Union and Corporate Political Activism: The Problem of Dissent

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Unions and corporations are engaged in a new wave of political activism. While some political activity has always been present and is likely unavoidable if unions and corporations are to deliver financial returns, a good deal of this new political activism has gone beyond core economic concerns and entered deeply controversial and polarizing terrain. This activism is neither uniformly progressive nor uniformly conservative, as different actors have staked out a variety of different positions. But this new wave of political activity has sparked interest for many activists and academics who see it as an opportunity to advance political or economic outcomes in their favored direction.

This Article focuses on an underexplored problem concerning these activities: the positions endorsed by unions and corporations are sometimes opposed by a substantial minority of their members. These dissenting workers and shareholders often have few meaningful options to hold their organizations accountable in these matters as they frequently lack effective voice or a realistic opportunity to exit from the organization. As a result, these workers and shareholders are effectively compelled to support political activities they may strongly disagree with. Approaching these issues across the two seemingly disparate areas of labor and corporate law can deepen understanding and open up new avenues to addressing the problem of shareholders, members and other constituents who dissent from the new corporate and union political activism.

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Introduction

Unions and corporations are, at their core, economic organizations primarily intended to advance the economic interests of their members or other constituents.[1] Both types of entities have recently taken controversial political stances that do not have an obvious and direct connection to their members' financial interests. Unions have staked out positions on the conflict in Gaza,[2] reproductive rights,[3] and

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[1] This is the dominant approach to corporate law, though it has been challenged at various points by theorists who suggest that corporate leaders ought to be attentive to a broader range of stakeholder interests. *See infra* Part I.A. It had been for many years also the dominant position within labor law, although union political activity has become more salient with the decline of unionization rates in U.S. private companies. *See* Samuel Estreicher, *Trade Unionism Under Globalization: The Demise of Voluntarism?*, 54 ST. LOUIS U. L.J. (2010); Samuel Estreicher, *Deregulating Union Democracy*, 2000 COLUM. BUS. L. REV. 501, 510 ("A union is a limited-purpose organization that, when it works as it should, advances the membership's economic goals; it is not for most members a vehicle for realizing their noneconomic, spiritual needs"); Aneil Kovvali & Jonathan R. Macey, *Toward a "Tender Offer" Market for Labor Representation*, 63 B.C. L. REV. 2111, 2121 (2022) (suggesting and defending an approach that would narrowly focus on economic terms); *cf.* Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After* Citizens United, 112 COLUM. L. REV. 801, 853 (2012) (urging that both corporations and unions are "hybrid" associations with economic and expressive features, but noting that "the predominant purpose of both institutions is economic"); CYNTHIA ESTLUND, REGOVERNING THE WORKPLACE 167 (2010) ("Employees seek union representation, and employers oppose unions, for more than economic reasons . . . . But higher wages and benefits are still at the heart of the case both for and against unionization."). Some commentators have suggested a "bargaining for the common good" framework that would call for unions to advance a broader range of social interests. *See, e.g.*, Diana Reddy, *Labor Bargaining and the "Common Good"*, L. & POLITICAL ECON. PROJECT (July 29, 2021), https://lpeproject.org/blog/labor-bargaining-and-the-common-good/. Other commentators have suggested that the modern labor movement should be understood as having the goal of remaking the political order. *See* Kate Andrias, *Constitutional Clash: Labor, Capital, and Democracy*, 118 NW. U. L. REV. 985, 989-90 (2024) ("labor consistently makes claims to higher law, couching its arguments in moral rather than pecuniary terms, and it unequivocally aims to restructure the government, to change our nation's fundamental commitments, and, ultimately, to transform how we constitute ourselves as a nation"). Similarly, there is interest in borrowing some of the mechanisms of labor law to advance a purely political model of unions. *See* Benjamin Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 148 (2013). As discussed below, a political conception of corporations and unions would not eliminate, and indeed may heighten, the problem of dissent.

Not all employees represented by unions are members of the organization. Not all significant stakeholders in a corporation are owners. For this paper, we use the terms "members" and "constituents" interchangeably.

[2] *See, e.g.*, *1199SEIU Calls for Ceasefire in Lebanon and Gaza & Arms Embargo Against Israel*, 1199SEIU (Oct. 18, 2024), https://www.1199seiu.org/media-center/1199seiu-calls-ceasefire-lebanon-and-gaza-arms-embargo-against-israel; *UAW Statement on Israel and Palestine*, UNITED AUTO WORKERS (Dec. 1, 2023), https://uaw.org/uaw-statement-israel-palestine/; Tara Suter, *Major Labor Unions Urge Biden to Halt Military Aid to Israel*, THE HILL (July 23, 2024), https://thehill.com/business/4788621-unions-demand-stop-israeli-aid/

[3] *See, e.g.*, *Reproductive Rights Are Worker Rights*, AFL-CIO (last accessed Apr. 9, 2025), https://aflcio.org/reproductive-rights; Jazz Tangcay, *SAG-AFTRA and IATSE Unions Vow to Fight Abortion Ruling: 'The Supreme Court Is Wrong'*, VARIETY (June 24, 2022), https://variety.com/2022/artisans/news/sag-aftra-iatse-reaction-roe-wade-1235302769/

immigration.[4] And their positions have not been uniformly progressive in today's political usage. Teamsters President Sean M. O'Brien gave a largely complimentary address at the Republican National Convention in 2024[5] and has achieved considerable influence with some Republican Senators[6] and within the second Trump Administration.[7] During the heat of the 2024 presidential campaign, the Teamsters released polling suggesting that many of their members supported Trump,[8] even though the Biden-Harris Administration had recently bailed out their pension fund.[9] Corporations have similarly staked out controversial positions on racial and gender

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[4] *See* Julia Preston & Steven Greenhouse, *Immigration Accord by Labor Boosts Obama Effort*, N.Y. TIMES (Apr. 13, 2009), https://www.nytimes.com/2009/04/14/us/14immig.html (describing accord between A.F.L.-C.I.O. and the Change to Win federation on immigration); Zachary Phillips, *Union Calls for Return of 'Unlawfully' Deported Tradesworker*, CONSTRUCTION DIVE (Apr. 15, 2025), https://www.constructiondive.com/news/deported-immigrant-el-salvador-union-trades/745387/ (describing statement by Sheet Metal, Air, Rail and Transportation Workers Local 100 regarding the wrongful deportation and imprisonment of Kilmar Abrego Garcia).

[5] For a recording of the speech, *see WATCH: Teamsters President Sean O'Brien Speaks at Republican National Convention*, PBS NEWS (July 15, 2024), https://www.pbs.org/newshour/politics/watch-teamsters-president-sean-obrien-speaks-at-republican-national-convention. *See also* Jonathan Weisman, *Teamsters Leader's Speech to Republicans Still Reverberates*, N.Y. TIMES (July 19, 2024), https://www.nytimes.com/2024/07/19/us/politics/teamsters-speech.html. Other unions reached similar decisions on the 2024 election. *See* Mick Niedzwiadek, *Firefighters union declines to issue presidential endorsement*, POLITICO (Oct. 3, 2024), https://www.politico.com/news/2024/10/03/fire-fighters-union-declines-presidential-endorsement-00182372; Noam Scheiber & Amy Chozick, *Firefighters' Union Backs Away From Endorsement of Hillary Clinton*, N.Y. TIMES (Oct. 2, 2015), https://www.nytimes.com/2015/10/03/us/politics/firefighters-union-backs-away-from-endorsement-of-hillary-clinton.html ("Members tilt Republican, but the union typically endorses Democrats for president because of their stances on labor and other issues of importance to firefighters.").

[6] See, e.g., S.844 ("Faster Labor Contracts Act"), 119th Cong. (2025-2026), introduced by Senator Josh Hawley (R-Mo.) This bill reflects a key aspect of organized labor 's legislative agenda – the ability of unions in first-time contract situations to force recalcitrant employers to agree to a labor pact via arbitration. See H.R. 842, Protecting the Right to Organize Act of 2021 ("PRO Act"). On March 10, 2025, the Senate confirmed the President's appointment of Lori Chavez-DeRemer, who had been one of the few Republican members of the House to vote for the PRO Act, as Secretary of Labor.

[7] Geoff Bennett & Ian Couzens, *Teamsters President on Trump's Economic Agenda: 'They Made a Lot of Promises'*, PBS NEWS HOUR (Mar. 11, 2025), https://www.pbs.org/newshour/show/teamsters-president-on-trumps-economic-agenda-they-made-a-lot-of-promises. Mirroring the thesis of this Article, O'Brien has suggested that the Democratic party had erred by emphasizing social and political issues over economic issues. *Id.* ("[T]he Democrats . . . forgot who they represented. I think the Democrats were too focused on social issues, which are very important, but our members were more concerned about the economic issues.").

[8] *See* Brett Samuels, *Trump Leads Harris in Poll of Teamsters Members*, THE HILL (Sept. 18, 2024), https://thehill.com/homenews/campaign/4886854-teamsters-poll-trump-harris/.

[9] *See, e.g.*, Jesus Mesa, *Biden Bailed out Teamsters' Pension Fund. They Still Won't Endorse Harris*, NEWSWEEK (Sept. 19, 2024), https://www.newsweek.com/teamsters-union-endorsement-kamala-harris-joe-biden-pension-1956536 ("The Teamsters' decision reflected a labor union divided over political identity and policy, despite its members having directly benefited from the Biden administration."); David A. Lieb & Seung Min Kim, *Biden Releasing Nearly $36B to Aid Pensions of Union Workers*, AP (Dec. 8, 2022), https://apnews.com/article/biden-business-united-states-government-and-politics-retirees-09d93d2af8cc68de47eccda4a9ef0250

equity[10] and climate change.[11] Their positions have also not been uniformly progressive. Indeed, many corporate leaders have gone out of their way to support the second Trump Administration, even though its policies may undercut their previous progressive positions.[12]

A vast literature has explored the public problems that can come from corporate and union financial support to political candidates and their campaigns, as these activities may distort democratic processes.[13] The Supreme Court's decision in *Citizens United v. Federal Election Commission*,[14] which concluded that corporations and unions have a First Amendment right to engage in unlimited independent expenditures—that is, expenditures not coordinated with the political candidate or campaign but supporting partisan political positions or simply advocating for their separate political views—has created a cottage industry of academic work warning of the dangers of corporate money in politics.[15]

Less attention has been paid to the problems of compelled affiliation between corporations and unions and their constituents. But the problems are nevertheless real, as dissenting workers and shareholders often have few practical ways to exit the organization or otherwise better align the organizations' political activities with their own views. Legal doctrine on the issue is better developed on the union side,[16] but academic commentary on the plight of dissenting workers has been limited despite polling suggesting that workers would prefer that unions refrain from political advocacy.[17] Business law doctrine and commentary have paid relatively little

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[10] *See, e.g.*, Aneil Kovvali, *Stark Choices for Corporate Reform*, 123 COLUM. L. REV. 693, 737-45 (2023)
[11] *Id.* 745-54
[12] *See, e.g.*, Emma Goldberg, Aaron Krolik & Lily Boyce, *How Corporate America Is Retreating From D.E.I.*, N.Y. TIMES (Mar. 13, 2025), https://www.nytimes.com/interactive/2025/03/13/business/corporate-america-dei-policy-shifts.html. Other corporations have taken conservative-coded positions from the outset but redoubled their activism under the second Trump Administration. *See, e.g.*, Joseph Cox, *ICE Just Paid Palantir Tens of Millions for 'Complete Target Analysis of Known Populations'*, 404 MEDIA (Apr. 16, 2025), https://www.404media.co/ice-just-paid-palantir-tens-of-millions-for-complete-target-analysis-of-known-populations/ (describing Palantir advertisement stating that "[a] moment of reckoning has arrived for the West").
[13] This Article does not focus on these "external" effects of union and corporate political activism on the state of our democracy. Rather, we are addressing principally the problem of dissent, which is an aspect of the agency costs of representation of constituent interests by corporations, union, and other entities.
[14] 558 U.S. 310 (2010).
[15] *See, e.g.*, Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course: The Tension between Conservative Corporate Law Theory and* Citizens United, 100 CORNELL L. REV. 335 (2015).
[16] *See* Janus v. Am. Fed. Of State, County & Municipal Employees, Council 31, 585 U.S. 878 (2018); Communications Workers of Am. v. Beck, 487 U.S. 735 (1988).
[17] *See* Not What They Bargained For, AM. COMPASS (Sept. 2021), https://americancompass.org/wp-content/uploads/2022/10/AC_Labor-Survey_Final2.pdf (reporting finding that "[b]y a three-to-one margin, potential union members . . . say they would prefer a worker organization that focuses only on workplace issues to one that is also engaged in traditional national political issues"). Surveys also

attention to the issue of dissenting shareholders, focusing more on the merits of political activism as a business strategy and imperfections in political and corporate democracy.[18]

The relative lack of attention is problematic. There is always dissent—some workers will always disagree with a union's decision to remain on strike for higher wages and some shareholders will always disagree with a corporation's decision to undertake an acquisition—but organizations must be able to override dissenters and act anyway to safeguard the broad economic interests of their constituents. This observation can sometimes justify union and corporate political activism on core economic issues, even when that activism does not command unanimous support. Recent union and corporate political activism is different. As political activities stray farther from the economic concerns of constituents and deeper into political controversy, serious questions arise about whether exit and voice options need to be bolstered so that dissenting workers and shareholders are not compelled to financially support or be associated with those views.

The exit options of dissenting union-represented workers and shareholders are different but both are significantly attenuated. Union-represented workers have a statutory right to leave the union at any time but may still have to pay union dues (or agency fees) and (where the union is the exclusive bargaining representative) may still be represented by the union in the negotiation and administration of labor contracts. Moreover, some may object to the politics but wish to continue to be represented by the union in economic matters. Many shareholders also often lack meaningful exit and voice options, even at publicly traded corporations. Investing in a particular corporation may be the exclusive vehicle for accessing some economic opportunities. An individual investor may only have a stake in the corporation indirectly, as they have a position in a fund that invests in many corporations, and as a result may lack any realistic ability to exit from a particular investment without exiting from the fund altogether. This problem is compounded by the fact that many

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indicate that union members do not have uniform views on political issues, though a majority lean democratic. *See* Andy Cerda, *Key Facts About Union Members and the 2024 Election*, PEW RESEARCH CTR. (Oct. 17, 2024), https://www.pewresearch.org/short-reads/2024/10/17/key-facts-about-union-members-and-the-2024-election/

[18] There are some important exceptions. *See* Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV. 639, 682-87 (2016); Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 111-17 (2010); Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235, 257 (1981). However, even these works tend to emphasize the challenge of ensuring that corporate directors' and officers' political activities are aligned with the interests of the main body of shareholders, as opposed to protecting minority shareholders. *See, e.g.*, Bebchuk & Jackson, *Who Decides*, *supra* at 85, 111-12 (describing protection of minority views as an "additional" objective not normally pursued by corporate law). Perhaps because of this limitation on the perspective of corporate law commentary, some of the more potent criticisms of corporate law's tendency to ignore politically dissenting shareholders have drawn from labor law. *See* Sachs, *Opt-Out*, *supra* note 1.

retail investors are, in a sense, "forced capitalists" who hold only through retirement accounts that afford few options and limited exit rights.[19] They also may lack the information required to use exit or voice effectively to discipline managers' political decisions. Corporate leaders across firms may engage in "herding" – essentially selecting nearly identical courses of action on controversial topics, leaving dissenting shareholders with few, if any, viable alternatives. Although there are important differences between unions and corporations, the differences can help clarify the issues, as they focus attention on the issues and mechanisms that actually drive problems.

