of-the-corporation-and-the-limits-of-the-law/ ("[O]ne reason [for] mounting pressure for corporations to take action today is that government has failed to act in many areas that people care about . . .");. Some of the foregoing analysts argue that CSR should fill the void left by government brokenness; others are reporting that this view is widespread.

[16] KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING (1998); GEORGE TSEBLIS, VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK (2002).

[17] Types 2 and 3 can interact: interest groups influence public opinion and, hence, Type 3 misguided public opinion arises, facilitating interest groups' influence.

Pure, Type 1 brokenness is the most propitious for CSR success. Yes, Type 1 government does nothing to promote CSR. But it's also too weak, inept, and incapable of obstructing that CSR which arises privately.

Brokenness of the second and third types, however, is less propitious for CSR. In Type 2—interest group blockage—and Type 3—majoritarian resistance—the gears of governmental machinery turn, but politics stops it from outputting CSR. Indeed—and here is when the political economy keystone starts to crack—the interests in Type 2 and public opinion in Type 3 can resist and reverse visible private CSR progress. Thus, while Type 1 brokenness neglects private CSR, Types 2 and 3 actively threaten it.

If Types 2 or 3 largely explain CSR inaction, then the underlying forces that stymied direct government action are well-placed to block private CSR. That is, those producing private CSR have reason to worry about latent interest-group opposition, boosted by misguided public opinion. The corporation is embedded in the same polity that refused to enact laws advancing the social goals in the first place.[18] And privately-produced CSR may well be unable to escape those forces.

D. Government-Induced and Shareholder-Induced CSR

The keystone problem—Type 1 brokenness is propitious for privately-produced shareholder-induced CSR and the other are not—can be seen in another corporate governance dimension.

1. The CSR/ESG corporate restructuring wish list. Let's start by considering the CSR movement's corporate governance goals of inducing the firm to: (1) take climate change and environmental sustainability seriously, (2) respect labor via fair wages and safer working conditions, (3) conduct business ethically, (4) to achieve greater diversity and inclusion, and (5) make safer, higher-quality consumer products irrespective of higher quality's and safety's profitability.

Social responsibility activists want the American corporation restructured in multiple ways to advance these goals:[19] They want corporate mission statements that embed such goals in managers' consciousness[20] and board committees that specialize in CSR. Boards should find and end exploitive labor practices, close unethical suppliers, and stop environmental degradation caused by the firm and its global supply chain. CSR

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[18] This scope-of-the-political-system thinking that I bring forward—i.e., the difficulty private social action has in escaping the polity—has parallels in public law analyses. Excessive partisanship in the legislative and executive branches is dysfunctional, leading some to call on the judiciary to curb such excesses. But appointed judges are themselves products of those partisan legislative and executive branches. Accordingly, they bring at least a modicum of that partisanship to the bench. See Eric A. Posner & Adrian Vermeule*, Inside or Outside the System?* 80 U. CHI. L. REV. 1743, 1744 (2013); Einer Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?* 101 YALE L. J. 31 (1991).

The fact that there's a hurdle does not mean that the hurdle cannot be surmounted. See infra Part III. It has for other social movements, but has not, yet, for shareholder-induced CSR.

[19] Gina-Gail S. Fletcher & H. Timothy Lovelace Jr., *Corporate Racial Responsibility*, 124 COLUM. L. REV. 361, 419–29 (2024).

[20] See Silvia Cervi & Emiliano Di Carlo, *The Relationship Between Mission Statements and ESG*, *in* ENVIRONMENTAL, SOCIAL, GOVERNANCE (ESG): RISE, PERFORMANCE, MONITORING 27, 27–29 (Nicaloa Castellano et al., eds, 2025).

proponents want investors to be enlightened stewards who promote these values.[21] Affected stakeholders—employees, customers, communities, and ESG groups—should participate in corporate decisionmaking. Lines of authority inside the firm should be drawn to promote diversity, equity, and inclusion.[22] Finally, required disclosure policies would promote these goals,[23] and executive compensation should reward positive social, environmental, and sustainability actions and results.[24]

2. Direct government social action. The cracks in CSR's political keystone come into sharper focus when we see that *direct* government action, via new law, rules or regulation, can achieve the CSR goals *without* corporate governance reform. Corporate governance can persist unchanged, but the corporation can be required to adhere to stronger social rules, with the consequence of violating them being executive sanctions, fines, or even imprisonment. Direct action would get much of the job done; and, by creating a more pro-social atmosphere, people and businesses will then go even further.

Consider how government can directly achieve each CSR goal from the prior subsection: (1) It could tax carbon emissions.[25] (2) It could promote pro-labor results by supporting unionization, requiring higher wages, and mandating employee benefits. (3) It could reach ethical goals via laws barring negative and rewarding positive social behavior. An example: After scandals erupted from American firms bribing foreign officials, Congress enacted the Foreign Corrupt Practices Act to criminalize such bribes.[26] The anti-bribers did not rely on voluntary CSR alone. (4) Government could

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[21] Dionysia Katelouzou, *The Purpose of Investor Stewardship*, 55 VICTORIA U. WELLINGTON L. REV. 465 (2024); Lisa M. Victoravich, Aimee L. Hamilton, Sung Soo Kim & N. Andrew Cohen, *Reflections on the Roles of Governance and Leadership in Profit-for-Purpose Companies: A European–United States Comparative Perspective*, 41 EUR. MGMT. J. 337 (2023).

[22] Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV. 1, 54–56, 84–91 (2022). But cf. Lisa M. Fairfax, *Empowering Diversity Ambition: Brummer and Strine's Duty and Diversity Makes the Legal and Business Case for Doing More, Doing Good, and Doing Well*, 75 VAND. L. REV. EN BANC 131, 152–54 (2022) ("a legal safe harbor may prove insufficient to encourage corporations to be more ambitious"). The definitive analysis of what such fiduciaries can and cannot do is in Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381 (2020).

[23] Atinuke O. Adediran, *Disclosing Corporate Diversity*, 109 VA. L. REV. 307 (2023) (calling for securities-law-like disclosure of diversity statistics). Tarek Miloud, *Corporate Governance and CSR Disclosure: Evidence from French Listed Companies*, 100943 GLOB. FIN. J. (2024) (finding a positive association between women board members and adoption of CSR measures in French public companies from 2006–2017); Elizabeth J. Kennedy, *Sustainable Labor Rights*, 45 BERKELEY J. EMP. & LAB. L. 55, 96–101 (2024).

[24] See Dorothy S Lund, *Enlightened Shareholder Value, Stakeholderism, and the Quest for Managerial Accountability*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 91, 103–07 (Elizabeth Pollman & Robert B Thompson, eds., 2021) (studying ESG inputs into executive compensation); Mehtap Aldogan Eklund & Pedro Pinheiro, *The Determinants of the Corporate Social Responsibility (CSR) Committee: Executive Compensation, CSR-Based Incentives and ESG Performance*, 20 SOC. RESP. J. 1240, 1243 (2024); Shira Cohen, Igor Kadach, Gaizka Ormazabal & Stefan Reichelstein, *Executive Compensation Tied to ESG Performance: International Evidence*, 61 J. ACC'T RES. 805, 806–10, 826–29 (2023); Lucian A. Bebchuk & Roberto Tallarita, *The Perils and Questionable Promise of ESG-Based Compensation*, 48 J. CORP. L. 37, 44–52, 74 (2022). For the backlash hitting ESG-based compensation, see Kenza Bryan, Andrew Hill & Malcolm Moore, *Big companies backtrack on climate goals in bosses' pay*, FIN. TIMES, Mar. 21, 2025.

[25] Or it could regulate emissions. The 1970 founding of the Environmental Protection Agency was an instance of direct action in that the EPA could move the U.S. closer to a social goal via regulation. The EPA's later weakening reduced government action and helped to justify compensatory private CSR pressure on the corporation.

[26] The Foreign Corrupt Practices Act of 1977, Pub. L. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1 et seq.).

promote diversity and inclusion by strengthening anti-discrimination law, lowering barriers to lawsuits against violators, and using administrative mandates. (5) It could regulate product safety through regulatory agencies armed with strong sanctions.[27]

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The sense that much that shareholder-driven effort seeks indirectly through the corporation could be accomplished directly, leaves us with an unsettling political question: How politically safe is it for shareholder-driven climate and CSR activism to seek indirectly what pro-CSR political forces have been unable to accomplish indirectly?

E. The Political Foundation's Instability: Taxing Carbon

Does the overall conceptualization of the American polity make a difference to the instability thesis? That is, political scientists debate which political model best explains American lawmaking—with median voter theory, elite opinion, and interest group pluralism being the three most prominent.[28] We need not choose among them for this Article's CSR thesis. It's enough to recognize that a Type 2 or a Type 3 polity unwilling to act directly on CSR can also build hurdles that impede the private corporation from doing so indirectly and privately in either pure type of polity.

To better see this political instability underlying privately-produced CSR, consider two main planks in CSR/ESG reforms. One is that the corporation should fear climate change and fight it. The other is that the corporation should promote racial and gender equality through DEI programs.

A carbon tax would do much for the climate program. However, the politically powerful American oil industry defeated efforts to tax gasoline and carbon. As such, glimmers of success for private CSR climate activism could induce that industry to mobilize against CSR. In this way, Type 2 interest group pressure could explain not only CSR defeats on carbon taxation *but also* explain industry resistance to privately-produced CSR aiming to lower carbon emissions.

Type 3 majoritarian opposition to a carbon tax is in play as well. Many suburban Americans have built their lives around car-dependent commutes to work and driving to the shopping mall, the supermarket, and their children's schools outside of work.[29] Consequently, many American voters without a stake in the oil industry did not welcome higher taxes on gasoline, so much so that raising the gasoline tax came to be known as the third rail of American politics.[30] While most Americans see climate change as real

[27] Not every socially responsible action is susceptible to regulatory, or even a private push: goals such as worker dignity and day-to-day social equality are difficult to legislate and difficult to achieve via private shareholder pressure.