The problem of dissent over political matters is most salient for those who view unions and corporations as limited agents of workers and shareholders, given a specific and narrow mandate to advance their members' shared economic interests.[20] But even if the role of unions and corporations were understood more broadly, the issue of dissent would remain. No one expects principally political or ideological actors like the Democratic Party, the Republican Party, the American Constitution Society, or the Federalist Society to stay out of politics. But dissenting members of such organizations can easily exit. A person who is dissatisfied with Republican Party positions can speak out or even switch sides at little direct cost to themselves, and vice versa. These mechanisms make the broad political orientation of those organizations tolerable and check their ability to use member resources for causes that the members do not agree with. Because exit and voice options are constrained for many union members and shareholders, the issue of dissent must be addressed

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[19] Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L.J. 1870, 1877 (2017).

[20] *See supra* note 1. This point distinguishes unions from employers, who may also engage in political activities that workers disapprove of. Employers can also exert serious pressure on workers on political matters, and workers may have limited ability to exit. *See* Note, Citizens United *at Work*, 128 HARV. L. REV. 669 (2014); ALEXANDER HERTEL-FERNANDEZ, POLITICS AT WORK: HOW COMPANIES TURN THEIR WORKERS INTO LOBBYISTS 25-27 (2018) (describing economic power of employers over workers, which employers can use to pressure workers to engage in political activities on their behalf). But for better or worse, employers are not normally expected to represent workers or defend their interests. Indeed, current law encourages leaders of business corporations to focus on shareholder profits to the exclusion of worker interests. Businesses that do have an ideological mission are often empowered to press that agenda even though it can harm worker interests. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (holding that the Religious Freedom Restoration Act of 1993 barred application of an Affordable Care Act contraceptive mandate to a privately held for-profit corporation whose owners stated a religious objection); Elizabeth Sepper, James D. Nelson & Charlotte Garden, *Expressive Association at Work*, 124 MICH. L. REV. --- (2026) (noting that many courts have sided with employers that seek to exclude gay individuals, despite prohibitions of antidiscrimination law). Similarly, customers of a corporation can be affected by its political activities: many people who bought vehicles from Tesla were later embarrassed by the political activities of the company's leadership. *See, e.g.*, John Leland, *They Loved Their Teslas. Now They're Too Embarrassed to Drive Them.*, N.Y. TIMES (Mar. 28, 2025), https://www.nytimes.com/2025/03/28/nyregion/tesla-backlash-divestment.html. But companies are not normally understood to represent their customers or to have a duty to advance their interests.

regardless of whether unions and corporations are treated as legitimate political actors.

Once the problem of dissent is identified and taken seriously, it becomes possible to develop solutions.[21] It would not be realistic to expect unions or corporations to refrain from all political speech, particularly as public policy affects the core economic interests of labor and capital.[22] Indeed, labor and capital often have directly opposite political agendas on core economic issues, and unilateral political disarmament on such matters would make no sense.[23] But some reforms to labor and corporate law are likely to improve the position of dissenters without undermining the ability of these organizations to use politics to further the economic goals of members or shareholders. Corporate law could require better disclosures, grant shareholders greater power to weigh in on political activities, and grant shareholders the ability to withdraw and extract capital from corporations that engage in political activities they disapprove of. Labor law could improve disclosures, strengthen the obligations of unions to dissenting workers, and afford workers greater exit rights.

This Article proceeds as follows. Part I charts the rise of union and corporate political activism, noting that unions and corporate leaders have taken controversial stances on a variety of issues that have limited economic relevance for their members. Part II seeks to articulate a workable distinction between the quotidian economic activities of corporations and unions and controversial political activism. Part III demonstrates that political activities by unions and corporations are problematic because shareholders and workers often lack effective exit options. Part IV turns to proposals to bolster exit and voice within unions and corporations. A brief conclusion follows.

I. The Rise of Corporate and Union Political Activism

This Part offers a brief history of political activism by corporations and unions. Subpart A notes that corporations began as political constructs, and that the extent to which they should become involved in political controversies has been a fraught topic in both academic and business circles ever since. Subpart B canvases union

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[21] *See infra* Part IV.

[22] *See, e.g.*, Matthew T. Bodie, *Mother Jones Meets Gordon Gekko: The Complicated Relationship Between Labor and Private Equity*, 79 U. COLO. L. REV. 1317, 1350-51 (2008) ("Given the pervasive and fluctuating schemes of government regulation, it would be foolhardy for companies *not* to be engaged in the political process."); Jill E. Fisch, *How Do Corporations Play Politics?: The FedEx Story*, 58 VAND. L. REV. 1495, 1500 (2005) ("corporate demand for political activity is a natural response to the effect of legal rules on business operations").

[23] *See, e.g.*, ESTLUND, *supra* note 1 at 13 (describing anti-union and anti-worker positions of corporate lobbying groups); Bodie, *supra* note 22 at 1353 ("We need to recognize that unions, like their negotiating counterparts, are in business. As such, they should be free to pursue their political objectives as any other business.").

political activities, observing that some degree of political activism is unavoidable, but that unions have moved farther into controversial areas with less direct relevance to the economic interests of their constituents.

A. Corporate Political Activism

The corporation began as a political construct. Key features of the corporation such as limited liability and indefinite life cannot be achieved through simple contracts and require government facilitation. Investors hoping to organize a corporation would lobby the government for a charter, which would include these essential features, and the government would grant charters to persuade investors to commit capital to achieve a specific public goal like building infrastructure.

Over time, this fundamentally political process gave way to a system in which charters were granted in ministerial fashion. But debates over the proper relationship between corporations and the political system have persisted. Although it would be impossible to summarize the full evolution here, three academics offered particularly relevant contributions. First, lawyer and legal academic Adolf Berle and his colleague Gardiner Means offered key insights as the Great Depression of the 1930s and President Franklin Roosevelt's New Deal administration unfolded. Although Berle initially insisted that corporate leaders should focus on delivering value to shareholders, he gradually developed a more complex vision in which corporations would play an active and supportive role in a government-led system. To Berle, corporations would build on community norms and take their lead from public officials.[24] Second, economist Milton Friedman offered a more narrowly economic model in the 1970s. In his view, corporations existed to deliver financial returns to shareholders.[25] If corporate managers used corporate property to advance

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[24] *See* William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and* The Modern Corporation, 34 J. CORP. L. 99, 114 (2008) ("While Berle did not stress corporatist modes of political organization, he otherwise fully embraced the corporatist vision, most notably the emphasis on government management of the economy. Corporatism views competition as a destructive force that has to be both controlled and channeled through institutions that practice fair, but not free, competition under the watchful, mediating power of the government."); Adolf A. Berle, Jr., *Legal Problems of Economic Power*, 60 COLUM. L. REV. 4, 9 (1960) ("[C]oncentration of power in corporate hands is being accompanied by a rudimentary and growing system of *ad hoc* economic planning, increasingly translating itself into explicit law, in which the Government stands ready both to enforce the plan and, if need be, to give financial or other assistance to make it feasible.").

[25] Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG. (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html ("In a free-enterprise, private-property system, a corporate executive is an employee of the owners of the business. He has a direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of society, both those embodied in law and those embodied in ethical custom.").

a public interest, they would be socializing the private property of the shareholders.[26] Friedman's position has been formalized as "shareholder primacy." Third, management theorist R. Edward Freeman challenged the shareholder-primacy perspective by suggesting that corporate leaders had to be attentive to the interests of a broad range of stakeholders who had the ability to affect or be affected by corporate actions.[27] Where Berle emphasized the role of government in influencing corporate America, Freeman stressed the role of individual stakeholders, groups affected by corporate actions and capable of affecting corporate outcomes even if they were not shareholders. As workers, environmentalists, and community members became more politically active, smart managers would find ways to shape and respond to their preferences. This required corporate leaders to become involved in politically charged issues.

The pendulum swings in the academic debate were paralleled by swings in the business environment.[28] Innovations in financial markets worked to strengthen shareholder control over corporations and to encourage managers to focus exclusively on activities that would generate financial returns for shareholders. As it became possible to raise large amounts of capital through debt markets, raiders and other acquirers were empowered to purchase control of underperforming corporations and generate returns by improving economic performance. The need to generate cash to service the debt and justify the economics of the transaction caused the new owners to focus on shareholder returns, sometimes disregarding implicit understandings with longstanding workers or communities of operation in an effort to wring cash out of the enterprise.[29] These transactions did not simply change the corporations that were directly affected, but also created an incentive for managers at other corporations to change their approach lest they be targeted as well. Apart from the stick of potential replacement, managers were also treated to the carrot of incentive schemes like stock option grants that provided exceedingly rich rewards if they succeeded in driving up share prices.

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[26] *Id.* (businessmen who speak of corporate social responsibility are "preaching pure and unadulterated socialism").

[27] R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH 25 (1984). Freeman's analysis generated an enormous academic and practical literature that remains influential. *See, e.g.*, Martin Lipton, *Understanding the Role of ESG and Stakeholder Governance Within the Framework of Fiduciary Duties*, HARV. L. SCH. CORP. GOVERNANCE F. (Nov. 29, 2022), https://corpgov.law.harvard.edu/2022/11/29/understanding-the-role-of-esg-and-stakeholder-governance-within-the-framework-of-fiduciary-duties/.

[28] *See* Dorothy S. Lund, *Toward a Dynamic View of Corporate Purpose*, 109 MINN. L. REV. 2089 (2025) (identifying eras in thinking about corporate governance and correlating them with economic and business conditions); Marcel Kahan & Edward Rock, *Corporate Governance Welfarism*, 15 J. LEGAL ANAL. 108, 108-09 (2023); Aneil Kovvali, *Stakeholderism Silo Busting*, 90 U. CHI. L. REV. 203 (2022).

[29] For the view that this focus on immediate shareholder returns undermines the corporation's ability to make strategic long-term investments, see Aleta G. Estreicher, *Beyond Agency Costs: Managing the Corporation for the Long Term*, 45 RUTG. L. REV. 513 (1993).

While these mechanisms encouraged managers to focus on economic returns instead of politically-inflected matters, a range of movements sought to broaden the scope of managers' and investors' attention. Prompted in part by concerns over investment in apartheid South Africa, the "Socially Responsible Investing" (SRI) movement sought to pressure managers to take more socially-aware stances.[30] A "Corporate Social Responsibility" (CSR) campaign similarly encouraged managers to minimize social harms.[31] The more recent "Environmental, Social and Governance" (ESG) concept marked a subtle shift, as the framing was ambiguous about whether the goal was to improve social outcomes or to improve financial outcomes using social strategies.[32] Asset managers offered a variety of funds promising to allow investors to deploy their capital in a manner consistent with ESG criteria.[33]

The effort to encourage managers to expand their focus was strengthened by a period of strong stock market performance and low interest rates, which muted concern that managers were sacrificing too much shareholder value to advance a political agenda. The effort was turbocharged by the first election of Donald Trump to the presidency and the growing number and intensity of protest groups that purportedly sought to address longstanding problems and inequities in American society. Concern over climate change led to renewed efforts, including by leading institutional investor BlackRock, to encourage corporate leaders to reduce carbon emissions.[34] Concern over harassment and discrimination against women in the workforce combined with antipathy to Trump's personal conduct and political agenda led to the "Me Too" movement. Several high-level executives were toppled by the revelation of sex-based misconduct.[35] California and others sought to mandate gender diversity on corporate boards, and their efforts were bolstered by the "Fearless Girl" campaign launched by institutional investor State Street.[36] Concern over police violence against Black people led to the "Black Lives Matter" (BLM) movement and spurred corporate America to make various statements and commitments regarding

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[30] *See* Elizabeth Pollman, *The Making and Meaning of ESG*, 14 HARV. BUS. L. REV. 403, 416 (2024); John H. Langbein & Richard A. Posner, *Social Investing and the Law of Trusts*, 79 MICH. L. REV. 72, 72-73 (1980).

[31] Pollman, *supra* note 30 at 438-39.

[32] *See* Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2613 (2021); Kahan & Rock, *supra* note 28 at 113.

[33] *See* Quinn Curtis, Jill Fisch & Adriana Z. Robertson, *Do ESG Funds Deliver on Their Promises?*, 120 MICH. L. REV. 393, 395 (2021) (noting the "rapidly expanding number of mutual funds that purport to consider ESG factors in their investment and voting decisions," and concluding that ESG funds do in fact represent a differentiated offering).

[34] Kovvali, *Stark Choices*, *supra* note 10 at 754-55.

[35] Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1585-86 (2018).

[36] Michal Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243 (2020); Jill Fisch & Steven Davidoff Solomon, Centros*, California's 'Women on Boards' Statute and the Scope of Regulatory Competition*, 20 EUR. BUS. ORG. L. REV. 493 (2019).

racial inequality.[37] The issues that prompted BLM also interacted with concerns over the health of democracy in America as various states imposed regulations that, to some, seemed likely to suppress voting. Further consternation arose after a group of Trump supporters attacked the Capitol building in an apparent effort to prevent Congress from certifying his electoral loss in 2020, leading to another round of corporate statements and commitments.[38] The Trump Administration and its allies generally worked to discourage corporate social responsibility initiatives.[39] But under the Biden Administration, government officials worked to encourage them. The Biden Administration SEC undertook a significant rulemaking that would force disclosure of carbon emissions,[40] and the Department of Labor sought to facilitate the use of ESG criteria by pension and retirement funds.[41]

These politically-inflected efforts proved unstable. Large asset managers like State Street and BlackRock are vulnerable to pressure from various public officials, in part because some major clients are public and private pension funds. These managers soon found themselves caught in a dilemma: Republican officials demanded that they walk back support from progressive-seeming causes and recommit to financing companies engaged in oil drilling and firearms manufacturing, while Democratic officials demanded that they demonstrate the sincerity of their progressive-seeming commitments.[42] Asset managers largely resolved the tension by backing away from political statements and recasting politically-charged initiatives like efforts to address climate change in more neutral terms like "resilience."[43]

Corporations also reversed course. Part of the impetus was a newly hostile regulatory environment. With the change in presidential administration and Republican victories in state houses, progressive-coded political activities became problematic and more costly. An effort by firms to preemptively reduce carbon emissions may have a strong economic justification if regulations on carbon emissions

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[37] Gina-Gail S. Fletcher & H. Timothy Lovelace, Jr., *Corporate Racial Responsibility*, 124 COLUM. L. REV. 361 (2024); Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV. 1 (2022); Kovvali, *Stark Choices*, *supra* note 10 at 737-45.

[38] *See* Ephrat Livni & Sarah Kessler, *After the Capitol Attack, Companies Pledged to Rethink Political Giving. Did They?*, N.Y. TIMES (Jan. 8, 2024), https://www.nytimes.com/2024/01/06/business/dealbook/jan-6-companies-donations.html (describing corporate reactions to the attack and subsequent backsliding on various commitments).

[39] Kahan & Rock, *supra* note 28 at 124 & n.5.

[40] *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, Securities & Exchange Comm., Release No. 11275 (Mar. 6, 2024).

[41] Utah v. Micone, 766 F. Supp. 3d 669, 675 (N.D. Tex. 2025); Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, Dep't of Labor, 87 Fed. Reg. 73822 (Dec. 1, 2022); Kovvali, *Stark Choices*, *supra* note 10 at 757-58.

[42] *Id.* at 759-60.

[43] *See, e.g.*, Yusuf Khan, *Don't Call It ESG, Call It Resilience*, WALL ST. J. (Feb. 28, 2025), https://www.wsj.com/articles/dont-call-it-esg-call-it-resilience-067a2a9a

are imminent, but a weak justification otherwise. And corporate Diversity, Equity, and Inclusion (DEI) initiatives went from a net positive with regulators to a potential source of liability.[44] Another part of the impetus may have been a growing consumer backlash against companies engaging in politically tinged economic activity. In one prominent example, Budweiser arranged for a customized can to be sent to Dylan Mulvaney, a transgender influencer; Mulvaney then made a brief promotional post for the company on Instagram.[45] The furious reaction led to a dramatic decline in sales of Bud Light, and the company's subsequent efforts to distance itself from Mulvaney, alienated progressive customers without winning back conservatives.[46] These developments encouraged executives to avoid any action that might lead to them being deemed "too woke."

Pressured by these forces, corporate America has retreated from some progressive stances. But it is not clear that corporations and their leaders have withdrawn entirely or permanently from politics or adopted a genuinely neutral stance. Elon Musk, the chief executive of several significant companies, played an unprecedented and active role reconfiguring the federal government from a now-abandoned perch in the second Trump Administration.[47] Musk's involvement appears to have persuaded other companies to do business with the President and his allies on favorable terms.[48] Several prominent technology CEOs publicly paid homage to Trump as guests at his second inaugural, while their companies made large contributions to his inaugural fund.[49] Meta invited Dana White, the President and CEO of Ultimate Fighting Championship, to its board despite White having been

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[44] *See* Lauren Weber, *How Trump's Assault on DEI Will Ripple Across Corporate America*, WALL ST. J. (Jan. 24, 2025), https://www.wsj.com/business/how-trumps-assault-on-dei-will-ripple-across-corporate-america-d219ad91.

[45] Amanda Holpuch, *Behind the Backlash Against Bud Light*, N.Y. TIMES (Nov. 21, 2023), https://www.nytimes.com/article/bud-light-boycott.html

[46] *Id.*; Jennifer Maloney, *How Bud Light Blew It*, WALL ST. J. (May 21, 2023), https://www.wsj.com/business/retail/bud-light-boycott-sales-dylan-mulvaney-6c23bb86

[47] *See* Jonathan Swan et al., *How Elon Musk Executed His Takeover of the Federal Bureaucracy*, N.Y. TIMES (Mar. 3, 2025), https://www.nytimes.com/2025/02/28/us/politics/musk-federal-bureaucracy-takeover.html

[48] Winston Cho, *Hollywood Studios Are Buying Ads On X Again Amid Elon Musk's Political Ascension*, THE HOLLYWOOD REPORTER (Mar. 7, 2025), https://www.hollywoodreporter.com/business/business-news/hollywood-studios-buying-advertising-x-elon-musk-1236158080/; Suzanne Vranica, *Senators Call for DOJ Probe of X's Advertiser Pressure Campaign*, WALL ST. J. (Mar. 6, 2025), https://www.wsj.com/business/media/senators-call-for-doj-probe-of-xs-advertiser-pressure-campaign-88e3a8be; *cf.* Issie Lapowsky, *'The Terror Is Real': An Appalled Tech Industry Is Scared to Criticize Elon Musk*, POLITICO (Apr. 4, 2025), https://www.politico.com/news/magazine/2025/04/04/elon-musk-silicon-valley-fear-00260273.

[49] Ali Swenson, *Trump, a Populist President, is Flanked by Tech Billionaires at His Inauguration*, ASSOC. PRESS (Jan. 20, 2025), https://apnews.com/article/trump-inauguration-tech-billionaires-zuckerberg-musk-wealth-0896bfc3f50d941d62cebc3074267ecd; Theodore Schleifer & David Yaffe-Bellany, *In Display of Fealty, Tech Industry Curries Favor With Trump*, N.Y. TIMES (Dec. 14, 2024), https://www.nytimes.com/2024/12/14/technology/trump-tech-amazon-meta-openai.html

videotaped slapping his wife; the invitation was apparently due to White's growing prominence in Republican circles.[50] Meta CEO Mark Zuckerberg would later begin pivoting the company toward Republican-friendly policies with comments urging that more "masculine energy" was required in the workforce.[51] After Trump openly suggested that America should "take back" the Panama Canal, BlackRock CEO Larry Fink personally worked with Trump officials to arrange the purchase from a Hong Kong company of ports servicing the canal.[52] The President touted the deal as delivering on his promise, and although Fink denied politics was the motivation, it also earned Fink goodwill with many Republicans.[53] Fink has also distanced BlackRock from DEI initiatives,[54] and urged reforms that would reduce and privatize Social Security benefits.[55] More quietly, corporations have continued political lobbying activities.

Asset managers have also offered products intended to permit investors to deploy capital and use voice in ways consistent with a broader range of values. BlackRock offers pass-through voting to institutional investors, essentially seeking to cut itself out of the process of deciding how shares will be voted. Former biotech CEO and Republican presidential aspirant Vivek Ramaswamy launched Strive Asset Management, a company that seeks to provide a kind of anti-ESG voice at major firms.[56] A number of current or proposed exchange traded funds (ETFs) seek to take a conservative position in either portfolio selection or when casting votes.[57] These funds often trade with colorful tickers—the God Bless America ETF has the ticker "YALL" while the Point Bridge America First ETF has the ticker "MAGA."[58] Even

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[50] Kevin Draper, *U.F.C. and Partners Reluctant to Speak on Dana White Slapping His Wife*, N.Y. TIMES (Jan. 6, 2023), https://www.nytimes.com/2023/01/05/sports/dana-white-slap-wife-ufc.html.

[51] Alyssa Goldberg, *Mark Zuckerberg Says Companies Need More 'Masculine Energy.' What Does That Even Mean?*, USA TODAY (Jan. 17, 2025), https://www.usatoday.com/story/life/health-wellness/2025/01/17/mark-zuckerberg-meta-workforce-masculine-energy/77755286007/

[52] Jack Pitcher & Costas Paris, *BlackRock Becomes a Power Player in Global Shipping—With Help From Trump*, WALL ST. J. (Mar. 11, 2025), https://www.wsj.com/finance/blackrock-panama-canal-deal-trump-a0af7b7d

[53] *Id.*

[54] Jack Pitcher, *BlackRock, a Diversity Pioneer, Distances Itself From DEI*, WALL ST. J. (Feb. 25, 2025), https://www.wsj.com/finance/investing/blackrock-a-diversity-pioneer-distances-itself-from-dei-24839d6c

[55] Vishesh Raisinghani, *Larry Fink has a big idea for Social Security, which he believes does not 'grow with the economy'*, YAHOO FINANCE (Apr. 3, 2025), https://finance.yahoo.com/news/larry-fink-big-idea-social-114500841.html

[56] Brooke Masters & Patrick Temple-West, *Vivek Ramaswamy's Fund Manager Strive Sticks to its 'Anti-Woke' Mission*, FINANCIAL TIMES (Feb. 24, 2023), https://www.ft.com/content/c7ccc5ea-3e8f-49a1-b250-31365f4f33e0. For example, Strive's largest exchange traded fund, "DRLL" focuses on the energy sector and encourages companies to maximize fossil fuel production. *Id.*

[57] *See* Jason Zweig, *You Can't Escape Politics. Your Investing Decisions Can.*, WALL ST. J. (Mar. 7, 2025), https://www.wsj.com/finance/investing/you-cant-escape-politics-your-investing-decisions-can-6be5a8e7

[58] *Id.*

the Anti-Defamation League has gotten involved, backing the JLens 500 Jewish Advocacy U.S. ETF with ticker "TOV."[59] Although these offerings remain relatively small in comparison to standard ESG funds, they do represent a shift away from the almost uniformly progressive views that had dominated environmental and social investing.

These actions may simply be an effort to manage risks and opportunities created by the second Trump Administration. Apart from the shift in government policy, many commentators have interpreted Trump's second election to signal a shift in the cultural zeitgeist from progressive to conservative attitudes. As a result, conservative positioning may simply be a way to maximize economic returns and minimize risks.[60] But it also seems likely that many corporate leaders are sympathetic with conservative views, and that they welcome the opportunity to curb pressure from politically progressive workers and consumers who have complicated their businesses and their personal lives in recent years.[61] This form of political activism may be conservative in its orientation, but it is political activism nonetheless.

B. Union Political Activism

Some level of union political activity in the U.S. context is inevitable. Samuel Gompers, the legendary leader of the American Federation of Labor (AFL), the largest U.S. federation of trade unions in the early decades of the twentieth century, articulated a philosophy called "voluntarism" to urge AFL affiliates to emphasize control of jobs and collective bargaining, while steering clear of political ideology and

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[59] *Investments in America's Largest Public Companies Will be Used for Shareholder Advocacy to Combat Antisemitism and Hate*, ANTI-DEFAMATION LEAGUE (Feb. 27, 2025), https://www.adl.org/resources/press-release/jlens-launches-first-ever-jewish-advocacy-etf-tov-nyse-backed-adl. Some of the fund's choices have been criticized, including its inclusion of Meta and Tesla. Arno Rosenfeld, *Why the ADL is Encouraging Jews to Invest in Tesla*, FORWARD (Feb. 27, 2025), https://forward.com/news/700072/adl-tesla-jlens-meta-amazon-musk/

[60] The strategy may still prove to be a miscalculation. *See* Erin Mulvaney, *Venerable New York Firm That Struck a Deal With Trump Is Losing Lawyers*, WALL ST. J. (May 8, 2025), https://www.wsj.com/us-news/law/new-york-law-firm-cadwalader-wickersham-taft-trump-10a87928 (law firm's decision to strike a deal with Trump has contributed to lawyer departures).

[61] Steven Rattner, *What Big-Business Leaders, Including Democrats, Say Privately About Trump*, N.Y. TIMES (Mar. 3, 2025), https://www.nytimes.com/2025/03/03/opinion/trump-wall-street-biden-big-business.html ("While very few businessmen have been publicly praising the president and his actions, in private, many of them voice support for him."); Ross Douthat, *How Democrats Drove Silicon Valley Into Trump's Arms*, N.Y. TIMES (Jan. 17, 2025), https://www.nytimes.com/2025/01/17/opinion/marc-andreessen-trump-silicon-valley.html (presenting interview with Marc Andreesen of Andreesen Horowitz). *But see* Reilly Steel, *The Political Transformation of Corporate America, 2001-2022*, COLUM. L. & ECON. WORKING PAPER NO. 4974868 (Oct. 29, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4974868 (suggesting that attitudes among corporate executives have shifted leftward somewhat over a 20- year period).

political activism.[62] He had several motives for this stance. One was the perception that improvements through the ballot box were likely to prove ephemeral given the reflexive anti-union attitudes of federal and state courts manifested in a willingness to strike down maximum work hour laws and other labor-protective legislation on "liberty of contract" grounds, and to issue broad injunctions to halt union protests and boycotts as a violation of the antitrust laws or tort law.[63] Voluntarism argued for self-reliance, building union bargaining power from the ground up through union-led organizing, strikes and boycotts, and supporting politicians only when they advanced labor's economic goals. A related motive was the organizational stability that could be promoted by focusing principally on skilled craft workers who enjoyed a practical supplier monopoly in certain local markets. Ideological movements like the Knights of Labor, the Socialist unions, and later the Industrial Workers of the World (IWW) cast too wide a net, advancing positions that were often far removed from "bread and butter" worker concerns, and frequently invited harsh employer and official reaction.

The AFL was not always consistently apolitical and nonpartisan. To obtain relief from the antitrust laws, the federation supported Democrat Woodrow Wilson's bid for the presidency, which led ultimately to the enactment of the Clayton Act of 1914, labor's first major legislative victory in this area and today the foundation of labor's statutory immunity from the antitrust laws alongside the union-supported Norris-LaGuardia Act of 1932.[64] The government's takeover of the railroads during World War I, resulting in significant labor relations regulations that entailed significant union involvement. Labor also pushed for the Davis-Bacon Act of 1931[65] (and related laws) which require government-funded construction and other projects to pay "prevailing wages" usually set at the level established in collective bargaining agreements (CBAs). Republican president Herbert Hoover signed Davis-Bacon into law. But although unions did not consistently avoid politics, labor was not closely

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[62] *See* 2 SAMUEL GOMPERS, SEVENTY YEARS OF LIFE AND LABOR: AN AUTOBIOGRAPHY 26 (1925) ("Foremost to my mind is to tell the politicians to keep their hands off and thus preserve voluntary institutions and opportunity for individual and group initiative and leave the way open to deal with problems as the experience and facts of industry shall indicate….Economic justice will come through the organization of economic agencies, the increasing adjustment of economic relationships in accord with principles evolved by experience"); *see generally* SELIG PERLMAN, A THEORY OF THE LABOR MOVEMENT (1949); Michael Rogin, *Voluntarism: The Political Functions of an Antipolitical Doctrine*, 15 ILR REV. 521 (1962). This concept is related to "trade unionism" or "business unionism," which suggest that unions should focus exclusively on financial goals within particular workplaces, as opposed to efforts to remake the political landscape. For the impact of the growing role of public-sector unionism on the political orientation of the labor movement, see Estreicher, *The Demise of Voluntarism*, supra note 1.

[63] *See* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 37-59 (1991).

[64] 47 Stat. 70 (Mar. 23, 1932), codified at 29 U.S.C. § 101 et seq, *See* Samuel Estreicher & Jack Samuel, *Labor's Antitrust Exemption for Independent-Contractor Workers*, 59 WAKE FOREST L. REV. 1060 (2024).

[65] 46 Stat. 1494 (Mar. 3, 1931), codified at 40 U.S.C. § 3141 et seq.

affiliated with either party and sought to advance union objectives largely through collective worker actions resulting in labor contracts until Franklin Delano Roosevelt, Jr.'s (FDR) presidency.

This stance changed during the 1930s but somewhat slowly. Many AFL unions did not join the FDR bandwagon and actually opposed FDR's landmark labor legislation, the National Labor Relations Act of 1935 (NLRA),[66] which provided workers with basic rights to engage in collective activity and seek recognition from employers. A rival union federation formed to counter the AFL, the Congress of Industrial Organizations (CIO). The CIO advanced a more inclusive approach (termed "industrial unionism") to organize all the workers in a facility, thus not limiting its reach to the skilled crafts. CIO affiliates were strongly supportive of FDR and actively engaged in electoral politics largely on behalf of Democratic Party candidates.

Republicans won both houses of Congress in 1946, aided in part by jurisdictional strife between the AFL and CIO throughout this period and a massive strike wave in 1946, a culmination of pent-up worker demand for improved wages and working conditions that had stalled due to a no-strike pledge from nearly all unions agreed to in the run-up to World War II. This in turn produced the 1947 Taft-Hartley amendments to the NLRA (also called the "Labor Management Relations Act" or "Taft-Hartley Act").[67] The Taft-Hartley Act substantially curbed labor power, outlawing "closed shop" agreements, secondary boycotts and "hot cargo" agreements – tactics and measures that had strengthened labor's economic leverage and promoted unionization by imposing economic pressures on firms delivering goods, working on aspects of the supply chain for final products, or otherwise doing business with struck employers. Calling Taft-Hartley "a slave labor bill," Democratic President

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[66] 49 Stat. 449 (July 5, 1935), codified at 29 U.S.C. § 151 et seq. The AFL opposed the enactment of the NLRA because some of its provisions favored the rival CIO union federation but principally because the NLRA was premised on an "agency theory" of union bargaining rights, which required either secret-ballot elections or voluntary employer recognition of unions in appropriate units designated by a government agency. Still inspired by the precepts of voluntarism, AFL affiliates advanced a "jurisdictional theory" of bargaining rights, where the union would claim jurisdiction over a group or craft or skilled workers and compel employers through strikes, boycotts, and pressure from local politicians to agree to a "closed shop" agreement requiring the employer to hire and retain only members of the union. Closed-shop agreements were bitterly opposed by employer groups and came under antitrust scrutiny but remained a central feature of AFL bargaining objectives until they were prohibited in the 1947 Taft-Hartley amendments to the NLRA, see note 67 *infra*. *See* SAMUEL ESTREICHER & MATTHEW T. BODIE, LABOR LAW (3d ed, 2025); CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960 (1985). The AFL also for a time opposed the enactment of the Fair Labor Standards Act of 1938, the federal minimum wage and overtime law. See Howard D. Samuel, *Troubled passage: the labor movement and the Fair Labor Standards Act*, MONTHLY LAB. REV., p. 32 (Dec. 2000).

[67] 61 Stat. 136 (June 23, 1947), codified at 29 U.S.C. § 141 et seq.