[28] See Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POLITICS 564, 565–68 (2014).

[29] KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 147–71, 246–71 (1985) ("Commercial, residential, and industrial structures [were] redesigned [since World War II] to fit the needs of the motorist").

[30] Shi-Ling Hsu, *The Politics and Psychology of Gasoline Taxes: An Empirical Study*, 15 WIDENER L. REV. 363 (2010) ("the gasoline tax is [nearly] unanimously supported by economists—and . . . opposed by almost everyone else"). See also Jeffrey Ball, *The Gas Tax Is Our Political Third Rail*, WALL ST. J., July 18, 2013; Ylan

and in need of abatement, "majority support for climate mitigation policy in the abstract . . . dwindle[s] rapidly as [soon as a] price tag" is put on it.[31] In one telling estimate, the average American family was willing to pay for carbon abatement but at no more than one-hundredth of its social cost.[32] This political reality—a focused, organized interest group, namely the oil industry, allied with many voters unwilling to pay—devastated the chances of enacting carbon when it was prominently brought forward in 2009.[33] And it just has not returned to the realistic national agenda since.

Citizens' unwillingness-to-pay is Type 3 not Type 1 brokenness. Oil industry opposition is Type 2 brokenness. Types 2 and 3 give less reason than Type 1 to think that the polity will leave privately-produced CSR unchallenged. Having rejected direct carbon regulation through taxation, the polity might resist *or reverse* private shareholder pressure on the corporation to reach the same result. CSR proponents could find themselves blocked by the same forces that defeated them in the first place.

We next see that they have been.

II. A DECADE OF AMERICAN SHAREHOLDER-BASED CSR: ITS RISE AND FALL

Do the major CSR events of the past decade correspond with, or contradict, the political outline thus far?

A. BlackRock v. Texas

BlackRock's path in the past decade—support in the 2010s for, and then retreat in the 2020s from, DEI and ESG—instantiates the political instability thesis and the power of latent opposition if it mobilizes. A simple political hypothesis is tempting. Elections have consequences, including consequences for climate change and CSR. As power shifted from Democrats to Republicans twice, the owner-driven CSR cycle should

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Mui, *Trump's Gas Tax Hike Tests a Third Rail in Politics*, CNBC (Feb. 15, 2018), www.cnbc.com/2018/02/15/trumps-gas-tax-hike-tests-a-third-rail-in-politics.html; Alex Nieves, *Lawmakers know how to solve the gas tax crisis. Doing it is another story*, POLITICO, Aug. 14, 2024 (the Chair of the California Senate Transportation Committee says that the gas tax is off limits and "certainly the third-rail issue here.").

[31] Jesse D. Jenkins, *Political Economy Constraints on Carbon Policies*, 69 ENERGY POLICY 467, 473 (2014).

The Biden administration rejected a carbon tax as regressive, because poorer people with long commutes and less efficient cars would pay more. See Howard Gluckman, *Some in the Environmental Justice Movement Oppose a Carbon Tax. That's a Problem for Democrats*, FORBES, July 20, 2021; Hanna Trudo, *Democrats Have Turned Solidly Against Gas Tax*, THE HILL, June 18, 2021; *Americans Say No to Gas Tax*, RASMUSSEN REPORTS, Oct. 2017, rasmussenreports.com/public_content/business/gas_oil/october_2017/americans_say_no_to_gas_tax ("[more] Democrats (61%) . . . oppose [taxes on gasoline] than Republicans (49%)"). Cf. Goshen, Hamdani & Raskolnikov, supra note 15, at 20 et seq. (analyzing ESG's regressive impact and potential solutions). A flat rebate for the poor—unlinked to actual gas use—would counter regressivity, but such policies are difficult political sells.

[32] Jenkins, supra note 31, at 471, 473. And the willingness-to-pay was not even half of carbon's lowest social cost estimate for those with the highest willingness to pay. Id. Two-thirds of Americans oppose raising gasoline taxes 25 cents per gallon—even if the proceeds lower federal income taxes. Id. at 472.

[33] See id. at 470.

map that cycle. But it did not; it moved opposite to the election cycle. Something deeper was at work.[34]

BlackRock is America's—and the world's—biggest investment manager, with over $10 trillion in assets under management.[35] In a triumph for the CSR movement, BlackRock became a CSR activist in the late 2010s. In annual letters that were widely-followed in the corporate world, its CEO called on corporate America to serve purposes beyond profit, to confront the world's climate challenges, and to promote workplace diversity.[36]

BlackRock's famous-in-finance CEO, Larry Fink, urged corporate America's leaders in those annual letters to widen their corporations' perspective beyond short-term profit-making.[37] "Companies must ask themselves: . . . How are we managing our impact on the environment? Are we working to create a diverse workforce?"[38] His letters built upon the logic of a Type 1 broken government: America's and the "world's leading democracies have descended into wrenching political dysfunction," and were failing to meet people's needs.[39] Because of the "failure of government to provide lasting solutions, society is increasingly looking to companies . . . to address pressing social and economic issues."[40] "Stakeholders are pushing companies to wade into sensitive social and political issues—especially as they see governments failing to do so effectively."[41] Accordingly, BlackRock's corporate governance leaders sought to influence the companies' policies in private meetings with portfolio firms' executives.[42]

BlackRock's critics complained that BlackRock's focus was no longer just on returns to its pension clients and other investors.[43] But, as it turned out, BlackRock had

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[34] It's at least possible that when a friendly administration was in power in Washington, pressure on universal owners to promote CSR fell; and when an unfriendly one was in power, perhaps that pressure rose. But that contrast fails to include the state-driven opposition (which moved differently—persistently against) and the chance that the CSR forces would run better with a Washington wind at their back or have more trouble when running into the Washington headwinds wind (instead of, as they did, accelerating into that wind).

[35] Sov. Wealth Fund Inst., Top 100 Asset Managers by Managed AUM, www.swfinstitute.org/fund-manager-rankings/asset-manager (accessed Apr. 10, 2025).

[36] Michael Mackenze & Billy Nauman, *BlackRock Pushes Companies to Adopt 2050 Net Zero Emissions Goal*, FIN. TIMES, Aug. 22, 2024.

[37] See, e.g., Larry Fink, 2018 Letter to CEOs: A Sense of Purpose (Jan. 17, 2018), www.blackrock.com/corporate/investor-relations/2018-larry-fin-ceo-letter. See also Andrea Pawliczek, A. Nicole Skinner & Laura Wellman, *A New Take on Voice: The Influence of BlackRock's 'Dear CEO' Letters*, 26 REV. ACCT. STUD. 1088 (2021) (annual disclosures from BlackRock's *portfolio* companies mimic the issues BlackRock raised in that year's BlackRock letter to America's CEOs; "our evidence suggests that portfolio firms are responsive to BlackRock's public engagement efforts").

[38] Amelia Pollard, Silla Brush & Cynthia Hoffman, *BlackRock Struggles to Escape from the ESG Crossfire: Timeline*, BLOOMBERG (Dec. 15, 2022), https://news.bloomberglaw.com/esg/blackrock-struggles-to-escape-from-the-esg-crossfire-timeline (citing to BlackRock's 2018 letter to America's public firm CEOs, supra note 37).

[39] Larry Fink, 2019 Letter to CEO's: Profit and Purpose, BLACKROCK (Nov. 1, 2019), www.blackrock.com/americas-offshore/2019-larry-fink-ceo-letter (because of the "failure of government to provide lasting solutions, society is increasingly looking to companies . . . to address pressing social and economic issue").

[40] Id.

[41] Id.

[42] See Sarah Krause, *BlackRock CEO to Companies: Pay Attention to Societal Impact*, Wall St. J., Jan. 16, 2018.

[43] Richard Vanderford, *Texas Blacklists BlackRock, UBS and Other Financial Firms Over Alleged Energy Boycotts*, WALL ST. J., Aug. 24, 2022.

misdiagnosed the nature of the brokenness. It thought, as its CEO said, that it was addressing the fallout from American government's basic brokenness: a government too dysfunctional to act. Instead, it ran into the political buzz-saw of Type 2 and Type 3 brokenness.

Once the shareholder-based attack on carbon became salient, the same oil industry and suburban car-driver coalition that blocked direct action via a carbon tax mobilized and struck back.[44] The backlash came particularly from oil and gas interests, and their political avatars.[45] Those interests, and conservative ideologues, sought to disrupt the growing power of the big three fund managers, which collectively vote about one-quarter of the stock in most public companies.[46] The anti-CSR, anti-BlackRock reaction tapped into America's historical populist suspicion of Wall Street power.[47]

BlackRock suffered media attacks, threats from oil-states' pension funds to take back investment funds from BlackRock, and actual divestment starting in 2022.[48] Several states removed BlackRock as fund manager,[49] several threatened lawsuits,[50] and several sued BlackRock.[51]

Media attacks helped propel the political reaction we see in the following paragraphs.[52] A prominent Republican called BlackRock's CEO the "king of the woke-

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[44] *See* Heather Gillers, *Texas Ban on 'Woke' Banks Opens Door for Smaller Firms*, WALL ST. J., May 4, 2024 ("Firms seeking to provide services to Texas must . . . attest[] that they don't 'boycott energy companies' or 'discriminate against a firearm entity.' . . ."); Tabuchi, supra note 45 ("In New Hampshire, state lawmakers have sought to criminalize . . . E.S.G.").

[45] Id. *Cf.* Hiroko Tabuchi, *Bank of American Pledged to Stop Financing Coal. Now It's Backtracking*, N.Y. TIMES, Feb. 3, 2024 ("Bank of America's change follows intensifying backlash from Republican lawmakers against corporations that consider environmental and social factors."); Benoît Morenne, *Fossil-Fuel Industry Exacts Its Revenge on Green Activists*, WALL ST. J., Mar. 21, 2025, at A1 ("major setbacks for green groups"); Chris Flood, *Under-fire US fund Manager Pulls Controversial Sponsorship of Climate Sceptics*, FIN. TIMES, Sept. 20, 2022.

[46] The Big Three are BlackRock, State Street, and Vanguard, with Fidelity not far behind.

[47] JOHN C. COATES, THE PROBLEM OF TWELVE: WHEN A FEW FINANCIAL INSTITUTIONS CONTROL EVERYTHING 17–18 (2023); MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE xiv, 28–36, 110, 153, 283–85 (1994).

[48] Will Schmitt, *US investment funds pull $13.3bn from BlackRock in anti-ESG campaign*, FIN. TIMES, Mar. 24 2024; *BlackRock Struggles to Escape from the ESG Crossfire: Timeline*, BLOOMBERG, Mar. 28, 2025, www.bloomberglaw.com/bloomberglawnews/esg/XFTE2BCK000000?bna_news_filtger-esg#jcite ("some states, . . . started to pull money from BlackRock funds" in 2022).

[49] Id.

[50] Mark Brnovich, Arizona Att'y Gen'l et al., Letter to Laurence Fink, CEO of BlackRock, Inc. (Aug. 4, 2022), www.texasattorneygeneral.gov/sites/default/files/images/executive-management/BlackRock%20Letter.pdf.

[51] Amended Complaint, *Texas et al. v. Blackrock et al.,* No. 6:24-cv-00437-JDK (E.D. Tex. Jan. 16, 2025), ECF No.+0.

[52] Glenn Beck video entitled "How BlackRock uses YOUR MONEY to push ESG & far-left plans." www.youtube.com/watch?v=X6TSTiaZAAE (emphasis in original). See also Vivek Ramaswamy, *BlackRock's Climate Crusade Doubletalk*, WALL ST. J., July 31, 2024; Liz Hoffman & Charley Grant, *'Woke, Inc.' Author's Startup to Take on BlackRock*, WALL ST. J., May 10, 2022; Loukia Gyftopoulou, Sill Brush & Francine Lacqua, *Larry Fink Says ESG Narrative Has Become Ugly*, *Personal*, BLOOMBERG NEWS, Jan. 17, 2023; Michael Posner, *How BlackRock Abandoned Social and Environmental Engagement,* FORBES, Sept. 4, 2024 ("BlackRock's pullback is part of a broader move by large investment firms [withdrawing] from ESG strategies [partly] in response to attacks by Republican politicians like Florida Governor Ron DeSantis. . . . [C]onservatives have accused investment firms of practicing 'woke capitalism.'").

industrial complex."[53] Bloomberg news reported that "BlackRock's push into ESG transformed the firm into a political punching bag."[54]

In the spirit of the anti-BlackRock backlash, the Texas Attorney-General organized ten fellow attorneys-general to demand that BlackRock and the other major investment firms change course.[55] The AGs' letter reminded the financial firms of their fiduciary duty to promote their clients' financial returns "without any ulterior political motive or agenda." The letter warned the fund managers of the AGs' "mounting concern that political objectives . . . influence[] . . . [your] decision-making. . . . Specifically, you have embraced race- and sex-based quotas . . . based not on maximizing shareholders' asset value, but in furtherance of political agendas." CSR's DEI efforts suffered Types 2 and 3 backlash.

The AGs singled out BlackRock for having "allegedly . . . placed race- and sex-based employment quotas in contracts and executive compensation agreements, and . . . [for] us[ing] pressure tactics to ensure hiring managers that help it meet those quotas."[56] Moreover, the AGs alleged, "BlackRock . . . [uses] shareholder engagements to push quotas across society . . . and especially on the boards of [its] portfolio companies. . . . BlackRock stated in 2019–2020 that it voted against management 'more than 1,500 times for 'insufficient diversity.'"[57]

The AGs went on to criticize the firms' climate activism. "[Y]ou [have] joined groups requiring members to spend time and money on helping the 'climate.'"[58] But, they said, this "net-zero" agenda would not increase financial returns.[59] Nevertheless, BlackRock, "[i]n the 2020-21 proxy season, . . . supported 64% of environmental proposals" and "voted against 255 directors on climate-related issues . . . ."[60] The AGs asked the investment firms to self-correct, and threatened legal action if they did not.

The Texas AG's letter was not an isolated effort against salient CSR investor activism. In 2022, for example, Texas launched a civil investigation of Standard and Poor, the major credit rating agency, for using ESG factors in its credit ratings.[61] That

[53] The Ramaswamy comment came in his Fox News attack on Larry Fink and BlackRock. https://x.com/VivekGRamaswamy/status/1492135715227983876. "Republicans in Congress opened inquiries. BlackRock tripled its spending on Fink's security." Jack Pitcher, Kevin T. Dugan & Brian Schwarz, *Republicans Hated Him—Until He Delivered the Panama Canal*, WALL ST. J., Apr. 5–6, 2025.

[54] *BlackRock Struggles*, supra note 48.

[55] Ken Paxton, Att'y Gen'l of Texas, et al., Letter to JPMorgan Chase & Co., Bank of America Corporation, Morgan Stanley & Co. LLC, The Goldman Sachs Group, Inc., Citigroup Inc., and BlackRock Inc., (Jan. 27, 2025), www.texasattorneygeneral.gov/sites/default/files/images/press/Updated%20Paxton%20Financial%20Institutions %20Letter.pdf ["Texas AG Letter"].

[56] Id. at 2.

[57] Id. at 3 ("BlackRock's . . . proxy voting guidelines . . . 'encourage' large companies to have boards with 'at least two women and a director who identifies as a member of an underrepresented group.'").

[58] Id. at 4.

[59] Id.

[60] Id.

[61] Office of Tex. Att'y Gen., Paxton Launches Investigation into S&P Global's use of ESG Factors in Credit Ratings, Potentially Violating Consumer Protection Laws, Sept. 28, 2022, www.texasattorneygeneral.gov/news/releases/paxton-launches-investigation-sp-globals-use-esg-factors-credit-ratings-potentially-violating.

pressure succeeded: in 2023, S&P ceased publishing ESG indicators.[62] And the Texas AG, alongside other states' AGs, pressed proxy advisors to turn away from climate change and DEI; sought to stop boycotts of energy and firearms companies; and barred Citigroup, one of America's largest banks, from underwriting Texas municipal bonds because, the AGs said, it had violated Texas' anti-ESG laws. Other states acted and sued similarly.[63] Collectively, these opposing states have 250 electoral votes[64]—enough to destabilize the investment funds' pro-CSR stance.

B. Back to Congress

The AGs' attack letters were not the only way that opposing interests sought to quiet BlackRock and other socially active investment companies. Congressional Republicans sought to amend securities law to neutralize the funds' voting power, by requiring the investment funds to pass those voting decisions back to the individual investors. Individual investors tend to do nothing with these votes, due to their rational apathy or (thought the sponsors) a lack of sympathy with CSR goals. Either way, the growing social power and influence on corporate governance of the big investment funds would diminish.

The bill's Senate sponsor said his aim was to "eliminate the influence that [investment advisers] wield at shareholder meetings, often to push [their own] political agendas." Passing the votes from the funds back to investors would "remove these firms as a gateway for special interest groups who push radical agendas through corporate governance that they could not otherwise achieve through the traditional political process."[65] These counter-pressures did not need to be codified in hard law to affect BlackRock and the others; the rhetorical reaction and its source was enough to change BlackRock's behavior.[66]

The senator's justifications are worth re-reading. He argued that the big investment houses and their allies were foisting a CSR political agenda on America that they could not get through Congress. In this Article's vocabulary, he said that CSR supporters sought to overcome Type 2 or Type 3 "brokenness" that impeded CSR and

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[62] Office of Tex. Att'y Gen., Major Company Reverses ESG Credit Rating Practice, A Victory for Texas Efforts Against Improper Political Activism by Financial Companies, Aug. 14, 2023, www.texasattorneygeneral.gov/news/releases/major-company-reverses-esg-credit-rating-practice-victory-texas-efforts-against-improper-political; S&P Global Ratings, S&P Global Ratings Update On ESG Credit Indicators, Aug. 4, 2023, www.spglobal.com/_assets/documents/ratings/esg_credit_indicators_mr.pdf.

[63] These actions and suits are sufficiently voluminous that we cite and describe them in Appendix A.

[64] Id.

[65] Press Release, Sullivan Introduces Index Act To Empower Investors and Neutralize Wall Street's Biggest Investment Firms (May 8, 2022), www.sullivan.senate.gov/newsroom/press-releases/sullivan-introduces-index-act-to-empower-investors-and-neutralize-wall-streets-biggest-investment-firms; see discussion in Raffaele Felicetti, Is Pass-Through Voting a Desirable Way to Limit BlackRock's Influence on Environmental and Social Issues? 30 (unpublished manuscript, Mar. 2025). The bill was not enacted, perhaps because BlackRock and others conceded before a congressional showdown.

Who is foisting their political agenda on whom could be analyzed, although that's not this Article's focus.

[66] Attracta Mooney & Susannah Savage, *US Multinationals Purge Website Reference to Climate Change*, FIN. TIMES, Mar. 14, 2025. Since the bill did not pass, the sequence could be Type 1 brokenness. Or it could be Types 2 or 3, if just the proposal and possibility of passage induced shareholder CSR activism, from BlackRock and others, to subside.

ESG progress. The senator aimed to build up *barriers to indirect CSR activism* through the corporation. He was not alone. Senator Daines, for example, justified pass-through because "[i]nvestment advisors [are] using their power to advance the Left's woke agenda in Corporate America."[67]

A CSR defender might reply to the senators that corporate ESG action counters the oil industry's Type 2 influence, and that if shareholders disagree, they are free to invest elsewhere. But regardless of which side holds the democratic high ground, the bill and the senators' justifications illustrate this Article's thesis. The same political economy forces that blocked government direct action in the first place—the forces behind Types 2 and 3 action and inaction—can mobilize against private-induced corporate and financial efforts to achieve similar ends. Privately-induced CSR and corporate ESG usually cannot land far from where the political system started.