Harry S. Truman vetoed the measure, but the veto was promptly overturned by Congress.

Taft-Hartley's heavy blow convinced unions that they needed to get actively involved in partisan politics. In 1954, the AFL and CIO formed a no-raiding pact and merged as the AFL-CIO (Federation). Over time, until recently, the unions have been perhaps the Democratic Party's most reliable and important base of support. The labor movement's financial support and mobilization activities are formidable, a major check on the political influence of business.

But labor's increasing turn to politics, enhanced by the growth of public-sector unionism since the 1960s,[68] raises the concern that at least a nontrivial number of workers are being compelled to financially support or at least be affiliated with political positions having nothing to do with their economic interests and with which they disagree. Workers vote for unions who will represent them in negotiating a contract and administering the contract through a union-led grievance-and-arbitration process. They rarely envision the union as their agent for political affairs[69] (although this may be changing in places where unions have organized workers like adjunct professors and coffee shop baristas who do not anticipate long-term involvement in the company or industry and for whom political solidarity may be especially salient). When union external politics is brought into the workplace, such activities implicate uncomfortable legal and policy questions of how to deal with worker harassment of coworkers with opposing views, and how union leaders should respond given their legal duty to fairly represent all the workers in the bargaining unit. Like other Americans, union-represented workers are nearly equally divided between the two major parties. Unions thus frequently mobilize material support for political candidates or positions that do not reflect the views of many represented workers.

Some of the issue areas and stances emphasized by unions in certain quarters may heighten the concern. In December 2023, the United Autoworkers (UAW) joined a statement calling for a cease fire in the conflict in Gaza.[70] In October 2024, Local 1199, SEIU, a large healthcare workers' union, not only called for a ceasefire but also

[68] *See* Estreicher, *Demise of Voluntarism*, *supra* note 1.
[69] *See* AMERICAN COMPASS, NOT WHAT THEY BARGAINED FOR: A SURVEY OF AMERICAN WORKERS (Sept. 6, 2021), https://americancompass.org/not-what-they-bargained-for ("Asked how important various activities are for a worker organization to pursue, potential union members assigned half their weight to collective bargaining and providing training and benefits, versus 3% to politics.").
[70] *UAW Statement on Israel and Palestine*, UAW (Dec. 1, 2024), https://uaw.org/uaw-statement-israel-palestine/. *See also* Tara Suter, *Major Labor Unions Urge Biden to Halt Military Aid to Israel*, THE HILL (July 23, 2024), https://thehill.com/business/4788621-unions-demand-stop-israeli-aid/

an arms embargo against Israel.[71] The AFL-CIO website has a page explaining that "Reproductive Rights Are Worker Rights," and offering guidance for workers supporting reproductive freedom in testimony or through protests.[72] The UAW has staked out a complex stance on climate change, expressing concern over programs and regulations that seem likely to cut into autoworkers' jobs while suggesting that government support could achieve a "just transition" away from fossil fuels.[73] Historically, the United Farm Workers (UFW) and other unions have had a complex attitude toward immigration; the UFW's stance lately has shifted toward a relatively liberal view on immigration matters.[74]

On occasion, there may also be a partisan mismatch. Unions, especially those representing government workers, make large contributions for, and spend significant sums in political action committees on behalf of, principally Democratic Party candidates for electoral office. During the 2024 presidential campaign, the Teamsters Union, the largest union representing workers in private companies, released polling information suggesting that a strong majority of their members supported Republican Donald Trump despite the Democratic Biden-Harris Administration's strong stances in favor of unions generally and the Teamsters specifically.[75] Teamsters president Sean O'Brien controversially addressed the

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[71] *1199SEIU Calls For Ceasefire in Lebanon and Gaza & Arms Embargo Against Israel*, 1199SEIU (Oct. 18, 2024), https://www.1199seiu.org/media-center/1199seiu-calls-ceasefire-lebanon-and-gaza-arms-embargo-against-israel.

[72] *Reproductive Rights Are Worker Rights*, AFL-CIO (last accessed June 7, 2025), https://aflcio.org/reproductive-rights. Other unions have staked out related stances on reproductive freedom. *See, e.g.*, Jazz Tangcay, *SAG-AFTRA and IATSE Unions Vow to Fight Abortion Ruling: 'The Supreme Court Is Wrong'*, VARIETY (June 24, 2022), https://variety.com/2022/artisans/news/sag-aftra-iatse-reaction-roe-wade-1235302769/

[73] *UAW Statement on the EPAs New Greenhouse Gas Emissions Rule*, UAW (Mar. 20, 2024), https://uaw.org/uaw-statement-on-the-epas-new-greenhouse-gas-emissions-rule/; *The UAW Strike, Climate Change, and the Just Transition*, GLASS LEWIS (Oct. 10, 2023), https://glasslewis.com/the-uaw-strike-climate-change-and-the-just-transition/

[74] *See Farm Workers Welcome Reintroduction of Bipartisan Farm Workforce Modernization Act*, UFW FOUND. (July 5, 2023), https://www.ufwfoundation.org/farm_workers_welcome_reintroduction_of_bipartisan_farm_workforce_modernization_act

[75] Jonathan Weisman, *Teamsters Won't Endorse a Candidate for President in 2024*, N.Y. TIMES (Sept. 18, 2024), https://www.nytimes.com/2024/09/18/us/politics/teamsters-endorsement-2024-election.html; *see also* Eric Levitz, *The Democrats' pro-union strategy has been a bust*, VOX (Oct. 17, 2024) https://www.vox.com/politics/378025/trump-harris-2024-election-polls-union-voters (noting that the Democratic party has been losing support from unionized households in recent decades); Oren Cass, *US union members and leaders are not always on the same political page*, FINANCIAL TIMES (Oct. 3, 2024), https://www.ft.com/content/8d09dee7-a508-43da-b37d-1b8a7b9008f3 ("Public polling typically shows union members are only slightly to the left of the general public.").

Republican National Convention in 2024 with a speech that seemed critical of the Biden-Harris Administration.[76]

The purpose of these examples is not to offer a position on the merits of any particular issue. These examples have been selected precisely because the issues are *controversial*, in the sense that workers have divergent and often strongly-held views on the topics. As a result, increasing union activity on these topics risks alienating current and potential union members and other constituents.

At the same time, a union's political stances may be a plausible strategy for advancing the organizational strength of the union which can in some circumstances enhance their leverage in collective bargaining for the workers it represents (or seeks to represent). Despite some high-profile recent representation election victories and a growing level of public support for unionism[77] unions have had relatively little success since at least the 1950s in maintaining unionization rates in private companies.[78] Combined with international trade, loss of relatively high-wage, easier-to-organize manufacturing jobs to places like China and Mexico, and the ever-increasing toll of automation, computerization, and now artificial intelligence, for such work, the diminished prospect of unionization across sectors has limited unions' economic strength. By engaging in politics, unions may be able to attain victories that they are unable to achieve through bargaining with employers, to strengthen solidarity among working people generally, and to appeal to the young, highly-educated, and politically-engaged workers at the frontiers of nascent organizing.[79] The SEIU in particular heralds its political action in securing support for a $15 hourly minimum wage in many "blue" cities, convincing the California legislature to enact a law establishing a Fast Food Council, comprised of union and company officials, to recommend for state approval of minimum-wage hikes—a $20 hourly minimum

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[76] *See Teamsters President Sean O'Brien Speaks at Republican National Convention*, PBS NEWS (July 15, 2024), https://www.pbs.org/newshour/politics/watch-teamsters-president-sean-obrien-speaks-at-republican-national-convention (criticizing "the way Washington is run").

[77] *See Labor Unions*, GALLUP (last accessed Jun. 7, 2025), https://news.gallup.com/poll/12751/labor-unions.aspx; Miranda Nazzaro, *Approval of Labor Unions Nears Record High: Gallup*, THE HILL (Sept. 9, 2024), https://thehill.com/business/4869155-poll-approval-labor-unions/

[78] Without discounting employer opposition entirely, declining unionization rates are principally due to structural changes in the U.S. economy, see Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3 (1993) (Kenneth M. Piper Lecture in Labor Law at IIT's Chicago-Kent School of Law).

[79] This frontier is evidenced by the workplaces targeted by unions and the organizers who lead union efforts. *See, e.g.*, Andrea Hsu, *UAW Members Aren't All Assembling Cars. More and More Are Unionized Grad Students*, NPR (Oct. 19, 2023), https://www.npr.org/2023/10/19/1206209107/united-auto-workers-union-uaw-membership-grad-students-big-3-strike ("roughly 100,000 of the [United Auto Workers'] union's 383,000 members work in higher education"); Noam Scheiber, *Why a Rhodes Scholar's Ambition Led Her to a Job at Starbucks*, N.Y. TIMES (June 22, 2023), https://www.nytimes.com/2022/06/19/business/starbucks-union-rhodes-scholar.html (profiling union organizer who joined Starbucks with the goal of unionizing its workers).

wage in April 2024—for fast-foot workers;[80] and obtaining voter approval for a Massachusetts law establishing a state-wide bargaining unit for Uber and Lyft drivers.

More generally, unions and commentators have sought to encourage the government to give labor greater bargaining power through sectoral or social bargaining schemes, effectively reinforcing the ordinary economic strength of unions by enlisting the government's strength as a regulator.[81] The Biden Administration also placed labor-friendly conditions on various companies and industries receiving government subsidies or federal contracting work.[82] These included requirements to recognize unions or stay neutral during organizing campaigns or assume voluntarily union-favored labor terms. In these and other ways, unions may simply be supplementing their degraded economic weapons with a suite of political weapons that can be used to advance members' interests.

The legal landscape is changing for union political activism. In 2018, the Supreme Court ruled in *Janus v. AFSCME*[83] that government workers represented by unions have a First Amendment right against compelled affiliation with the union. Under *Janus*, public-sector unions and the CBAs they negotiate cannot require payment of union dues or agency fees as a condition of employment.[84] The Court's reasoning was that unions of government workers are "inherently political", because they bargain with the government employer and are involved in political campaigns to elect union-friendly public-sector management. *Janus* may have implications for union-dues or agency-fee requirements in the private sector, but the lower courts have not (yet) extended *Janus* in this way because government action, a prerequisite for federal constitutional analysis, is not present.[85]

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[80] CA AB 1228 (Sept. 28, 2023).

[81] *E.g.* Andrias, *Clash*, *supra* note 1 at 991-92; Kate Andrias, *The New Labor Law*, 126 YALE L.J. 1, 8-10 (2016); *cf.* Cynthia Estlund, *Sectoral Solutions That Work: The Case for Sectoral Co-Regulation*, 98 CHI.-KENT L. REV. 539, 543 (2023) (conceptualizing a "sectoral co-regulation" model in which worker voice and regulatory muscle are combined).

[82] *See Biden-Harris Administration Announces Action to Support Economic and Efficient Construction Projects While Creating Good-Paying and Union Jobs*, WHITE HOUSE (Dec. 18, 2023), https://bidenwhitehouse.archives.gov/omb/briefing-room/2023/12/18/fact-sheet-biden-harris-administration-announces-action-to-support-economic-and-efficient-construction-projects-while-creating-good-paying-and-union-jobs/.

[83] 585 U.S. 878 (2018). *See generally* Kate Andrias, Janus*'s Two Faces*, 2018 SUP. CT. REV. 21.

[84] 585 U.S. at 885-86.

[85] *See, e.g.*, Levine v. Assoc. of Legal Aid Attorneys, UAW Local 2325, 2025 WL 1795961, at *1 (S.D.N.Y. June 30, 2025) (*Janus* rights do not apply to Legal Aid attorneys because Legal Aid and union of Legal Aid workers do not "perform a traditional, exclusive public function that renders them state actors").

Constitutional norms, however, have influenced statutory labor law in the private sector as well. Under *Communication Workers of America v. Beck*,[86] and earlier decisions under the Railway Labor Act, courts have required unions to provide an accounting to objecting employees to prevent use of union dues for certain political expenditures. Some commentators have argued that because the new union political activism turns even unions representing private-sector workers into "inherently political" organizations, conferring exclusive representation rights on unions violates the First Amendment.[87] The lower courts have not gone this far, distinguishing between the economic role of unions and political and other activities not "germane" to the union's collective bargaining and grievance-adjustment functions. The National Labor Relations Board (NLRB), the administrative agency responsible for enforcing the NLRA, takes the view that a union's organizing activities are chargeable against union dues as long they "may ultimately inure to the benefit" of the unit employees.[88] These doctrines raise a key question: Can a meaningful, principled line be drawn between political activities that "ultimately" inure to the benefit of represented workers and political activities that do not?

II. Defining Political Activity

It is difficult to define political activity and distinguish it from ordinary economic activity. This Part addresses that challenge. Subpart A identifies some of the central forces that make the issue complex. Subpart B considers business law's traditional approach to the problem. Subpart C considers labor law's traditional approach. Subpart D evaluates several alternative approaches.

A. Basic Countervailing Factors

Any attempt to draw a workable, principled line between political and economic activities is difficult for at least three reasons. *First*, this is a highly politicized era. A good deal of previously settled understandings are being contested in politics, and many seemingly unrelated issues are increasingly linked.[89] For example, some contend that unions or corporations must take specific positions on

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[86] 487 U.S. 735 (1988). *See* SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT 251-55 (2014) (describing compromises and concerns that led to the Court adopting statutory rule of *Beck*)

[87] *See* Alex MacDonald, *Political Unions, Free Speech, and the Death of Voluntarism: Why Exclusive Representation Violates the First Amendment*, 22 GEO. J. L. & PUB. POL'Y 229 (2024).

[88] California Saw & Knife Works, 320 N.L.R.B. 224, 238 1995), *enf. sub nom.* Machinists v. NLRB, 133 F.3d 1012 (7th Cir. 1998),

[89] *See* Ezra Klein, *The Problem With Everything-Bagel Liberalism*, N.Y. TIMES (Apr. 2, 2023), https://www.nytimes.com/2023/04/02/opinion/democrats-liberalism.html (criticizing a perceived progressive "inability or . . . unwillingness to choose among competing priorities" and to layer new requirements and issues on top of others); WORLD ECONOMIC FORUM, THE GLOBAL RISKS REPORT 9 (18th ed. 2023) (describing the concept of a "polycrisis" in which multiple interconnected crises strike simultaneously and cause amplified harm).

the environment, on social issues, or on foreign conflicts to advance the interests of their members. This can be because a presence on political hot-button matters can help build a broader coalition useful to advance more immediate goals of the organization. It may also be possible to forge links between political issues and economics. Climate change, the plight of workers in plants abroad that supply goods and services to U.S. businesses, the health of democracy, and the rule of law are not simply political issues. They may have direct consequences on the economy, corporations, and individuals.

Second, political positioning can also be an important tool for delivering economic benefits to members. Most obviously, lobbying is an important activity for many unions and corporations,[90] and lobbying can be made more effective when leaders stake out politically salient positions even if not directly related to core interests of those whom they represent. It can also be an important way to engage with the public, which can lead to useful alliances. Stakeholders—customers, suppliers, workers, neighbors—may have strong political views that need to be noticed and sometimes accommodated. Indeed, stakeholder theory was developed as an analytic approach to help business leaders manage these views.[91] In addition, some support of political parties is inevitable, if only to preserve and advance core constituent interests against adverse or in favor of supportive government action. This can be fueled by the competitive dimension of the political process. If corporations play at politics, unions must do so as well, and vice versa.

Third, these forces are not static and indeed can be shaped by both outsiders and insiders. If workers successfully persuade the public that it is immoral to buy from Amazon or Starbucks until those companies change their approach, the profit motive may align corporate interests with the workers' agenda.[92] If corporate management persuades the public that the company is committed to "green" goals, the profit motive may push management to meet that commitment.[93] And if competitors are staking out positions, it may be necessary for a company to take a similar approach just to remain competitive.