C. What did BlackRock Do?

These anti-CSR efforts reveal why the "government-is-broken" foundation for corporate ESG pressure is incomplete and misleading. How it's broken affects whether shareholder CSR can succeed. These state anti-CSR acts underscore why understanding the brokenness typology I advanced above is essential—namely that the forces that defeat direct government action lie in wait to reverse stockholder-produced CSR. Type 1 brokenness could produce large gaps between political and private action, yes; and the gaps resulting from Types 2 or 3 brokenness could be real, but should be small.

And it's not just the Texas AG: Texas legislators summoned executives from the Big Three investment houses—BlackRock ("BlackRock Subpoenaed by Texas Senate Panel Over ESG Issues"[68]), State Street, and Vanguard—to a hearing where they "grilled [the] finance . . . executives . . . amid a growing concern [in the state] . . . that financial firms are pushing a 'woke' ideology with investing rules tied to ESG issues."[69] Prior to the hearing, Vanguard withdrew from the world's largest climate-finance alliance—after which Texas excused Vanguard from testifying.[70]

Even if Congress is Type 1 broken—the most propitious for successful private CSR—the state of Texas is not. It opposed private CSR and rounded up support from states with about 250 electoral votes. Texas's government beat back pro-CSR pressure

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[67] Sen. Sullivan Press Release, supra note 65. See also Minority Staff of the U.S. Sen. Comm. On Banking, Housing, and Urban Affair, The New Emperors: Responding to the Growing Influence of the Big Three Asset Managers 19 (Dec. 2022), www.banking.senate.gov/imo/media/doc/the_new_emperors_responding_to_the_growing_influence_of_the_big_three_asset_managers.pdf (the May 2022 Index Act bill would, its sponsors said, "ensure that public companies' shares are voted consistent[ly] with the values and instructions of the actual investors in those companies, [and will not reflect the differing] views of the Big Three").

[68] *BlackRock, ISS Head to Texas for ESG Talks; Vanguard Excused*, BLOOMBERG, Dec. 14, 2022, www.news.bloomberlaw.com/esg/blackrock-iss-head-to-texas-for-esg-talks-vanguard-excused-2.

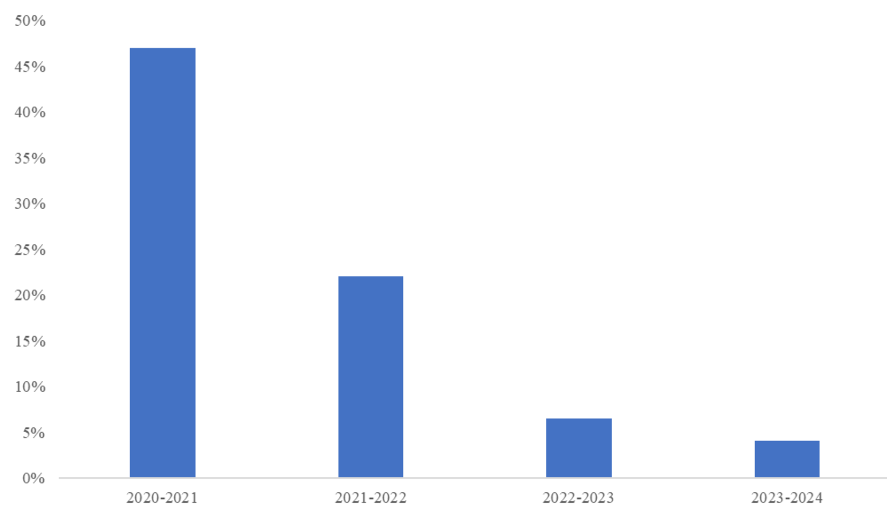
[69] Brendan Walsh & Danielle Moran, *BlackRock and State Street Grilled by Texas Lawmakers in ESG Debate*, BLOOMBERG, Dec. 15, 2022, Bloomberg.com/news/articles/2022-12-15/blackrock-state-street-grilled-by-texas-lawmakers-in-esg-debate; *BlackRock, ISS Head to Texas for ESG Talks; Vanguard Excused*, BLOOMBERG, Dec. 14, 2022, www.news.bloomberlaw.com/esg/blackrock-iss-head-to-texas-for-esg-talks-vanguard-excused-2. (Vanguard Quits Net-Zero Group, Marking Biggest Defection Yet").

[70] Walsh & Moran, supra note 69.

from BlackRock and the investment funds. Government here is getting things done, but not what CSR proponents want. State governments are acting—against them.

How did BlackRock respond to the media, legal, and legislative pressure? Like Vanguard, it backed away.[71] To wit, BlackRock's CEO's 2023 annual letter to CEOs disengaged from the corporate purpose, ESG, DEI, and climate goals that he had championed in his prior letters to corporate America. "It is for governments to make policy and enact legislation, and not for . . . *asset managers*[] to be the environmental police."[72] In line with its new view, and citing legal scrutiny it faced, BlackRock withdrew from the arrest-climate-change Net Zero Asset Managers Initiative.[73] It shifted its rhetoric to emphasize "energy pragmatism"[74] from climate change.[75]

Figure 1. BlackRock's retreat from environmental and social issues



This figure shows BlackRock's declining support for environmental and social resolutions. In 2020-2021, BlackRock reported supporting more than 45% of the proposals. By 2023-2024 it was supporting only 4% of the proposals, a ten-fold decline, while overall voting support only halved. And the later years have more anti-CSR resolutions. But these anti-CSR resolutions were too small a portion of the total to materially affect the overall trend. Source: BlackRock reports, compiled in Felicetti, supra note 65.

[71] Brooke Masters & Kenza Bryan, *BlackRock's Support for ESG Measures Falls to New Low*, FIN. TIMES, Aug. 21, 2024; Patrick Tempe-West, Amelia Pollard & Eric Platt, *BlackRock and Vanguard halt meetings with companies after SEC Cracks Down on ESG*, FIN. TIMES, Feb. 19, 2025; Rob Copeland, *Fearing Trump, Wall Street Sounds a Retreat on Diversity Efforts*, N.Y. TIMES, Feb. 28, 2025. See Figure 1, infra.

[72] Larry Fink, 2023 Annual Chairman's Letter to Investors, HARV. L. SCHL. FORUM ON CORP. GOV. (Mar. 17, 2023), https://corpgov.law.harvard.edu/2023/03/17/larry-finks-annual-chairmans-letter-to-investors/ (emphasis supplied).

[73] BlackRock, Excerpt from letter to clients on BlackRock's decision to leave NZAM (Jan. 9, 2025), https://www.blackrock.com/corporate/newsroom/announcement/blackrock-withdraws-from-nzam.

[74] Larry Fink, 2025 Annual Chairman's Letter to Investors (Apr. 1, 2025), www.blackrock.com/corporate/investor-relations/larry-fink-annual-chairmans-letter.

[75] BlackRock, Energy Pragmatism: An Evolving Approach for the Mid-21st Century (Sept. 30, 2024), www.blackrock.com/corporate/literature/whitepaper/energy-pragmatism.pdf.

Figure 1 measures BlackRock's retreat from CSR.[76] In 2020, it supported nearly half of the ESG resolutions presented at annual meetings of shareholders. By 2024 it cut its support to one-tenth of that earlier support for ESG resolutions.[77]

In 2025, Texas declared victory.[78]

D. It's Not Just Texas

Texas poses a major counterexample to the basic "broken government" thesis. It's functioning, effective, and pushing back on corporate ESG initiatives.

But it's not just Texas. A map of state-based CSR actions shows how the latent opposition hypothesis I advance as placing cracks in CSR's Type 1 keystone is also visible via the wide state-based CSR action. Some states restrict ESG shareholder activity; others encourage it. But restrictive states account for 200 to 250 electoral votes in Figure 2, more than supportive states.[79] (Multiple states are neutral.[80]) Moreover, popular support for CSR and fighting climate change suffered as well. Government is clunky but it's working—just not how CSR proponents prefer.[81]

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[76] Anson Frericks, *The Corporate D.E.I. Movement Was Destined to Fail,* N.Y. TIMES, Mar. 17, 2025 (the author is affiliated with Vivek Ramaswamy and Strive Asset Management, the investment firm they organized to counter what they viewed as excessive corporate ESG efforts).

[77] A small part of the decrease is due to anti-ESG proposals rising from 3% of all ESG proposals in 2020 to 16% in 2024. For the underlying data, see Jun Frank & Anna Desis, 2025 U.S. Proxy Season: Midseason Review Finds Sharp Drop in Shareholder Resolutions on Ballot, ISS-Corporate, May 22, 2025, www.iss-corporate.com/library/2025-u-s-proxy-season-midseason-review-finds-sharp-drop-in-shareholder-resolutions-on-ballot/. Also, in 2021, the SEC expanded the permitted scope of shareholder resolutions, which then doubled. Raffaele Fellicetti, *The Fortunate Demise of SEC Staff Legal Bulletin No. 14L*, 31 FORDHAM J. CORP & FIN. L. (forthcoming). However, expanded volume can explain only some of BlackRock's retreat, because overall support halved while BlackRock's dropped by 90%.

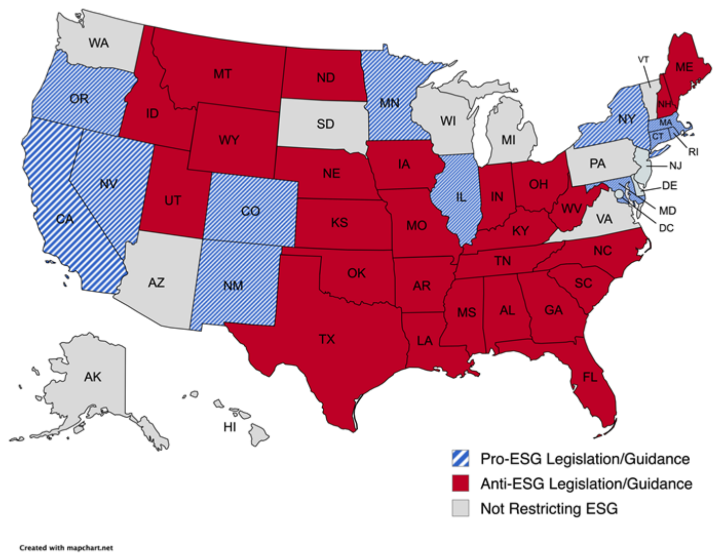
[78] Myles McCormick, Sujeet Indap & Kristina Shevory*, How corporate America learnt not to mess with Texas*, FIN. TIMES, June 6, 2025.