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[90] *See* Reilly Steel, *Lobbying Against Enforcement*, COLUM. L. & ECON. WORKING PAPER No. 5005959 (Apr. 24, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5005959 (finding evidence that corporations engage in lobbying activities to limit regulatory enforcement).

[91] *See supra* note 27 and accompanying text (describing Freeman's development of stakeholder theory). Worker protests that involve product disparagement that not clearly linked to underlying economic dispute with the employer may not be protected by labor law statutes. *See* SAMUEL ESTREICHER & MATTHEW T. BODIE, LABOR LAW: CONCEPTS AND INSIGHTS 91-94 (2d ed. Fountain Press, 2020).

[92] A worker's right to take this type of step against their employer may be limited. *See* NLRB v. Local Union No. 1229, IBEW (Jefferson Standard), 346 U.S. 464 (1953) ("naked" product disparagement is not protected)

[93] *See* Hajin Kim, *Expecting Corporate Prosociality*, 53 J. OF LEGAL STUD. 267 (2024).

As a result of these difficulties, previous efforts to criticize political activities have often foundered on this definitional question. For example, a range of corporate law commentators have urged that business leaders ought to stay out of politics. Professors Anthony J. Casey and Tom Ginsburg penned an op-ed titled "Corporate Leaders Need to Keep Their Mouths Shut."[94] Despite the bold title, they almost immediately carved out exceptions: Elon Musk's political activities have given him (at least for a time) enormous influence over policy, which many investors seem to have assumed would translate into enormous profits; Ben & Jerry's has used political positions to construct a brand identity; and the National Basketball Association has taken positions on racial injustice due in part to the perspectives of marquee players and ardent fans.[95] Several important businesses like Meta or X also must make business decisions on user moderation policy that have both a political and an operational dimension.[96] As the range of views deemed legitimate discourse has broadened, these moderation policy decisions have grown more controversial.

B. Business Law's Approach

Different business law fields have taken different approaches to distinguishing between political and economic activities. First, corporate law has largely avoided the issue, treating political activism as a simple business strategy and trusting that managers are adequately incentivized to pursue economic returns for shareholders. Second, securities law has attempted to draw lines but has taken a shifting and sometimes confusing approach. Finally, investment law has sought to ensure that asset managers focus on economic interests but has drawn an unclear line.

1. Corporate Law

Corporate law does not try to draw a sharp distinction between political activities and ordinary business activities. The Delaware Chancery Court's decision in *Simeone v. Walt Disney Co.*[97] is instructive. The litigation stemmed from Disney's decision to express opposition to Florida House Bill 1557, also known as the "Don't Say Gay" law. The law sought to limit discussion of topics relating to sexual orientation and gender identity in Florida schools. Disney was initially silent on the issue despite its large presence in Florida. Then-CEO Robert Chapek initially suggested that the company supported the LGBTQ+ community, that its silence

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[94] Anthony J. Casey & Tom Ginsburg, *Corporate Leaders Need to Keep Their Mouths Shut*, N.Y. TIMES (Jan. 29, 2025), https://www.nytimes.com/2025/01/29/opinion/speech-universities-corporations-executives.html; *see also* Anthony J. Casey & Tom Ginsburg, *Kalven For Corporations: Should For-Profit Corporations Adopt Public Statement Policies?*, 3 U. CHI. BUS. L. REV. 305 (2024).

[95] Casey & Ginsburg, *Mouths Shut*, *supra* note 94.

[96] *See* Evelyn Douek, *Content Moderation as Systems Thinking*, 136 HARV. L. REV. 526 (2022) (noting that designing content moderation systems entails numerous contestable tradeoffs); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018) (noting that major platforms have made opaque judgments on speech).

[97] 302 A.3d 956 (Del. Ch. 2023).

should not be taken as a lack of support, and that it would continue to support "organizations that champion diversity."

This led to strong pushback from groups like actors, directors, writers, and animators. Chapek had a conversation with the Disney board and took a stronger stance during the company's annual meeting. Disney's stance led to a very public feud between Disney and Florida Governor Ron DeSantis, who was eager to burnish his conservative credentials ahead of the Republican presidential primary. Florida's government took various steps intended to subject Disney's operations in the state to additional oversight. A stockholder brought suit seeking information on Disney's decision to speak out against HB 1557. The asserted basis for the investigation was that Disney's decision to speak out had damaged the business, lowering its stock price and causing continuing financial harm.

Delaware Vice Chancellor Will rejected the claim, explaining:

> The plaintiff is not describing potential wrongdoing. He is critiquing a business decision. . . .
>
> Although choosing to speak (or not speak) on public policy issues is an ordinary business decision, this case exemplifies the challenges a corporation faces when addressing divisive topics—particularly ones external to its business. Individual investors have diverse interests—beyond their shared goal of corporate profitability—and viewpoints that may not align with the company's position on political, religious, or social matters. Yet stockholders invest with the understanding that the board is empowered to direct the corporation's affairs.

Corporate law is similarly deferential to a board's decision to cultivate political ties. In *City of Birmingham Retirement and Relief System v. Good*,[98] the Delaware Supreme Court considered allegations that Duke Energy had compromised a state environmental regulator, with the result that the company's limited efforts to address longstanding problems failed to prevent a sudden and deadly disaster. Over a powerful dissent, a majority rejected a shareholder suit against the corporation's leadership. The court insisted that "it is not enough to allege cooperation with what plaintiffs describe as a too-friendly regulator. Instead, the plaintiffs must allege in sufficient detail that Duke Energy illegally colluded with a corrupt regulator."[99] In essence, anything short of violating bribery laws was simply a business strategy not subject to meaningful judicial checks.

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[98] 177 A.3d 47 (Del. 2017).
[99] *Id.* at 60.

Business law's reluctance to define a sphere of political activity and to subject it to special judicial scrutiny makes sense given the institutional context. Corporate law and governance create powerful incentives for board members and officers to prioritize financial returns to shareholders. As former Chief Justice Leo Strine has suggested, corporate power is corporate purpose, and corporate law empowers only shareholders.[100] Shareholders are the only corporate constituency empowered to vote, and at a healthy firm they are the only constituency protected by judicially-enforceable fiduciary duties.[101] A robust market for corporate control ensures that managers who fail to generate shareholder value are replaced, and corporate leaders have built on these incentives with compensation schemes that promise rich rewards to executives if and only if they drive up the share price.[102]

Advocates for a broader stakeholder-oriented approach have advocated for revisions to these mechanisms. But at present, at a typical public corporation, there is not much risk that the board members are going to consciously sacrifice material economic returns to pursue a political agenda. Corporate leaders may be short sighted or wrong in their political calculations, but they are unlikely deliberately to take a step that meaningfully reduces share prices to advance their vision of political good.

It is entirely possible that corporate leaders will pursue a political agenda with mild economic costs for the corporation but strong personal costs for dissenting shareholders. Political contributions or statements may be a trivial expense for the corporation or its executives and have little impact on share prices but work a serious moral injury to shareholders who disagree. But corporate law at present is largely unconcerned with that type of harm.

2. Securities Law

Securities law takes a more complex approach to the line between political and ordinary economic activities. The fault line arises in at least three securities law contexts. *First*, there has been extensive controversy over whether corporations should be forced to disclose their political activities as part of the mandatory disclosure regime created by securities law. Congress has repeatedly included language in appropriations measures prohibiting the use of funds to issue or implement a rule requiring disclosure of political contributions or dues to trade

[100] Leo E. Strine, Jr., *Corporate Power is Corporate Purpose I: Evidence from My Hometown*, 33 OXFORD REV. ECON. POL'Y 176 (2017).
[101] Leo E. Strine, Jr., *Our Continuing Struggle With the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 153 (2012).
[102] *See* Lund & Pollman, *supra* note 32.

associations.[103] While the constitutionality of a disclosure rule seems relatively clear,[104] the political will to impose such a rule seems absent.

Second, there have been disputes about the appropriate line when Congress or the SEC seek to mandate disclosures on politically charged topics. These disputes have erupted into consequential litigation. In *National Association of Manufacturers v. SEC*,[105] the D.C. Circuit rejected an SEC rule, adopted pursuant to a specific statutory mandate, that required companies to affirm that they were not using minerals from a conflict zone.

Three parts of the court's analysis may be relevant to the line-drawing problem. The court was concerned that the conflict-mineral disclosure regime was focused on issues that were quite different from the usual economic or investor-protection benefits pursued by securities regulation. Moreover, the benefits to shareholders had not been proven. Because of First Amendment strictures requiring commercial speech "to be of 'purely factual and uncontroversial information' about the good or service being offered,"[106] the court noted that the disclosure mandate was not framed in a "factual and non-ideological" way, instead inviting condemnation of disfavored activities by implying that companies that used such minerals were morally responsible for the conflict.[107] Needless to say, it is not obvious how these principles should be applied beyond the facts of the case; there has been extensive controversy over how First Amendment requirements apply to mandated disclosures on other politically charged topics like climate change.[108]

Third, securities law helps structure shareholder voting. This can lead to line-drawing problems when dealing with proxy proposals touching on political matters. Instead of actually attending an annual meeting and casting a vote,

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[103] *See* Cydney Posner, *What's Happening With Corporate Political Spending Disclosure*, COOLEY (Apr. 5, 2022), https://cooleypubco.com/2022/04/05/whats-happening-with-corporate-political-spending-disclosure/ ("Congress has once again prohibited the SEC from using any funds for political spending disclosure regulation"); Lucian A. Bebchuk, Robert J. Jackson Jr., James D. Nelson & Roberto Tallarita, *The Untenable Case for Keeping Investors in the Dark*, 10 HARV. BUS. L. REV. 1, 5 & n.15 (2020). The SEC has worked to ensure the accuracy of any voluntary disclosures that corporations make. *See* Anita B. Bandy, Charles Ricciardelli & Olivia Marshall, *Full Disclosure? Traps for the Unwary in Corporate Political Activity Disclosure Policies*, REUTERS (Sept. 3, 2024), https://www.reuters.com/legal/legalindustry/full-disclosure-traps-unwary-corporate-political-activity-disclosure-policies-2024-09-03/.

[104] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 366-67 (2010). *But see* Americans for Prosperity Found. v. Bonta, 141 S. CT. 2373 (2021) (holding that California statute requiring disclosure of donors to non-profit organizations impermissibly burdened donors' First Amendment rights).

[105] 800 F.3d 518 (D.C. Cir. 2015).

[106] *Id.* at 527, discussing *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985).

[107] 800 F.2d at 530.

[108] *See* Sean J. Griffith, *What's "Controversial" About ESG? A Theory of Compelled Commercial Speech Under the First Amendment*, 101 NEB. L. REV. 876 (2023).

shareholders usually vote by proxy. The company's management sends out a proxy to the shareholders. If a shareholder wants their fellow shareholders to vote on a proposal, they probably want that proposal included on the company's proxy.

An evolving body of law addresses whether a shareholder proposal can be excluded from the company's proxy consistently with SEC Rule 14a-8. Many of the relevant exclusions were either originally designed to exclude political matters or have had that effect.[109] Working through all of the exclusions and their history would be beyond the scope of this Article.

But one provision, which permits exclusion of a proposal if it "deals with a matter relating to the company's ordinary business operations,"[110] is particularly instructive. There has been a back and forth on the rule. In *Trinity Wall Street v. Wal-Mart Stores, Inc.*,[111] the Third Circuit considered a proposal that the board of directors of Wal-Mart should formulate a policy on stocking firearms in their stores. The SEC concluded that the proposal was excludable, and the Third Circuit agreed.

The court explained that the key "difficulty in this case is divining the line between proposals that focus on sufficiently significant social policy issues that transcend a company's ordinary business (not excludable) from those that don't (excludable)."[112] This distinction was intended to track the corporate law principle that managers have authority over routine business matters, and shareholders can only instruct them on extraordinary matters. The court concluded that a retailer's decision of what to stock on its shelf was too closely related to the essence of their business to transcend it. As a result, the proposal was excludable.[113]

Depending on which presidential administration is in power, the SEC's position on the "ordinary business" exclusion has shifted. The first Trump Administration sought to focus attention on whether the policy transcended the particular company's operations. The Biden Administration's approach as articulated in Staff Bulletin 14L returned to a broader perspective of whether the issue is of general importance. The second Trump Administration quickly issued new guidance in Staff Bulletin 14M that sought to redraw the line.

A central takeaway is that it is difficult to draw a clean line between ordinary operational decisions and general political policy issues. There are strong intuitions

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[109] *See* Harwell Wells, *Shareholder Meetings and Freedom Rides: The Story of* Peck v. Greyhound, 45 SEATTLE U. L. REV. 1, 31-32 (2021) (describing the SEC's efforts to tamp down on the use of the shareholder proposal mechanism to engage in civil rights activism).
[110] 17 C.F.R. § 240.14a-8(i)(7).
[111] 792 F.3d 323 (3d Cir. 2015)
[112] *Id.* at 338.
[113] Although it was successful in excluding the proposal, Wal-Mart subsequently decided to curtail its sale of firearms after a mass shooting at a store in El Paso. *See* Clare Curran, *Note, Walmart and Guns: A Case Study in Modern Corporate Governance*, 2020 COLUM. BUS. L. REV. 1071, 1103.

that some decisions are entrusted to managers and directors while other decisions involve matters as to which shareholders likely have views and ought to be allowed to give voice to them, but this is certainly contested terrain. While the rules are politically-charged, and corporations have taken shifting stances over time, shareholders themselves appear to have limited appetite for proposals that take strong ESG or anti-ESG stances. For example, a shareholder proposal opposing DEI efforts at Costco received only 1.7% support from shareholders.[114] And among numerous asset managers, support for ESG proposals has declined over time.[115]

3. Investment Law

A final body of business law addresses how investment managers handling pension or retirement funds make investment decisions. There was a high-profile regulatory back and forth in which the first Trump Administration and Biden Administration offered contrasting of guidance. Although both seemed to state that pension fund fiduciaries should be making reasoned judgments about factors that affect the financial risk or return of an investment,[116] the general lean of the guidance was very different. The first Trump era Department of Labor guidance seemed designed to create unease over considering ESG factors, while the Biden era guidance seemed designed to make people more comfortable with considering ESG factors.

Again, it is not always easy to distinguish between a political agenda and normal investing practices. Take climate change. A company's decision to move away from investments in oil and gas refining may be a political statement, but it may also be understood as an attempt to avoid a risk factor. Climate disasters could potentially cause a sudden regulatory shift against such companies. How should a regulator distinguish between an economically-focused investment decisions and one principally motivated by social and political concerns, especially when predicted returns on the investments are not materially different?

C. Labor Law's Approach

Labor law must also navigate the line between political activism and ordinary economic activities. The problem arises in at least three contexts. *First*, workers have a right under federal labor law and most state public-sector laws to engage in concerted activity for mutual aid and protection free of employer interference. In

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[114] *See* Matteo Tonello, *2025 Proxy Season Preview*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 10, 2025), https://corpgov.law.harvard.edu/2025/03/10/2025-proxy-season-preview/#more-172101.

[115] Lindsey Stewart, *Voting on ESG: A Gap Becomes a Gulf*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 12, 2025), https://corpgov.law.harvard.edu/2025/02/12/voting-on-esg-a-gap-becomes-a-gulf/#more-171581 ("Average support by 20 large U.S. firms for significant E&S shareholder resolutions . . . fell to 31% in 2024 from a 2021 peak of 54%").

[116] For an analysis supporting this understanding of investing by trustees, see Max M. Schazenbach & 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).

Eastex v. NLRB,[117] the Supreme Court upheld an NLRB order protecting a union's in-plant distribution of a newsletter to employees as part of a statutory right to communicate with its constituents at the workplace. While the newsletter advanced political positions on matters like embedding "right to work" laws in the state constitution and raising minimum wages that did not immediately affect represented employees, those issues were close enough to the concerns of workers *as workers* to enjoy protection. The Court did caution that the link could become so attenuated that the protection is lost: "There may well be types of conduct or speech that are so purely political or so remotely connected to the concerns of employees as employees as to be beyond the protection of the clause."[118] But it is for the NLRB to assess in the first instance, on a case-by-case basis.