[79] Appendix Tab 1, Electoral Votes of States Restricting CSR/ESG Effort. Compiling population instead of electoral votes moves the gap closer but not by much.

[80] And thirty-seven states had before the 2024 election 167 bills to restrict ESG. Henry Tricks, *How BlackRock's Larry Fink Became the Face of Woke Capitalism*, FIN. REV., Aug. 18, 2023, www.afr.com/wealth/investing/how-blackrock-s-larry-fink-became-the-face-of-woke-capitalism-20230809-p5dv6a

[81] Twenty states bar their public pension funds from investing in ESG funds. See Morgan Lewis, ESG Investing Regulations Across the 50 States (July 21, 2023), www.morganlewis.com/pubs/2023/07/esg-investing-regulations-acros+s-the-50-states#:~:text=As%2520of%2520September%25204%252C%25202023,%252 For%2520discourage%2520such%2520investments). Eight others have pro-ESG rules. Id.

Figure 2: States enact anti-ESG laws (as of January 1, 2024)



The map shows enacted legislation and concrete government actions that are pro- or, more often, anti-ESG. We cut the compilation at January 2024 to avoid interpretive issues for anti-CSR state action occurring in the run-up to, or after, the 2024 election—although the map changed little after that date. The map shows anti-CSR rules were widespread before the 2024 election.

Source: Ropes & Gray, Navigating State Regulation of ESG, www.ropesgray.com/en/sites/navigating-state-regulation-of-esg (compilation, last accessed May 15, 2025).

E. More Pushback Channels

Other legal developments are consistent with stockholder-driven ESG and CSR results ultimately converging toward publicly-produced results.

Consider corporate DEI resolutions. As backlash to corporate DEI intensified (even *before* the 2024 election),[82] conservative activists brought forward during the Biden administration *anti*-DEI proxy resolutions to restrict corporate DEI.[83] And, while

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[82] After the 2024 election: Eva Xiao, Taylor Nicole Rogers & Clara Murray, *US Companies Drop DEI from Annual Reports as Trump Targets Corporate Values,* FIN. TIMES, Mar. 17, 2025 (companies' annual reports "cut . . . references to DEI, with many [companies] ditching the term entirely."); Rob Copeland, *Fearing Trump, Wall Street Sounds a Retreat on Diversity Efforts,* N.Y. TIMES, Feb. 16, 2025 (business front page); Emma Goldberg, Aaron Krolik & Lily Boyce, *How Corporate America Is Retreating from D.E.I.,* N.Y. TIMES, Mar. 12, 2025.

But even before the 2024 election: Brooke Masters, *Larry Fink Dismisses 'Sad' Criticism of BlackRock in Republican Debate*, FIN. TIMES, Dec. 7, 2023; Jeff Green & Phil Kuntz, *Anti-LGBTQ Backlash Puts a Chill on Corporate America's Rhetoric*, BLOOMBERG (June 29, 2023), www.bloomberg.com/news/articles/2023-06-29/us-companies-were-kess-vocal-on-pride-month-during-anti-lgbtq-protects; Jeff Green, *Businesses Are Quietly Rethinking their DEI Efforts: Equality*, BLOOMBERG (July 27, 2023), www.bloomberg.com/news/newsletters/2023-07-27/businesses-are-quietly-rethinking-their-dei-efforts-quality.

[83] Id.; David A. Bell & Wendy Grasso, *How DEI Shareholder Proposals Are Faring in 2025*, HARV. L. SCHL. FORUM ON CORP. GOV., Mar. 22, 2025, www.corpgov.law.harvard.edu/2025/03/22/how-dei-shareholder-roposals-are-faring-in-2025/.

Congress did not enact the pro-DEI legislation that the activists sought, the cause seems not to be Type 1 dysfunction alone, but also, or mainly, an unsure, divided electorate. Polls show the division: 49% supporting ending corporate DEI programs, while 41% oppose doing so.[84]

Division abounds. Not all state shareholder-focused ESG political action is *anti*-ESG, like Texas and allied states. Some public pension fund directors, like New York City's Comptroller, pressured their advisors (like BlackRock) to reverse their retreat.[85] California has pushed forward several prosocial, anti-carbon efforts, in contrast to Texas's pressure on America's institutional shareholders. But this too reinforces the political thesis: ESG initiatives in a polarized polity attract pressure and counterpressure similar to the division and pressure that stymied policymaking in the first place. In Congress, polarization limits its effective range of action; in the states, polarization produces opposing actions and signals.

Climate change regulation through corporate governance also activated latent opposition.[86] The SEC sought in the early 2020s to require public companies to report their susceptibility to climate change.[87] The rule had two justifications. Its basic rationale was to get investors the information needed to assess climate risks to portfolio companies' businesses.[88] The second goal (according to many[89]) was to reduce climate risks by making them more visible. The rule was challenged in the courts[90] and is

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[84] Mark Murray, *Poll: American Voters Are Deeply Divided on DEI Programs, Political Correctness*, NBC News (Mar. 6, 2025), www.nbcnews.com/politics/politics-news/poll-american-voters-are-deeply-divided-dei-programs-political-correct-rcna196377; David Montgomery, *The Economist/YouGov Poll*, Jan. 19–21, 2025, https://d3nkl3psvxxpe9.cloudfront.net/documents/econtoplines_P1J4BlQ.pdf (close splits); Naomi Isenberg & Markus Brauer, *Diversity and Inclusion Have Greater Support Than Most Americans Think*, 14 SCI. REP. 28616 (2024), https://doi.org/10.1038/s41598-024-76761-8 (pro-diversity majority); Lydia Saad, *ESG Not Making Waves With American Public*, GALLUP (May 19, 2023), https://news.gallup.com/poll/506171/esg-not-making-waves-american-public.aspx (public opinion is unsure what to think about ESG).

[85] Lere Harris & Sun Yu, *New York Pension Funds Put Asset Managers on Notice Over Climate Plans*, FIN. TIMES, Apr. 3, 2025 (New York City's Comptroller, Brad Lander, "running for New York City mayor, put asset managers on notice . . . : 'Asset managers like BlackRock have forsaken even the symbolic forms of climate action'").

[86] Pew Research Center, How Americans View Climate Change and Policies to Address the Issue (Dec. 9, 2024), www.pewresearch.org/science/2024/12/09/how-americans-view-climate-change-and-policies-to-address-the-issue/ (68% of Americans support a *corporate* carbon tax, but not an increase in the tax on gasoline at the pump). The gas tax is seen as the third rail of American politics. See supra note 30.

[87] The Enhancement and Standardization of Climate-Related Disclosures for Investors, Release No. 33-11275 and 34-94478 (Mar. 6, 2024), 89 Fed. Reg. 21668 (Mar. 28, 2024).

[88] *See id.;* Letter from Corporate Law Professors re: Enhancement and Standardization of Climate-Related Disclosures for Investors (S7-10-22) at 3–4, (June 6, 2022), https://ssrn.com/abstract=4129614; Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 923, 925–26 (2019) ("Being able to assess an issuer's sustainability practices is critical to evaluating the[ir] effect . . . on economic value.").

[89] *See* Hester Pierce, We Are Not the Securities and Environment Commission, at Least Not Yet (Mar. 21, 2022), www.sec.gov/newsroom/speeches-statements/peirce-climate-disclosure-20220321 ("The proposal . . . tells corporate managers how regulators, doing the bidding of an array of non-investor stakeholders, expect them to run their companies"); Andrew Vollmer, *The SEC Lacks Legal Authority to Adopt Climate Change Disclosure Rules,* MERCATUS CENTER AT GEORGE MASON UNIV. (Apr. 12, 2022), www.mercatus.org/research/public-interest-comments/sec-lacks-legal-authority-adopt-climate-change-disclosure-rules ("the objective of climate-change disclosures is predominately the policy goal of combating the causes of climate change and reducing fossil fuel emissions."); James Freeman, *SEC Rule Aims to Make Every Company a Climate Company*, WALL ST. J., Dec. 9, 2022 (the climate rule "would essentially force every public company, regardless of industry, to focus on climate.").

[90] See generally Consolidated Brief of State Petitioners, Iowa v. SEC, No. 24-1522 (8th Cir. June 21, 2024).

unlikely to survive the challenge.[91] Tellingly, attorneys-general from 25 states with 225 electoral votes actively opposed the rule, through lobbying[92] and amicus briefs.

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Overall, the last decade's ups and downs for privately-generated, shareholder-originating CSR pressure reflect the thesis advanced in Part I. If government's failure to enact the CSR-boosting legislation originally was due to Type 2 or Type 3 brokenness more than it was due to Type 1 brokenness, we should not expect the private pressure to get much farther than that reached by direct government action. It hasn't.

III. Counters to the Political Economy Theory Presented

Other political economy concepts round off the hard edges to the thesis here. They add nuance and coloring. Overall, however, they do not, as yet, reverse the core concepts or even mitigate them much. But someday they might. And several could give activists strategic insights for improving their chance of success.

Other broad political movements have succeeded, perhaps because they did better along one of the dimensions outlined below than has shareholder-driven, privately-produced CSR, thus far. And some residual CSR successes could portend that transformational first hoped for from shareholder-driven CSR.

A. The Political Economy of Agenda Configuration

Agenda configuration can decide outcomes. Minor changes in decisionmaking order can cause a proposition to win in one configuration but not in another.[93] More colloquially, a government's unwillingness to enact a rule does not perfectly align with a hunger to crush the same action when it arises in the corporate sphere.

This difference is shareholder-driven CSR's political economy foundation: if government just does not upset the status quo, then the nature of that status quo is key and it might be made to be pro-CSR. A highly polarized polity could be unable to act for or against an issue—this is where we started in the first place and what provided shareholder-focused CSR its keystone. It's possible that government does not react either way, as a matter of logic, but that's neither necessary nor, as the last decade's stymied private CSR efforts show, the experience thus far in the U.S.

That is, if the anti-woke, anti-CSR, anti-climate regulation coalitions and ideologies are strong enough—as they seem thus far to be in CSR conflicts—then the coalition preventing direct governmental action seeks to bar pro-CSR shareholder-

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[91] Mark T. Uyeda, Statement by Acting Chair Uyeda on Climate-Related Disclosure Rules, Mar. 8, 2025.

[92] Ken Paxton, Att'y Gen'l of Texas, et al., Letter to Vanessa Countryman, Secr'y of SEC (June 17, 2022), www.texasattorneygeneral.gov/sites/default/files/global/Texas%20Comment%20Letter%20re%20SEC%20Proposed%20Rules%20(Final%206.17.2022.pdf.

[93] Kenneth J. Arrow, Social Choice and Individual Values 9–22 (2d ed. 1963). Prominent precursors to Arrow include Duncan Black, The Theory of Committees and Elections 18–19 (1958), and Marie-Jean-Antoine-Nicolas de Condorcet, Essai sur l'application de l'analyse a la probabilité des décisions rendues à la pluralité des voix 118–29 (1785).

induced change to the status quo as well. If it succeeds, as it has thus far, the endgame is the same for government activism and for shareholder activism.[94]

The underlying political configuration counts, too. If the CSR challenge is on carbon, for example, the challengers confront one of America's most powerful interests, the oil industry, which is concentrated (consider Olson[95]) and positioned to motivate political powers in both Washington and the states. And the challengers face opposing public opinion, because most Americans dislike paying heavier taxes on gasoline. But if the challengers seek CSR that does not induce concentrated opposition—if their goal is, say, to reduce toxic chemical emissions or, perhaps, to promote boardroom gender diversity—they could succeed.[96]

* * *

Other features, resembling agenda configuration, could wedge open corporate and congressional results. A conservative Congress could refuse to enact CSR laws but defer to corporations and Republican CEOs that do CSR, trusting the business corporation to do the right thing.[97] Relatedly, if corporate elites sign on to shareholder-induced CSR (but were indifferent to direct CSR), the elites may be influential enough to prevent the polity from stopping corporate-generated CSR. Or some CSR issues—perhaps gender placements on boards—could fail in Congress but have sufficient private support (or face only weak opposition) that one sub-goal succeeds while other CSR sub-goals (carbon) do not.[98]

Such gaps between the polity and corporation are plausible. But there are reasons to question their breadth. First, even if a corporate elite switch to CSR had valence in earlier decades, it seems weaker today in a populist, MAGA political environment that does not respect corporate elites in the way they once enjoyed deference.

Second, if corporate elites really favor CSR, could they have had the influence to get CSR enacted directly? In the past, and maybe today still, they have influence. And if they are CSR-supporting, they have incentives to seek such legislation, because a

[94] Long-term strategists would consider whether the backlash could activate opposition that would otherwise lay dormant.

[95] MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1964).

[96] Some readers raised a seemingly related concern. Political invariance has been disputed in other contexts; i.e., if a Coasean allocation of liability maximizes efficiency, some proponents of Coasean results assume that there's no distributional impact or that the distributional impact can be mitigated elsewhere. But, the critics state, this distributional invariance should not be assumed. Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, 100 MINN. L. REV. 1051 (2016), Here, first, I propose something less daunting than "invariance"—namely, a previously-unrecognized but steep political hurdle. Second, the climate-based and CSR distributional effects are unclear. And, third, most importantly, I show that in this CSR space, in the past decade, the political result *have* indeed converged. Perhaps they will not converge elsewhere, but they have here.

[97] Cf. Pargendler, supra note 11.

[98] On gender vs. carbon: Approximately half of the voting population is female. Less well-known is that about half of totaled indirect (through funds and pensions) and direct ownership of public company stock is female. Sarah C. Haan, *Corporate Governance and the Feminization of Capital*, 74 STAN. L. REV. 515 (2022). The Texas AG and others did attack BlackRock for its DEI initiatives. See supra Part II.

broad requirement reduces corporate free-riders who do not undertake voluntary but costly social action.[99]

But, all that said, the underlying thesis persists intact. If Type 2 or Type 3 barred direct action, then promoting transformative change through shareholder-action in the large American corporation must surmount a major hurdle.

The hurdle could, in principle, be surmounted. But thus far it has not been.

B. The Political Economy of Social Movements and Small Victories

A social movement aims to influence public opinion, political decisionmakers, and the societal norms that underpin the rules. A social movement is not let down by an unsuccessful end to a single pressure campaign, by one lawmaking failure, or by one adverse court ruling.

1. Shareholder-based CSR as embedded in a social movement? Instead, a social movement seeks change through multiple channels: media coverage that changes public opinion; rallies that highlight the problem; data and academic analysis that seep into public consciousness; political campaigns that change some voter sentiment; and lobbying that persuades politicians. Setbacks—like one defeated legislative foray, a corporate retreat from CSR, or public criticism—need not signal ultimate defeat. Interim defeats can still win converts[100] and eventually narrow the acceptable range of behavior into a pro-CSR zone.[101] Small victories boost advocates' morale to press on. Over the long haul, shifts in public norms can make once-radical proposals become mainstream and, ultimately, they could then become law. Activity signals the movement's underlying strength to political decisionmakers.[102] That strength can facilitate political success. Radical proponents can make moderate efforts seem mainstream. Eventually, they hope and expect, the political winds will shift.

2. Counterrevolution? While these movement channels are plausible, thus far none has featured prominently in CSR academic analyses or in the CSR movement itself. Indeed, if initial CSR successes signaled strength, such as when activists brought BlackRock on board rhetorically, that signal of strength proved to be false: the CSR movement lacked the political power to preserve its initial successes with BlackRock, and early success provoked an effective counter coalition. Early CSR successes (at this juncture) have not held up.

In contrast, analyses of the decades-long civil rights movement fit this paradigm of a multi-step movement that regularly failed but still accomplished many of its initial

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[99] Moreover, it's unclear whether corporate elites support CSR for CSR's own sake, as opposed to compromising with pro-CSR pressure groups. If it's the latter—a reluctant compromise—they could welcome the political backlash as freeing them, the corporate elite, to do what they wanted to do in the first place.

[100] David Pettinicchio, *Elites, Policy and Social Movements*, *in* 24 RESEARCH IN POLITICAL SOCIOLOGY 155, 162–64 (Barbara Wejnert & Paolo Parigi, eds. 2017).

[101] Bert Useem & Jack A. Goldstone, *The Paradox of Victory: Social Movement Fields, Adverse Outcomes, and Social Movement Success*, 51 THEORY & SOCIETY 31, 55 (2022).

[102] DAVID S. MEYER, HOW SOCIAL MOVEMENTS (SOMETIMES) MATTER 6 (2021) ("opponents and allies in government make judgments about how strong and widely held demonstrators' grievances are, and respond, sometimes with concessions and reforms, sometimes with harsh repression. . . . Social movement[s] . . . , often start[] a chain of events [whose course is hard to predict].").

goals: no single election, legislative effort, rally, academic study or moral appeal sufficed *on its own*. But together they shifted public opinion, shaped norms, and achieved legal and societal reforms. Thus, yes, "[s]ocial movements [can] sometimes . . . promote change. They work by upsetting the stalemate of existing forces . . . ."[103]

CSR could become that. But thus far it has not; a different but negative reaction is in play: "[i]n a democratic polity, whenever an organized force seems on the verge of effecting change, it is likely to mobilize a counterforce, often [itself] in movement form . . . [that] push[es] in the other direction . . . , mak[ing] for a kind of stalemate."[104]

3. Opening an Overton window? Political scientists refer to so-called "Overton windows" opening and closing.[105] If that window is closed; political discourse on the closed off idea is unacceptable—such as gasoline tax being seen as the third-rail of politics. Some things just cannot even be considered, much less done. But sustained pressure from many angles could lever open a long-closed CSR Overton window, making previously out-of-bounds ideas respectable. Once opened, ESG would be normalized, pressuring firms to act works, and legislation that once was thought impossible could move forward unblocked.

4. Do small victories portend big victories? CSR advocates might respond: "We'll take our victories where and when we can." Even small wins energize partisans and gain observers' respect.[106] They keep the CSR troops motivated, and mobilized, ready to go when the political balance shifts favorably.[107] Shareholder pressure for CSR hasn't induced transformative prosocial change in corporate America, yes, but smaller gains are attainable.

Media attention could make the CSR issues more vivid and lead CSR-focused customers, employees, and investors to shy away from CSR-negative companies. A corporate social responsibility movement could thereby make the less responsible corporation less profitable. Responsibility thereby affects the public corporation through its central profit-making portal.

And local victories could pave the way to wider change. Some affirmative action and DEI pressure expanded ethnic, racial, and gender diversity inside firms. A new corporate DEI officer, for example, could change hiring practices or influence executive opinion on DEI. Similarly, climate activism pushed some firms to take global warming

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[103] Id. at 92. See generally LINDA GORDON, SEVEN SOCIAL MOVEMENTS THAT CHANGED AMERICA (2025).

[104] Meyer, supra note 102, at 136. I do not analyze whether owner-driven CSR is more democratic than the political status quo, or less so. For example, private lobbying skews legislation away from democratic norms. But *corporate* democracy skews away from political democracy because shareholding skews toward wealth. Hence, it's not obvious which decisional locus is more democratic. In this article, I focus on why *corporate* social responsibility law tends to resemble direct social legislation, and not on which outcome is the more democratic.