This distinction between the "purely political" expression or activities that may have political valence but relate to worker concerns in the workplace continues to play an important role, as shown by a recent dispute involving Home Depot.[119] The NLRB deemed an employee's wearing of a "Black Lives Matter" (BLM) button in contravention of the company's uniform policy a form of protected concerted activity because it was a logical outgrowth of prior employee complaints about racial discrimination at the Home Depot and thus was sufficiently related to a workplace condition. The Eighth Circuit overturned the NLRB's decision, concluding that Home Depot's position was supported by "special circumstances" that justified impingement on the employee's self-expression.[120] Among other things, the court emphasized that Home Depot had offered the employee the option of wearing a button that showed support for racial equity without being "politically controversial,"[121] that it had similarly prohibited "Blue Lives Matter" buttons,[122] and that there were specific safety concerns at the employee's location given its proximity to the site of George Floyd's murder.[123]

Second, a union's ability to insist, to the point of impasse, that the employer bargain in good faith on an issue depends on whether the issue is a mandatory,

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[117] 437 U.S. 556, 568 (1978).
[118] *Id.* at 570 n.20. While labor law tends not to forbid or withdraw protection from otherwise protected activities because of their political dimension, it also does not authorize otherwise prohibited activities due to their political dimension. *See* Int'l Longshoremen's Assoc., AFL-CIO v. Allied Int'l, Inc., 456 U.S. 212 (1982) (holding that longshoremen's refusal to unload Soviet cargo as part of a protest amounted to a secondary boycott, which is an unfair labor practice).
[119] Home Depot USA, Inc. and Antonio Morales Jr., 373 NLRB No. 25 (Feb. 21, 2024).
[120] Home Depot USA, Inc. v. NLRB, 158 F.4th 910, 922-24 (8th Cir. 2025).
[121] *Id.* at 921.
[122] *Id.*
[123] *Id.* at 922-23.

permissive, or illegal subject of bargaining.[124] Political matters tend to straddle the lines between these categories. Some matters directly implicate working conditions and benefits and thus fall within the mandatory category. Coverage for reproductive care, a possible medical care benefit, likely falls within this category. Other matters would seem to fall within entrepreneurial control of the business, such as the company's branding and its corporate reorganization goals, and thus are at most a permissive category; the employer is not required to bargain but a contractual provision on the subject would be lawful. If, say, a company's managers want to bid for contracts for a weapons development project, that is probably not a subject they are required to negotiate with the union (because it is a decision about which area of business to get into), even if workers have passionate views on the subject.

Third, dissident workers enjoy a measure of protection against being compelled to support union political activities. In *Janus v. AFSCME*,[125] the Supreme Court held that public-sector unions were "inherently political" and laws requiring dues or equivalent agency fees from objecting represented employees violated their freedom of speech and non-association. The courts have been forced to draw finer distinctions in the private-sector context. In *Communications Workers of America v. Beck*,[126] the Supreme Court concluded that, to avoid constitutional issues, the NLRA would be interpreted so that unions could only charge fees and dues that were necessary in "performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." Because it requires a line to be drawn between political activities and ordinary union activities, substantive distinctions are inevitable in this context. Use of union funds for contributions to a political candidate or a political action committee is not chargeable to objectors. But are expenses incurred organizing other workers or lobbying for legislation that may benefit labor in the large but not necessarily unit employees chargeable expenses?

Other contexts that raise this issue are union dissemination of leaflets announcing controversial political positions, participating in political protests offensive to some represented employees, engaging in, leading, or condoning in-plant job actions to promote foreign affairs issues, or filing grievances on employer attempts to depoliticize the shop do not involve the level of expenditures that would trigger *Beck* scrutiny.[127]

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[124] *See First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). *See generally* Michael C. Harper, *Leveling the Road from Borg-Warner to First National Maintenance: The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447 (1982).

[125] 585 U.S. 878 (2018).

[126] 487 U.S. 735, 762-63 (1988).

[127] *See* Caylie Tuerack, *The Interplay Between the Rise of Political Unionism and a Union's Duty of Fair Representation: A Case Study of the Jewish Experience Post-October 7th* (2025) (unpublished manuscript on file with authors).

D. Two Paths Forward

This Subpart moves beyond existing decisional law to sketch two alternative approaches to defining political activism and distinguishing it from ordinary economic decisions. First, it suggests a strategy-based approach that would focus on the manner in which an activity is meant to advance members' economic interests. Some political activities directly advance policies that serve workers' or shareholders' economic interests, while other political activities are part of a more complex and attenuated strategy. Second, it suggests a harm-based approach that would focus on the precise harms to dissenters of a particular activity.

1. A Strategy-Based Approach

One approach might focus less on the content of the political activity and more on the strategy behind it. An organization can act directly, say, by supporting a policy that would advance members' economic interests if adopted. It can act more indirectly, as when political activity strengthens the organization by improving its standing with its members. Or it can act in a more attenuated way, by seeking to make the organization more popular with outsiders. As an organization's strategy drifts away from directly advancing economic interests, it becomes more problematic.

First, some political activities support policies that would directly make members better off economically. For example, if a union advocates for legislative or administrative action promoting stronger workplace safety standards and ensuring their implementation, members directly benefit even if other employees (not constituents of the union) may also benefit. Similarly, if a corporation advocates lower taxes on profits, shareholders directly benefit. For this kind of political activity, the audience is a public official and if the public official acts in the requested manner, shareholder will see direct benefits even though shareholders in other firms will as well.

This kind of political activity is relatively unproblematic. Although a member might abhor being compelled to be associated with a political activity they disagree with, the compulsion is no more serious than when leaders push any other bargaining or business strategy likely to redound to the direct benefit of most constituents. It is a cost of collective representation. And while unions and corporations may be engaging in political activity also to advance their personal or ideological interests, if the benefits of the political activity will accrue to constituents, the leader's motivation is largely irrelevant. Even if a union's urging passage of higher minimum wage laws may not immediately benefit members, it is not implausible that over time it will increase the union's bargaining leverage; in many work settings, the wage for hourly workers is often considered as a multiple of the minimum wage. A deferential "business judgment" rule should apply in such situations.

Second, some political activities may be intended to make the union or corporation more appealing to their own members, shareholders, or customers. This kind of activity could strengthen solidarity, which could bolster bargaining leverage and thus could yield economic value. But it runs the risk of alienating some members and political leaders. If the Teamsters had endorsed Donald Trump in the 2024 election, it may have made a majority of its members happy, but at the cost of infuriating a significant minority of members along with Democratic allies.[128] Similarly, many corporations have made statements on ESG issues that appeal to many investors but displease others.[129] Although this type of activity might deliver value to the overall organization, it also effectively transfers value from minority members who disagree with the stated position, to majority members who agree. This would be unproblematic if minority members could easily exit or use voice, but as discussed below, exit and voice options are often quite limited.[130]

Compelled-affiliation problems are more serious here, as members are in effect being conscripted into supporting a position they disagree with for reasons that do not directly advance their own interests. Because the activities are directed at subgroups within the organization, rather than the members' shared interest, there is also a heightened potential that incumbent leaders will use this type of positioning to strengthen their hand against internal challengers, effectively diverting value to themselves. If Teamsters president Sean O'Brien's decision to speak at the Republican National Convention in 2024 was popular among a small majority of members, it could help him personally in his efforts to retain his leadership position even if it damaged the union's support among important allies. Similarly, faced with activist pressure and the threat that they personally will be replaced,[131] some corporate leaders might make the calculation that ESG positioning is worthwhile even if it has no or negative impact on the value of the overall enterprise. As corporate law generally recognizes, corporate leaders have powerful reasons to entrench themselves, and any strategy that could have an entrenching effect must be evaluated with skepticism.[132]

Finally, political positioning may improve economic strength primarily by appealing to outsiders. A union might adopt a progressive position on a foreign

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[128] *See* Weisman, *supra* note 75 (noting that a substantial minority, and perhaps majority, of Teamsters supported Harris).

[129] Kovvali, *Stark Choices*, *supra* note 10 at 759-60 (describing backlash to ESG).

[130] *See infra* Part III.

[131] This is not a purely hypothetical possibility. Engine No. 1 successfully replaced directors at ExxonMobil in 2021. *See* Anna Christie, *The Agency Costs of Sustainable Capitalism*, 55 U.C. DAVIS L. REV. 875, 920-21 (2021).

[132] *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985) (describing "omnipresent specter that a board may be acting primarily in its own interests" when resisting a pending takeover bid and imposing "an enhanced duty which calls for judicial examination").

conflict not because a progressive resolution of the conflict would directly advance the members' economic interests or because a majority of present members are meaningfully invested in a particular outcome, but because the position is popular with the young, educated, and politically engaged workers who are activists in the organization, perhaps likely prospects for future organizing, or perhaps likely partners for future alliance. Similarly, a corporation might adopt a controversial position on a relatively new or tangential topic to tap into investor or consumer excitement.

The target audience can increase the risk of miscalculation, as leaders may seriously misjudge the opportunities and risks from playing to outsiders. Bud Light's relatively trivial gesture of support to transgender influencer Dylan Mulvaney, followed by its retreat in the face of major opposition, seriously damaged the brand without generating meaningful new support.[133] Greater skepticism may often be appropriate with respect to this kind of strategy, though there may be some exceptions where political activities directed at outsiders are plainly value-additive.

2. A Harm-Based Approach

A separate approach might focus on the nature of the harm involved. Decision-makers could be alert to specific dangers and apply greater skepticism when those dangers are heightened. *First*, there is the threat of compelled affiliation. An individual worker or investor may suffer injury if they are forced into an affiliation with a political position with which they fundamentally disagree. A union-represented worker might profoundly disagree with positions taken by their union, and a worker might disagree with positions taken by their employer. An investor might profoundly disagree with positions taken by the financial intermediaries that deploy their capital, or with positions taken by companies that use their capital. An employer may also be associated with stances taken by a union that represents their workers.[134]

Some of these concerns can operate in the opposite direction, though there they may be better understood as business problems than affiliative problems. A worker who takes a controversial political stance may create problems for their employer if the expression or activity interferes with the workplace environment, even if the

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[133] *See supra* notes 45 to 46 and accompanying text.

[134] For example, Starbucks brought a trademark suit against the SEIU and others alleging that their use of Starbucks branding was damaging the company, particularly in light of "social media posts in support of violence in Israel." Starbucks Corp. v. Service Employees International Union, No. 3:23-cv-00068-SHL-SBJ (S.D. Iowa) (filed Oct. 18, 2023; terminated Feb. 3, 2025), https://storage.courtlistener.com/recap/gov.uscourts.iasd.85481/gov.uscourts.iasd.85481.1.0.pdf; *see also Starbucks Condemns Acts of Terror, Files Complaint Against the Union to Defend Partners and Company*, STARBUCKS (Oct. 18, 2023), https://one.starbucks.com/get-the-facts/workers-united-does-not-speak-for-starbucks/.

worker is off the clock when they speak or act. The worker may also create problems for their union, which is legally obligated to provide them fair representation in any disciplinary proceeding.[135] And in some cases, the political activities of an important shareholder can create a marketing problem for a company.[136]

The concern might be understood broadly or narrowly. If an employer hangs an obnoxious political banner inside a private workplace, it may cause some workers discomfort. But it likely does not cause a compelled-affiliation problem—associating the objecting worker with speech they disagree with. Hanging the same banner on a public entrance to the business might have a different impact, as it could suggest to the public that the workers inside agree with the message. And if the employer pressures workers to engage in desired political activities on the employer's behalf under threat of termination, the compelled-affiliation may be more extreme.[137] The concern might also be understood to embrace both economic and personal dimensions, as affiliation (or perceived affiliation) can cause economic harms as well as moral or emotional disquiet.

The intensity of the activity can also affect its character. Hanging an obnoxious banner for a limited period may simply be an annoyance that creates only a moral or emotional harm, but relentless badgering over the same political issue can cross the line into harassment that registers as an economic harm. This distinction is familiar from the law of sex discrimination, which recognizes that conduct that is sufficiently severe and pervasive can become actionable harassment. This type of harm is more likely to arise in the workplace context than in the investing context. While a worker must generally be present in a workplace on a daily basis and must deal with coworkers and managers who have enormous ability to make the worker's life unpleasant, an ordinary investor simply does not have a relationship with the corporation that can be abused in this way.

Second, political activism presents an agency problem. As noted, political activities might be a sensible strategy to advance economic interests—unions might use political posturing to obtain benefits for workers or support organizing, and

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[135] Indeed, in an environment where a state "right to work" law applies and bans any requirement to pay dues, the union may still be the exclusive bargaining representative who owes a statutory duty for fairly represented all workers in the unit, whether dues- paying members or not. Nevertheless, in such circumstances the union may as a practical matter no longer fully represent the non-member's welfare.

[136] Elizabeth Culliford, *SoulCycle, Equinox Face Boycott Calls Over Investor's Trump Fundraiser*, REUTERS (Aug. 7, 2019), https://www.reuters.com/article/business/soulcycle-equinox-face-boycott-calls-over-investors-trump-fundraiser-idUSKCN1UY00K/; Jack Ewing, *Elon Musk's Politics May Be Pushing Some Buyers Away From Tesla*, N.Y. TIMES (July 2, 2024), https://www.nytimes.com/2024/07/02/business/elon-musk-politics-tesla-sales.html.

[137] *See* HERTEL-FERNANDEZ, *supra* note 20 at 4, 18-21 (describing strategies for "employer mobilization of workers").

lobbying is of course a viable strategy for enhancing profits. But various actors may be pursuing a personal political agenda at the economic expense of workers and shareholders.[138] A union leader might adopt a political position not because it is in the economic interest of represented workers, but because the position will help the leader to personally ingratiate themselves with politicians, celebrities, or the media or simply advance the leader's political or other personal agenda. Similarly, corporate leaders might take political stances not because they advance shareholder financial interests, but because the stances are useful to them personally.[139]

Apart from situations of overt self-dealing by leaders, it can be challenging to define the agency problem. Should a corporate manager pursue shareholders' financial interests even when shareholders themselves would prefer otherwise? Similarly, should union leaders pursue workers' economic interests even when members themselves would make different choices? The issue has been a matter of concern in the corporate law space.[140] And it is increasingly salient also in the labor law space, as many blue-collar workers seem inclined to support political leaders and parties that have not been supportive of the legal or policy positions of union leadership.[141] There is also an analogous problem where employers can impose costs on workers by requiring their participation in political activities contrary to their own politics.[142]

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[138] *See* Jonathan R. Macey, *Agency Costs, Corporate Governance, and the American Labor Union*, 38 YALE J. ON REG. 311 (2021) (discussing agency problems within unions and developing analogy to agency problems within corporations); Eitan Hersh & Sarang Shah, *Who Wants Stakeholder Capitalism? Public and Elite Perceptions of the Role of Business in Politics*, Working Paper (Aug. 22, 2023) (finding that business elites are more enthusiastic than the general public about corporate involvement in political issues).

[139] *See* Michal Barzuza, Quinn Curtis & David H. Webber, *The Millennial Corporation: Strong Stakeholders, Weak Managers*, 28 STAN. J. OF L., BUS. & FIN. 255, 284-85 (2023) (noting that a corporate CEO may have a strong interest in avoiding ESG-related scandals, even if shareholders are indifferent).

[140] *See* Ann Lipton, *What We Talk About When We Talk About Shareholder Primacy*, 69 CASE WESTERN RES. L. REV. 863, 865-66 (2019) (noting that "institutional investors made it known that their actual preferred outcomes often diverged from the ones predicted by corporate theory," which "has prompted a round of corporate soul-searching").