[105] The Overton Window (Mackinac Center for Public Policy), www.mackinac.ortg/OvertonWindow (accessed Apr. 14, 2025) (explicating the think tank's concept, first put forward by Joseph P. Overton); Nathan J. Russell, An Introduction to the Overton Window of Political Possibilities (Mackinac Center for Public Policy, Jan. 4, 2006), www.mackinac.org/7504 (ideas in the Overton window are mainstream consensus; ideas outside this window are implausible and not politically viable; political leaders must operate within the window to survive).

[106] Karl E. Weick, *Small Wins: Redefining the Scale of Social Problems*, 39 AM. PSYCHOLOGIST 40, 44 (1984).

[107] Brenda Wineapple, *Peaceable Revolutions*, N.Y. REV. OF BOOKS, Apr. 10, 2025 (the social movements reviewed "provide[d] a sense of community and solidarity").

seriously. Even if these shifts did not transform American society, they changed how some firms operated. For some activists, that's a meaningful start.

Perhaps. But two caveats are in order. First, this satisfaction with the local is not a celebration of a transformative, society-wide victory. It celebrates localized, reversible micro-events that have had little impact on ultimate transformative goals, such as reversing climate change. Second, much CSR aims to internalize externalities, like pollution and carbon. But a "victory" via one firm foregoing that activity raises the profitability of another firm taking it on.[108] That other firm's added emission is an offsetting defeat.[109] Net impact: zero. Moreover, this Article's political economy analysis still applies to small victories. Despite CSR local wins on DEI and climate in the past decade, an organized countercoalition emerged, stopped much of the advocates' progress once it became media-worthy, and began rolling back their gains.

Worse still for CSR, celebrating small victories could be misguided, if the small ones push society *away* from the activists' aims. Small wins are sometimes media-salient, especially if major players like BlackRock or State Street support them. They then create an illusion of impact and a promise of future, greater success. Friendly policymakers' urgency can accordingly weaken, and opponents can argue that "the problem is being handled privately, so there's no need for government action."[110] Or vivid, symbolic but substantively inconsequential wins can spark media criticism, widen popular opposition, and activate latent opposition.

In retrospect, an alternate ESG strategy could have been for proponents of shareholder-initiated CSR to fly "under the radar," seeking modest change instead of declaring more as a goal more transformative change.[111]

C. The Political Economy of Coalition Formation: CSR's Missed Opportunities

Thus the political economy analysis in this Article highlights CSR's political economy weaknesses. But, next, it can also point to unexplored paths for potential success.

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[108] E.g., Nathaniel O. Keohane, C*ap and Trade, Rehabilitated: Using Tradable Permits to Control U.S. Greenhouse Gases*, 3 REV. ENV. ECON. & POL. 42, 47, 50 (2009).

[109] Clifford Krauss & Peter Eavis, *Engine No. 1 Wins Board Seats at ExxonMobil in Climate Push*, N.Y. TIMES, May 26, 2021; James Mackintosh, *Shell Is the Greenest Big Oil Company. Look What That Got It*, WALL ST. J., Oct. 31, 2021.

[110] Cf. Anthony Downs, *Up and Down with the Ecology-Issue-Attention Cycle*, 28 THE PUBLIC INTEREST 38, 40 (1972) (partisans discouraged by weak victories).

[111] Or the new shareholding class of indexers could recognize their limited skill in promoting systemic climate change and DEI. They could leave activism to the activists, as they do for operating matters—i.e., letting the activists make the first move and then supporting them when the indexers and institutional shareholders see the first move as a winning strategy. Cf. Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863 (2013) indexers are rationally reticent in monitoring portfolio firms, supporting activists when appropriate but not themselves activist).

CSR advocates want the corporation to forsake some profit for CSR and ESG.[112] For profit-driven American corporations, this is a heavy lift. Still, CSR advocates do not lack potential allies. Executives often disfavor a purely profit-making corporation; some seek more autonomy from profit-driven shareholders, so that slipping profits do not threaten their jobs. This managerial preference for autonomy has long been central for corporate law theory—and often labelled managerial agency costs.[113] Overcoming such managerial slack justified the 1980s' corporate takeover wave, which had outsiders buying up—taking over—public corporations with sinking stock prices and weak profit, by buying up their stock and then replacing those firms' managers. More recently, the same concern fuels dollar-focused shareholder activists who second-guess corporate leadership and seek board seats for themselves, the dollar-focused activists.

Thus, consider a potential corporate coalition: *executives* and CSR advocates. Each has an incentive to curb profit-focused shareholders' power.[114]

Executives have seized on CSR rhetoric to justify more executive autonomy from shareholders,[115] both in the past and now. In the 1980s, executives sought political coalitions with that era's CSR precursors, aiming to fend off hostile takeovers of their companies that could affect the target firm's employees. Many states, at executives' behest, enacted constituency statutes, which empowered those executives to oppose a takeover to protect the firm's constituencies, such as its employees, from disruption.[116] Prominent academic work justified the employee-manager coalition.[117]

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[112] An alternative path is for CSR and ESG proponents to make CSR and ESG more profitable. By encouraging customers to pay premiums for CSR positives and stay away from CSR negatives, they can do that.

[113] Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976), is the iconic agency cost analysis.

[114] Mark J. Roe, *Why America's CEOs Are Talking about Stakeholder Capitalism*, PROJECT SYNDICATE, Nov. 4, 2019, www.project-syndicate.org/commentary/america-business-roundtable-ceos-corporate-purpose-by-mark-roe-2019-11. Roe posits that the well-known Business Roundtable statement that corporate purpose is not just for shareholders was partly "a plea from CEOs for more autonomy vis-à-vis shareholders. . . . Thus interpreted, US corporate leaders are [seeking in 2019] a coalition against activist shareholders, and want employees, customers, and those demanding more ethical sourcing to support" CEOs against profit-minded hedge fund shareholders.

[115] Wachtell, Lipton, Rosen & Katz, Business Roundtable Embraces Stakeholder Corporate Governance, Aug. 19, 2019 ('the board of directors [should be empowered to] use[] its business judgment in deciding among the stakeholders—employees, customers, suppliers, the environment, communities and shareholders"); Wachtell, Lipton, Rosen & Katz, It's Time to Adopt the New Paradigm, Feb. 11, 2019 (advocating for executive discretion to depart from "prioritization of the wealth of shareholders at the expense of employee wages . . . which gave rise to deepening inequality . . . "). Wachtell Lipton often represents boards and executives in transactions and litigation. Advocating for more board discretion to pursue ESG and CSR expands board autonomy from shareholder oversight—particularly from profit-focused investors. See generally Caley Petrucci & Guhan Subramanian, *Pills in a World of Activism and ESG*, 1 U. CHI. BUS. L. REV. 417, 417, 421–25 (2022) (proposing rules for poison pills, which shield executives and boards from outside owners, to more "effectively balance the board's interest in considering a broad set of constituencies [and thereby handle] the challenges of facing . . . shareholders activists").

[116] Lucian Bebchuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain*, 94 U.S.C. L. REV. 1467, 1485, 1507–16 (2021); Ellen Lieberman & Jeffrey B. Bartell, *The Rise in State Antitakeover Laws*, 23 REV. SEC. & COM. REG. 149 (1990); James P. Kovacs, Constituency Statutes: Do They Protect Stakeholders or Entrench Managers? (May 4, 2020), www.robinskaplan.com/newsroom/insights/constituency-statutes.

[117] Andrei Shleifer & Lawrence H. Summers, *Breach of Trust in Hostile Takeovers*, *in* CORPORATE TAKEOVERS: CAUSES AND CONSEQUENCES 33, 37–38, 42–43 (Alan J. Auerbach ed. 1988); John C. Coffee, Jr., *The Uncertain Case for Takeover Reform: An Essay on Stockholders, Stakeholders and Bust-Ups*, 1988 WISC. L. REV. 435, 436, 440 (1988).

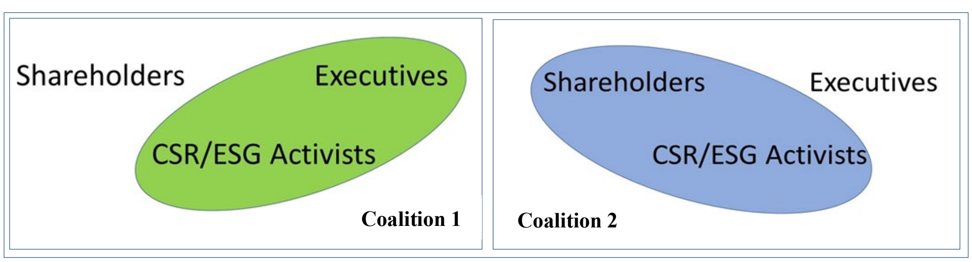
Whether managers, once victorious, deliver regularly for CSR is questionable.[118] Once executives fended off the takeovers, they did little for their employees' and constituencies' welfare and social responsibility.[119]

Today, a similar coalition—depicted as Coalition 2 in Figure 3—arises from time-to-time. But so far, it arises by executives largely coopting CSR advocates and ideas, while giving little in return. Executives sometimes frame their desire for autonomy from profit-oriented shareholders as a means to advance CSR. That narrative can help them coopt liberal or moderate corporate governance figures, such as SEC commissioners or liberal-leaning Delaware Chancery judges.

A savvy CSR movement could seek to strike better, more binding deals with executives. (The result, if successful, would likely degrade the quality of the American public corporation, whose central weakness is still that agency cost misalignment of shareholders and executives. Executives could use CSR to obtain more autonomy, allowing them to respond slowly to business challenges, all in ways that enhance neither social welfare, economic efficiency, shareholder interests, nor the aims of CSR itself. I am not pursuing a normative analysis here on what is best overall for society. If I were, I would have reservations that this coalition's success would be a net positive for America for fear that corporate degradation would be great while public goods production would be minuscule.[120])

That alternative CSR-manager coalition—Coalition 1 in Figure 3—would unite to weaken financially-driven shareholders' power inside the corporation. Instead, CSR activists have pursued Coalition 2, a coalition with shareholders, such as BlackRock, and that coalition failed in its immediate aims. Yet Coalition 1 is the more propitious alliance for CSR advocates, given that historically in the United States executives have more often than not prevailed over shareholders in legislative and regulatory contests.[121]

Figure 3: Internal corporate coalitions



[118] Bebchuk & Tallarita, supra note 24, at 38, 42 (ESG-based compensation "likely serve[s] the interests of executives, not of stakeholders").

[119] Bebchuk, Kastiel & Tallarita, supra note 116, at 1485, 1507–16; Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85, 108–20 (1999).

[120] See Mark J. Roe, Holger Spamann, Jesse M. Fried & Charles C.Y. Wang, *The European Commission's Sustainable Corporate Governance Report: A Critique*, 38 YALE J. ON REG. BULL. 133, 133, 145, 150 (2021).

[121] As I write, this potential coalition could be slipping away from CSR activists. Prominent public firms are now controlled—think of Musk and Tesla, Ellison and Oracle, Zuckerberg and Meta, Sergey Brfin and Google. Activists would not get far by closing a deal with executives in these firms, as it's the controller who decides.

In another era, Jack Coffee posited shifting shareholder-executive-stakeholder coalitions for corporate lawmaking. John C. Coffee, Jr., *Shareholders Versus Managers: The Strain in the Corporate Web*, 85 MICH. L. REV. 1, 4 (1986). See also Roe, supra note 47, at 43, 154, 161–63.

Private CSR pressure can induce other coalition shifts. If some firms in an industry succumb to the pressure, they could want that costly CSR to apply to their competitors in the industry; hence, they could join a public coalition for direct regulation, even though previously they opposed that direct regulation. And winning coalition shifts are possible outside the corporation. Academic analyses show that we lack a carbon tax due to oil industry lobbying *and* resistance from suburban drivers wary of higher gasoline prices.[122] But as more suburbanites drive electric vehicles, they oppose a gas tax less. Likewise, if automakers sold more EVs, they would oppose carbon taxes less. In principle, an active CSR movement would exploit those opportunities if such self-interest realigns. But the issue identified in this paper persists: If politics shifts enough to support successful shareholder CSR pressure on the corporation, there's a good chance that it could support more efficacious direct political action via regulation.

D. The Political Economy of Morals

Thus far we have analyzed CSR and ESG as political preferences for outcomes. But a moral evaluative dimension is plausible and for some is more important. In this moral view, markets and our market-based economy are excessively self-seeking. CSR and ESG are desirable not just for their outcomes, but because the process of making over the corporate economy to be ESG-friendly should dampen that self-interest, change enough people's preferences, with that reduction and change a desirable end in itself.[123]

E. The Political Economy of Milton Friedman's Concept of Social Responsibility

The analysis in this Article shows the flaw in CSR's political economy keystone. One might think that this weakness only undercuts pro-CSR conceptualizations and their critics' logic. But a similar overlooked contradiction is embedded in Milton Friedman's iconic analysis of corporate social responsibility,[124] an analysis echoed and elaborated on by many, before and since.[125]

Friedman's well-known perspective is that the corporation belongs in the productive not the political sphere and the line separating the two spheres should be sharply drawn. Executives should not make social policy, for which they are unqualified.

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[122] See supra notes 29–33 & accompanying text. Hence, Biden-era subsidies for electric vehicles could change the climate coalition, by separating suburban car drivers from the oil industry.

[123] Examples from academic legal work on the corporation: LYNN STOUT, THE SHAREHOLDER VALUE MYTH XX (2012); KENT GREENFIELD, THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES (2006); THOMAS DONALDSON, CORPORATION AND MORALITY (1982); Joseph Heath, *Business Ethics and the 'End of History' in Corporate Law*, 3 J. CORP. L. STUD. 349 (2003); Andreas Georg Scherer & Guido Palazzo, *Toward a Political Conception of Corporate Responsibility: Business and Society Seen from a Habersmasian Perspective*, 32 ACAD. MGMT. REV. 1096 (2007); Henderson, supra note 9.

[124] Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept 13, 1970, 17 et seq. (Sun. Mag.).

[125] Brian Cheffins, *Stop Blaming Milton Friedman!*, 98 WASH. U. L. REV. 1607 (2021); David Chan Smith, *The Intellectual History of Milton Friedman's Criticism of Corporate Social Responsibility*, 22 MOD. INTELL. HIST. 184 (2025).

Social responsibility is for legislators, not executives. Elaborators in the Friedman camp argue that separating the two spheres best positions the corporation to produce effectively.[126]

But a decision to keep social policy out of the corporation is a political decision that legislatures and governments make. It is itself *a social policy that Friedman's followers seek*—that the profitmaking corporation's social policy be zero.[127] But for that policy, the political process gets the final say.

This is not saying "it's politics, all the way down."[128] True, some businesspeople and most financiers have incentives to seek legislative support for a profit-focused result—that's where an "it's all politics" view is strong. But there's still a normative discussion, not just political power: does business do its best for society if the productive and social spheres are kept separate? Friedmanites seek to persuade policymakers and the public that their productive program is best for America. They win if voters and policymakers agree. They lose if voters and policymakers do not.

Profit-maximizers, like today's CSR activists, thought they could escape the polity. They cannot.

* * *

As far as I am aware, academic analyses do not directly engage with the political economy tension I identify in this Article.[129] Yet CSR's political economy fractures are central to whether it succeeds or not. To reiterate the fundamental thesis: Shareholder-pressure for transformative corporate social responsibility faces a severe, potentially immoveable political economy blockage—shareholder-driven private CSR cannot get itself very far from what the political process wants. Government can require most of what's sought via shareholder-initiated, privately-produced CSR. If the polity refuses to act directly, private CSR pressure on the corporation is unlikely to yield stable results far from what the polity does directly. If it makes progress, it is likely to face political counter-pressures from the same forces that blocked direct action, and it must overcome the hurdles thereby constructed. For the most part, CSR has not done so.

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[126] E.g., Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 14 BUS. ETHICS. Q 235 (2001) ("Stakeholder theory . . . directs corporate managers to serve 'many masters.' . . . [But] all end up being short-changed"); Smith, supra note 125, at 187–88 (Friedman's followers seek a division: business should seek profits; the state should handle public, social issues). Friedman himself though was concerned that business would use social responsibility as a cover for their own self-interest. Id. at 199.

[127] Friedman was more subtle than the text is: Profitmaking often requires that firms follow social norms and, regardless, they must follow the law and widely accepted norms. Friedman, supra note 124.

[128] For law as "politics all the way down," see Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 109–10 (1984); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15 (1987) ("legal reasoning is inevitably indeterminate, with outcomes sharply shaped by political preference and ideology"); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1688–93 (1976),

[129] Spamann & Fischer, supra note 9, at 59, is a rare suggestion that the broken government explanation is weak. See also Matteo Gatti & Chrystin Ondersma, *Stakeholder Syndrome: Does Stakeholderism Derail Effective Protections for Weaker Constituencies?* 100 N.C. L. REV. 167, 226–27 (2021), for the idea that using the corporation for CSR would require rigid structures that would degrade the organization, or looser, but readily bypassed structures.

CONCLUSION

The movement for CSR-favorable, shareholder-driven corporate governance rests on the assumption that, because American government is broken, private pressure on the corporation must make up for as much of this shortfall as it can. Private pressure from newly-configured big asset managers owning a thick slice of the stock market, and hence of a cross-section of the American economy, have the incentive to favor more and better CSR than the old-school firm-by-firm ownership. Yes, the thinking goes, they are imperfect engines of CSR, but if they moved forward, transformative CSR goals would become attainable. In any case, it's been the only game in town, and broken government makes transformative change, induced by universal owners, a realistic goal. That proposition has gone through the last decade of rising CSR action unexamined, despite that it is wrong.

A political economy hurdle impedes those seeking to press a shareholder-driven ESG agenda on the American corporation—a high hurdle that much sought-after CSR may never be able to fully clear. American government is broken, or could be broken, in three ways. Only one—a government unable at all to act—readily allows proponents of private CSR to clear the political economy hurdle; that is, if government cannot act directly but also would do nothing in reaction to what the corporate sector does, then the transformative story might be made real. But if government is able to, but *unwilling* to, act due to opposition from interest groups and voters—as seems to the case in the past decade—then the hurdle to strong, privately-produced, economy-wide CSR is high. CSR in that setting can stumble—and has stumbled—badly, unable to clear the same political hurdles that blocked direct governmental action in the first place. Indeed, while it might be said that, incorrectly, that this results from the national election cycle, the actual results run almost precisely *counter* to that cycle. CSR's private result ends up not very far from the original political outcome that motivated the CSR movement in the first place.

True, early owner-propelled CSR efforts encountered little political opposition. And hurdles, even if high, can be surmounted. But that absence of early opposition misleadingly validated CSR's potential to succeed through shareholder action. Then, as shareholder-induced CSR successes gained traction, or at least became salient in the media—such as when the world's largest asset manager promoted CSR and ESG—opponents commandeered the polity and lashed back quickly and effectively.

For CSR/ESG proponents, these are not happy political results to face up to. But they help to explain why CSR/ESG success in the American public corporation has been so elusive. At the same time, this analysis of the political economy of private CSR suggests potential strategies and different coalitions inside and outside the corporation for CSR proponents.

Regardless, this hurdle to shareholder-induced corporate CSR is tall and difficult but not impossible to overcome—after all, some social movements have eventually succeeded. But this hurdle to CSR means that, for some CSR goals, direct political action—however difficult that is—is the endgame, and the only realistic channel to victory.