[141] *See* Weisman, *supra* note 75 (describing internal polling by the Teamsters); Camille Von Kaenel, *California Firefighters Consider Bucking National Union on Harris*, POLITICO (Oct. 9, 2024), https://www.politico.com/news/2024/10/09/california-firefighters-union-harris-00182991 ("While [union] leadership trends Democratic because of the party's history of pro-union policies, members have been trending Republican for decades, in line with other demographic markers like gender and socioeconomic status.").

[142] For example, suppose that a manager displays an obnoxious political banner in the workplace. The decision might destroy value because the manager's increased enjoyment from having the banner in place is less than the workers' decreased personal utility. But the banner may remain up if workers lack effective tools to force the manager to internalize the harm they are causing. Employers have also directly pressured and encouraged employees to engage in political activities on their behalf. *See* HERTEL-FERNANDEZ, *supra* note 20 at 4, 18-21. Because employers often enjoy economic power over

Third, activism may generate substantive problems due to a mismatch between the institutions and political causes. Labor unions are designed to advance interests of workers within, and sometime across, particular bargaining units, not the health of the overall economy or society.[143] Similarly, the structure and governance of corporations tends to focus their leaders on shareholder profit maximization even if at the expense of the larger interests of society. For better or worse, these organizations are not usually established, and their leaders are not particularly competent, to evaluate and promote general social welfare.

III. Limited Exit Options of Shareholders and Workers

This Part traces the challenges that shareholders and workers would have in exiting corporations and unions that advance a political agenda they disagree with. These challenges vary in relative strength. An investor who directly owns a small number of shares in a public corporation as part of a diversified portfolio may have little difficulty in selling their stake. By contrast, a worker cannot easily exit their employment. But even investors face challenges. Subpart A examines the limited exit options of most investors. Subpart B turns to the challenges faced by workers who are uncomfortable with the direction taken by their union or employer. Subpart C seeks to contrast the key problems faced by shareholders and workers.

A. Shareholders

Shareholders face several challenges in exiting a corporation when they disagree with its political activities. First, shareholders may not have adequate information to detect when the corporation is doing something that they disagree with. Second, an investor may have few meaningful alternatives as corporate managers generally may adopt similar positions. Third, investors may not deploy their capital directly, meaning that they lack the ability to make direct choices about which companies to invest in and how any shares should be voted. These indirect investors may also be locked in if their assets are in retirement accounts, either

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workers, there is a real threat of compulsion in the space. *See id.* at 25-27. This can be a problem even if the employer has good business reasons for enlisting workers in the political activity. E.g., Novosel v. Nationwide Ins. Co., 721 F.2d 893 (3d Cir. 1983) (requiring employees to join campaign to defeat pending no-fault accident measure). On the general claim of employee personal autonomy with respect to political activities, see RESTATEMENT OF EMPLOYMENT LAW § 7.08 (2015).

[143] One arguable example is the International Longshoremen's Association's long battle against port automation. *See* Joe DeManuelle-Hall, *Longshore Deal Secures New Automation Language and Big Pay Bump*, LABOR NOTES (Jan. 10, 2025), https://labornotes.org/2025/01/longshore-deal-secures-new-automation-language-and-big-pay-bump (describing deal regarding automation of East and Gulf Coast ports). Some labor law provisions recognize the potential disconnect between the private interests of unions and the health of the broader economy, authorizing government to impose terms in the event of a dispute causing significant economic spillover effects. *See* 29 U.S.C. §§ 176-79 (provision of Taft-Hartley Act permitting the president to intervene in certain strikes that threaten to create a national emergency); 45 U.S.C. § 160 (provision of Railway Labor Act establishing procedure for emergency resolution of disputes).

because the accounts are linked to an employer or because they are unable to withdraw easily without paying tax penalties. Finally, exiting investors will incur economic costs if they sell shares at inopportune times.

1. Disclosure

Investors cannot exercise exit or voice rights to discipline corporate political activities without reliable information about those activities. Some corporate political activities are public. A company might seek to publicly position itself as conservative or progressive in an attempt to win support from government officials, investors, or consumers. Such positioning is obviously potentially visible to investors, though the information may be difficult or expensive to collect and compare across a large number of firms. Corporations and corporate leaders may also be required to disclose some information that attentive analysts can use to draw inferences.[144] And corporations sometimes disclose information without a legal mandate, either purely voluntarily or as a result of pressure from institutional investors, though the quality of these disclosures varies dramatically from corporation to corporation.[145] Various laws also regulate or prohibit other corporate political activities, such as direct contributions to candidates,[146] with political expenditures funneled through trade associations and political action committees (PACs) reducing the likelihood that corporations will engage in political activities of without the knowledge of most of their shareholders.

Shareholders have also taken other approaches to encourage transparency. Shareholder proposals on corporate disclosure of political activities are relatively common.[147] These proposals tend to focus on the twin themes of surfacing the corporation's activities and identifying areas where the corporation's activities are not aligned with its stated values. And the considerable number of shareholder proposals on these topics may understate the level of shareholder support and management acquiescence on these topics, as complaints are often settled by

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[144] *See, e.g.*, Reilly S. Steel, *The Political Transformation of Corporate America*, 2001-2022 (Mar. 19, 2025) (using campaign contributions by corporate directors and executives to draw inferences about shifting political preferences).

[145] The variation in these disclosures has led to the creation of the CPA-Zicklin Index of Corporate Political Disclosure and Accountability, which evaluates their quality. *See CPA-Zicklin Index: A Focus on Transparency*, CTR. FOR POLITICAL ACCOUNTABILITY (last accessed June 7, 2025), https://www.politicalaccountability.net/cpa-zicklin-index/

[146] *See* Richard Briffault, *The Surprising Survival—So Far—of the Corporate Contribution Ban*, 3 U. CHI. BUS. L. REV. 397, 398-99 (2024).

[147] Subodh Mishra, *Corporate Political Activity Disclosures: A Continued Priority for Investors and Companies*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 12, 2024), https://corpgov.law.harvard.edu/2024/11/12/corporate-political-activity-disclosures-a-continued-priority-for-investors-and-companies/ ("Over the past decade, shareholder proposals focused on political activity transparency have consistently ranked among the highest in volume among proposals submitted at U.S. companies").

management agreeing to the disclosures without insisting on a full contest. While this can plug some gaps, it ultimately requires majority support at each corporation (making it a limited tool for protecting the interests of dissenting minority shareholders) and it does not necessarily result in standardized disclosures that shareholders can realistically act on. It is also possible that shareholder proposals will see a retrenchment, as some corporations have become exceedingly aggressive in fighting them off.[148]

Mandatory disclosures and limits are more promising on this front. But the haphazard nature of current disclosure requirements and limits means that current disclosures have important blind spots, especially if corporations use intermediaries like industry groups or charities to disguise their political positioning.[149] Congress has repeatedly acted to prevent the SEC from remedying this problem by mandating comprehensive political disclosures.[150] As a result, an investor may not have the information required to evaluate whether a corporation's political activities are consistent with the investor's values.[151] This undermines the utility of exit and voice options.

2. "Herding"

A separate problem relates to herding by corporate leaders, as leaders at different firms often choose the same path. Investors who object to political activities writ large are unlikely to find a corporation that fits their preferences.[152] And if every corporation simply follows the herd on political topics, shareholders are denied meaningful choices on the substance of those activities: A shareholder who disagrees with a corporation's political stances can sell their shares, but if they are unable to reinvest their capital in an otherwise-comparable corporation with different political stances, they lack a meaningful exit opportunity. This type of problem is not unique to political activism. A shareholder who thinks that artificial intelligence (AI) applications have are of limited utility or socially damaging would have trouble finding a major technology company that reflects their views. But there are several reasons for concern about herding in the political domain.

First, variation on political positions across corporations may be suppressed by asset managers who have their own political agenda and sufficient economic power

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[148] Exxon Mobil sued two proponents of a climate-related proposal in the Northern District of Texas and attempted to push the lawsuit forward even after the proposal was abandoned. *See* Exxon Mobil Corp. v. Arjuna Capital, LLC, 737 F. Supp. 3d 444, 446 (N.D. Tex. 2024) (dismissing action only after proponent "'unconditionally and irrevocably' promised to stop submitting similar proposals").

[149] *See* Bebchuk, Jackson, Nelson & Tallarita, *supra* note 103 at 5 & n.15 (2020).

[150] *Id.*

[151] Of course, an investor may not experience psychic distress if they never find out that a corporation they have invested in has supported a political position that they disagree with. But the moral and economic harms would remain real, and investors would have no way to address them.

[152] Sachs, *Opt-Out*, *supra* note 1 at 841-42.

to implement it. Because of their enormous holdings, BlackRock had the power to push its preferred climate policies and State Street had the power to push its position on gender diversity across an enormous swath of corporations.[153] This effect is also present for more commonplace corporate governance matters.[154] But it may be more pronounced for political activities. Political activism can have low economic stakes for many corporations, so asset managers may not perceive a real need to undertake a careful and individualized analysis before adopting and enforcing a position at the companies they own or manage. Instead, they may be driven by their own personal preferences. The leader of BlackRock, for example, may enjoy personal benefits from being seen as a thought leader on climate change, may use positioning on ESG issues as a way to fend off intrusive regulation, or may use ESG stances to try to differentiate themselves from competitors.[155]

Second, corporate political activism may be prone to cycles and fads. Corporate leaders may tend to take the same approach or follow the same trends as their peers at other companies in their industry or sphere of comparison. Again, this phenomenon is not unique to political activism.[156] But a belief that the economic stakes are low may cause corporate leaders to simply jump on a bandwagon without careful reflection or analysis. There is also the potential for a reinforcing cycle as a corporation that fails to join a cause supported by its peers may be treated as a laggard and targeted by activists.[157] The net effect of these forces may be to lead corporate leaders to conform, reducing the range of opinions expressed through corporate political activism.

Finally, corporate leaders may tend to act publicly only on issues where they perceive a high degree of consensus among economically relevant actors. If they believe that an issue is controversial, they may conclude that the costs or risks of a

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[153] *See* Barzuza, Curtis & Webber, *supra* note 36 at 1248-49 (noting that index funds like BlackRock and State Street have insisted on minimum gender diversity on corporate boards and have used their voting power to secure results on these issues); Kovvali, *Stark Choices*, *supra* note 10 at 719-21 (collecting examples of index fund influence).

[154] Zohar Goshen & Doron Levit, *Agents of Inequality: Common Ownership and the Decline of the American Worker*, 72 DUKE L.J. 1, 9-10 (2022) (index funds suppress normal variation in corporate governance); Neil Whoriskey, *The New Civil Code: ISS and Glass Lewis as Lawmakers*, CLS BLUE SKY BLOG (July 28, 2020), https://clsbluesky.law.columbia.edu/2020/07/28/cleary-gottlieb-discusses-the-new-civil-code-of-iss-and-glass-lewis/ (proxy advisor recommendations are so influential on governance matters that they effectively make law); Kovvali, *Stark Choices*, *supra* note 10 at 721-23 (describing campaigns over staggered boards and dual class shares).

[155] *See* Barzuza, Curtis & Webber, *supra* note 36.

[156] For example, for a brief period numerous companies were eager to claim real estate in the "metaverse," a virtual reality domain being constructed at enormous expense by Meta. *See* Eric Ravenscraft, *What is the Metaverse, Exactly?*, WIRED (June 15, 2023), https://www.wired.com/story/what-is-the-metaverse/

[157] *See* Jill E. Fisch & Jeff Schwartz, *How Did Corporations Get Stuck in Politics and Can They Escape?*, 3 U. CHI. BUS. L. REV. 325, 342-43 (2024).

position outweigh the potential opportunities from staking out a strong stance.[158] This point is slightly different from uniformity across firms or the presence of fads. An executive may be indifferent to pressure from investors or peers, but attentive to the concern that some set of customers will react extremely negatively to particular political stances.[159]

Of course, these mechanisms may have salutary systemic effects. If corporations uniformly adopt a good position, it may lead to good outcomes, and mechanisms that tend to enforce conformity can be helpful. But the mechanisms do suggest that a dissenting shareholder who sells their shares in a corporation may struggle to find another corporation with a different political position.

3. Separation of Ownership from Ownership

A third challenge relates to the nature of stock ownership in the United States. Many retail investors do not own shares directly. Instead, they own units of funds offered by asset managers, often within tax-advantaged accounts intended to support saving for retirement or education. The funds in turn own shares, which are handled by the asset manager. This means that a retail investor has limited choice about how their capital is deployed, and little incentive even to learn where exactly their money has been invested.[160] If they are investing through an employer's retirement plan, they may only have a limited menu of options offered by a narrow set of asset managers. And once the capital is invested with a particular fund, they have essentially no control over the fund's voting practices or whether the fund moves capital from one corporation to another.

This "separation of ownership from ownership"[161] complicates any claim that investors can freely exit their position in a corporation that engages in political activities they disagree with. An investor may have few ways to avoid committing their capital to a particular corporation, especially if the corporation is large and is included in prominent indices like the S&P 500, because the corporation's shares will be included in all available funds. An investor may also be uninformed as to the

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[158] *See* Kahan & Rock, *supra* note 28 at 123-24 (identifying lack of consensus as a cost of corporate welfarism). Corporate efforts to focus on uncontroversial issues can deny investors meaningful choices through other mechanisms. A corporation that focuses on the uncontroversial goal of keeping its tax bill low may end up supporting candidates who embrace a wide variety of other views, making it impossible for an investor to discern a coherent position on other topics. If all corporations pursue this type of goal, an investor will find it difficult to place their money with a corporation that aligns with their values. Sachs, *Opt-Out*, *supra* note 1 at 842-43.

[159] *See* Kahan & Rock, *supra* note 28 at 123-24. For an example of this, consider the example of Bud Light's decision to court support from trans influencer Dylan Mulvaney. *See supra* notes 45 to 46 and accompanying text.

[160] *See* Elizabeth Pollman, *Citizens Not United: The Lack of Stockholder Voluntariness in Corporate Political Speech*, 119 YALE L.J. ONLINE 53, 56 (2009)

[161] Strine, *Who Bleeds*, *supra* note 19 at 1873.

holdings of funds, as many funds send confusing signals about the companies they hold and the investing strategies they employ.[162] An investor may also have little or no ability to determine how votes are cast at various corporations, even when it is their capital at risk. An investor may also face challenges in attempting to exit the game entirely, if it involves selling shares at the wrong time or incurring penalties.[163]

At the same time, investors who deploy their capital in this way may be somewhat shielded from the problems of corporate political activity. An investor who is not even aware that their investments include economic exposure to a corporation's performance will not feel any emotional injury from the corporation's political activities. But, of course, if the corporation's political activities harm its economic prospects, the investor will feel the impact.

4. Economic Impact

Finally, an investor's ability to exit a corporation by selling shares comes with real economic limitations and costs. First, even if investors can exit a corporation by selling shares, the terms of the sale may be affected by the corporation's political activities. The corporation's profitability will be affected if the corporation takes a politically unpopular stance that damages its relationships with customers or regulators or if it undertakes an expensive political campaign without corporate benefit. As a result, a shareholder who is determined to exit from a corporation in these circumstances will only receive a discounted price when they sell.[164] In addition, a simple sale does nothing to compensate the stockholder for past political spending.[165]

Of course, as exit frictions go, this set of problems may be less impactful. Ordinary corporate governance mechanisms strongly encourage directors and officers to avoid any course of action that would significantly depress share prices. In addition, only certain corporate political activities are likely to affect the corporation's share price. An individual shareholder may disagree with the corporation and be

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[162] *See* Peter Molk & Adriana Z. Robertson, *Discretionary Investing by 'Passive' S&P 500 Funds*, 41 YALE J. ON REG. 248 (2024); Aneil Kovvali & Yair Listokin, *Valuing ESG*, 49 BYU L. REV. 705, 707-09 (2024); Adriana Z. Robertson, *Passive in Name Only: Delegated Management and 'Index' Investing*, 36 YALE J. ON REG. 795 (2019). *But see* Jill E. Fisch & Adriana Z. Robertson, *What's in a Name? ESG Mutual Funds and the SEC's Names Rule*, 96 S. CAL. L. REV. 1417 (2024) (funds with ESG in their name do appear to offer a meaningfully different product from other funds); Curtis, Fisch & Robertson, *supra* note 33 at 395.

[163] Strine, *Who Bleeds*, *supra* note 19 at 1878-79 ("[O]nce funds are invested in a 401(k) plan, the funds are out of their effective reach until they reach age fifty-nine and a half. To withdraw before that time subjects the worker to Castro-like expropriation in the form of confiscatory taxes."); Jonathan Macey & Leo E. Strine, Jr., Citizens United *as Bad Corporate Law*, 2019 WIS. L. REV. 451, 510-11.

[164] *Cf.* Lucian Arye Bebchuk, *Limiting Contractual Freedom in Corporate Law: The Desirable Constraints on Charter Amendments*, 102 HARV. L. REV. 1820, 1828 (1989) (making this point in the context of value-destroying charter amendments).

[165] Pollman, *Citizens Not United*, *supra* note 155 at 56.

unwilling to hold its shares even at a price that reflects its economic and financial value, but that will not be the reaction of most other investors whatever their political outlook.[166] As a result, an unpopular political stance will not affect the corporation's share price unless it affects the corporation's profitability.

Second, an investor who sells a corporation's shares to avoid participating in the corporation's political activities also loses the ability to participate in the corporation's economic activities. A corporate manager's ability effectively to "bundle" economic and political activities into a take-it-or-leave-it package can operate as a tax on investors who have disfavored political views, particularly if the corporation has special economic prospects.[167] This problem is especially pronounced in the modern American economy, where several large corporations operate without meaningful competition. An investor has only one way to invest in the dominant online retailer (Amazon), the dominant search engine (Alphabet), or the dominant designer of artificial intelligence chips (Nvidia), and must accept their political activities as a part of the price of access to valuable economic opportunities.

B. Workers

As mentioned, significant legal safeguards are available to limit the "compelled affiliation" concerns of represented workers. These include the right to quit membership in the union at any time; the *Beck* right to obtain a rebate of union funds used for activities not "germane" to the union's collective bargaining and grievance adjustment functions; and the labor law right of represented employees, if the union loses majority support, to decertify the union altogether. In "right to work" states, workers cannot be required to pay union dues or fees at all. In addition, public sector workers who quit the union have a First Amendment right under *Janus* not to have to pay union dues or fees as a condition of obtaining or keeping their jobs. Apart from workers' exit rights, unions also have an implied statutory duty of fair representation (DFR) to fairly represent all employees in the bargaining unit, even if they are not union members or dues-payers.

There are several important limits to this set of protections. First, outside of "right to work" states, dissenting workers in private companies can be required by a collective bargaining agreement to pay union dues and fees, subject to their *Beck* right to a rebate of non-chargeable expenditures.

Second, represented employees have to resign from membership in the union to assert their *Beck* or *Janus* rights. As non-members, they are not entitled to certain important participation rights, like voting on strike authorization and contract

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[166] Aneil Kovvali, *ESG and Securities Litigation: A* Basic *Contradiction*, 73 DUKE L.J. 1229 (2024).
[167] *Cf.* Brudney, *supra* note 18 at 264-65; Sachs, *Opt-Out*, *supra* note 1 at 827 (noting that there is a "general problem" that "occurs when the economic power to control access to significant economic opportunities is deployed to secure political support for the economic actor's political agenda").

ratification. In addition, although unions have a legal duty of fair representation to workers, some unions as a practical matter may not be particularly attuned to the welfare of non-members and *Beck* objectors especially when it comes to deciding whether to file a grievance on their behalf or aggressively pursue it.[168]

Third, even if the workers are not paying dues – in the private sector, for non-chargeable expenditures – they are still subject to exclusive representation by the union in collective bargaining or grievance adjustment. The NLRA, the Railway Labor Act, and federal and state public sector laws generally provide that the employer may not deal with individual employees if such dealings are inconsistent with the collective labor contract or otherwise undermine the collective representative. The Supreme Court has sustained state laws against constitutional challenge that provide for exclusive union representation even in "meet and confer" sessions over matters that do not trigger a statutory duty to bargain.[169]

Fourth, *Beck* and *Janus* rights do not reach union activities that do not consume significant financial resources, like endorsing candidates, enlisting workers in promoting campaigns, passing resolutions, joining protests, forming alliances with political groups, or resisting employer efforts to de-politicize a workplace. Also, the union's DFR, as presently conceived, is generally triggered only when the union is exercising its exclusive representation functions.

C. Contrasting Problems

This Subpart contrasts two categories of problems faced by shareholders and workers. First, it examines problems with disclosures that might prevent shareholders and workers from identifying areas of disagreement or finding organizations better aligned with their values. Second, it evaluates differences in shareholders' and workers' ability to exit.

1. Disclosures

Unions[170] representing workers in the private sector and federal government are required to disclose on publicly available U.S. Labor Department forms

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[168] In some cases, the union may allow the non-member to access the arbitration process, but this would be at the grievant's cost and unless the non-member's consent is required to appoint an arbitrator, the grievant would not be likely to fare well in the arbitral proceedings.

[169] Minn. Bd. Commun. For Colleges v. Knight, 465 U.S. 271, 291-92 (1984) ("The goal of reaching agreement makes it imperative for an employer to have before it only one collective view of its employees when 'negotiating.' Similarly, the goal of basing policy decisions on consideration of the majority view of its employees makes it reasonable for an employer to give only the exclusive representative a particular formal setting in which to offer advice on policy.").

[170] Union (and corporate) contributions to federal election campaigns are prohibited unless part of a "get-out-the vote" campaign or made to a "separate segregated fund to be utilized for political purposes". 11 C.F.R. §§114.2(b); 114.1(a)(ii) & (iii). *See* Briffault, *Surprising Survival*, *supra* note 141;

significant expenditures in support of political candidates or political committees or "to advance the passage or defeat of existing or potential laws or the promulgation of any other action with respect to rules or regulations (including litigation expenses)."[171] But in *Citizens United v. Federal Election Commission*[172] the Supreme Court struck down on First Amendment grounds federal limits on corporate independent expenditures, electioneering communications, or other speech that expressly advocates the election or defeat of a federal candidate without coordination with the candidate's campaign. There is no reason to think *Citizens United*'s holding would not apply to unions' independent political expenditures. State and local laws limiting independent political expenditures by corporations and unions would also contravene First Amendment strictures. The Court in *Citizens United* made clear, however, that disclaimer and disclosure requirements were facially constitutional.[173]

As discussed above, the corporate landscape is more of a tangle, as shareholders often lack access to consistent and reliable information about a corporation's political activities. Insisting on disclosure, along with a clear explanation of how any private lobbying activities align with the corporation's public positions, would facilitate shareholders' efforts to exit corporations that engage in political activities that they disapprove of.

2. Exit Rights

As an underlying economic matter, workers likely have less ability to escape an employer than shareholders to sell their shares in a corporation. A typical shareholder has a relatively small stake in a public corporation and can easily sell their shares at prices that reflect the corporation's current value.[174] While mismanagement at a corporation might reduce the corporation's share price, making exit less attractive, a typical corporation's social and political profile is unlikely to have this effect. In addition, investors can redeploy capital to a broad range of enterprises and can place it at an enterprise that is better aligned with their values.

Richard Briffault, *The Uncertain Future of the Corporate Contribution Ban*, 49 VAL. U. L. REV. 397 (2015).

[171] U.S. Dep't of Labor, Instructions for Form LM-2 Labor Organization Annual Report. Schedule 16 – Political Activities and Lobbying 26 (Nov. 20, 2010).

[172] 558 U.S. 310 (2010).

[173] "Disclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities'. The Court has subjected these requirements to 'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirements and a 'sufficiently important' government." *Id.* at 366-67 (citations omitted). The Court further noted that "as-applied challenges would be available if a group could show a 'reasonable probability' that disclosure of its contributors' names 'will subject them to threats, harassment, or reprisals from Government officials or private parties.'" *Id.* at 367.

[174] A shareholder with a larger stake may have more difficulty exiting, but should find it easier to use voice to influence corporate policy and bring it into alignment with their own preferences.

Of course, as discussed above, there are real limitations on shareholders' ability to exit.[175] Shareholders may not have the information they need to evaluate a corporation's political activities; shareholders may lack meaningfully different alternative corporations in which to place their capital; investors may hold corporate shares through investment vehicles that limit their capacity to sell; and certain kinds of political activities may affect the corporation's share price.

But workers face more fundamental constraints in exiting enterprises they disagree with. Workers often have made firm-specific or industry-specific investments in their human capital, or face difficulty in searching for other employment.[176] These forces can make it difficult for workers to find alternative comparable employment on attractive terms. Most workers also have only one career at a time, limiting their ability to diversify away risks and requiring they take a risk-averse approach when contemplating change in plans. They are rooted in their community, their children's schools, and in a house that may be difficult to sell easily. In addition, in many firms, their compensation and benefits are linked to the period of service; and could result in serious economic loss if they change jobs. Put differently, political principles may be a luxury for many workers. Finally, a worker may struggle to find an alternative employer or union with a different political orientation, particularly if their skills are focused on a particular industry.

Although the underlying economics makes exit easier in the corporate space than the union space, labor law, as we have mentioned, offers relatively robust exit rights. Many states have enacted a "right to work" regime that makes it possible for a worker to not have to fund union activities at all, political or otherwise, to get hired or keep the job. Public employees effectively operate under a right-to-work regime, as the Supreme Court in *Janus* has interpreted the First Amendment to forbid public-sector unions from demanding membership as a prerequisite for obtaining and retaining employment.[177] Workers in the private sector and the federal sector have *Beck* rights that treat union expenditures for political activities as not chargeable against union dues or fees.[178] *Beck* rights have important limits: workers have to quit the union to trigger these rights; they are not always easy to invoke; and would not reach activities that do not involve a non-trivial financial outlays. Employees also have the legal right to quit a job at any time, though there may be meaningful financial consequences in doing so.[179] Another constraint is that employees cannot

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[175] *See supra* Part III.A.

[176] *E.g.* Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536 (2018).

[177] *Janus*, 585 U.S. at 886, 896.

[178] *Beck*, 487 U.S. at 762-63.

[179] *See* RESTATEMENT (SECOND) CONTRACTS § 367 (specific performance remedy generally not available for breach of personal service contract); U.S CONST. amend. 13 § 1 (banning "slavery [and] involuntary servitude, except as a punishment for crime"). Financial consequences may come from the employer's

prevent their employer from using corporate funds (which are ultimately augmented by the efforts of employees) to finance political activities.

Corporate law offers relatively weak rights in this sense.[180] A shareholder is presumptively free to sell their shares in the way that a worker is free to quit. An investor can also invest directly in a public corporation instead of investing via an asset manager. But a minority shareholder in a corporation cannot prevent the corporation from diverting its financial resources toward political activities. Indeed, the basic structure of corporate law is designed effectively to lock in shareholders' capital so that managers can deploy it in long-term projects without the threat of withdrawal: after the corporation has sold its shares to investors in exchange for capital, it has little obligation to return the capital to shareholders.[181] A shareholder can get cash by selling their stake to another investor, but that transaction does not withdraw cash from the corporation itself.

IV. Bolstering Exit and Voice

This Part considers a set of proposals to strengthen the exit and voice options of members of unions and corporations. Subpart A identifies possible reforms to business law, and Subpart B identifies possible reforms to labor law.

In designing reforms, policymakers should be attentive to the challenges of imposing an effective system. While we address various difficulties with particular proposals below, a central and common challenge is drawing a distinction between political and non-political activities. As discussed above, there are sensible approaches to this difficult problem.[182] But the challenge may counsel in favor of a cautious approach. Policymakers could proceed incrementally, experimenting with small steps. Or they might favor approaches that permit private ordering over absolute prohibitions, and remedies that compensate dissenters instead of barring union or corporate action.

A. Corporate Law Reforms

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power in the relevant labor market or contractual terms that impose limits. *See, e.g.*, ORLY LOBEL, TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE-RIDING (2013) (discussing legal rules that inhibit worker mobility and implications for the broader economy); Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575 (1999) (discussing effects of non-compete provisions on high tech industries).

[180] *See* Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169, 185 n.84 (2015) ("Notably, corporate shareholders enjoy no parallel right to opt out of contributing to corporations' political expenditures"); Sachs, *Opt-Out*, *supra* note 1 (identifying this asymmetry and urging that it is not justifiable); Macey & Strine, *supra* note 158 at 511.

[181] Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 291 (1999).

[182] *See supra* Part II.

This Subpart identifies three groups of reforms that would enhance the voice and exit options of shareholders: (1) enhanced disclosures of political activities, (2) improvements in shareholder voice and corporate procedures, and (3) monetary remedies that would enable a shareholder to prevent their capital from being used for political activities that they disagree with.

Each of these reforms could be implemented in a variety of ways, giving policymakers a number of variables that can be adjusted to address concerns. The discussion here seeks to identify the tradeoffs that could affect their choices. We also note that the best approach to one area is likely to depend on choices made in others. For example, it would be sensible to tailor exit and damages to match the voice options available to shareholders, and disclosures should at a minimum be adequate to support shareholders' voice and exit options.

1. Disclosure

At a minimum, publicly-traded corporations should be required to provide standardized and comprehensive disclosures that indicate the nature and volume of, and financial resources involved in, their political activities. Numerous proposals for a political disclosure regime have been floated, and they have generated a significant body of academic and practitioner commentary.[183] For present purposes, we note that disclosures must meet two basic criteria. First, they must enable present and prospective shareholders to identify any conflict between their beliefs and a corporation's political activities. Simply disclosing a dollar value or even an issue area for political expenditures would not be sufficient for this purpose. Disclosing that a corporation has spent $1 million on lobbying on climate issues may not adequately inform an investor who is passionate about the topic whether the corporation is a friend or foe; disclosure should make clear the general position that corporation taking in making these expenditures. Second, the disclosures must work in concert with other protections. For example, if stockholders are empowered to vote on an annual basis, political activities should be disclosed at least annually.

One question that recurs across proposals centers on how serious an activity must be to trigger regulation. In principle, a simple political statement that costs the corporation no money could create a moral or personal injury to a shareholder. But requiring specialized corporate disclosures on (or, as discussed below, a specialized decision making and damages process for) every such statement would be costly, unworkable, and ultimately useless to any nontrivial number of shareholders. A standard that only required disclosure of political activities that are economically material to the corporation might help focus attention on the most important issues. But if a central concern here is moral injury to dissenters not just economic injury,

[183] *See* Bebchuk, Jackson, Nelson & Tallarita, *supra* note 103 at 3 (describing influential rulemaking petition).

an economic materiality standard may be inappropriate: a dissenter might have good faith moral concerns about their funds being used to support political activities they find odious, even if the total funds expended are small relative to the size of the corporation. Broadening the concept of materiality to address a broader range of concerns may be appropriate. This may entail broadening the concept substantively to address non-financial concerns or general risks,[184] or acknowledging that investors with unusual viewpoints are entitled to disclosures relevant to their views.[185]

2. Voice and Process

Shareholders should be given the opportunity to voice disapproval of the corporation's political activities. In *Citizens United*, the Supreme Court suggested that the "procedures of corporate democracy" would suffice to allow shareholders to control political decisions by managers.[186]

That assessment was almost certainly over-optimistic.[187] Although the process of shareholder voting is often compared to a "democracy," it is designed to address economic as opposed to political issues.[188] In principle, shareholders could vote out the directors of a corporation if the corporation engaged in disfavored political activities. In reality, the mechanisms of corporate voting are not designed to overcome collective action problems unless they have a substantial economic dimension. Economic resources are required to buy shares, monitor for a problem, and use the machinery of voting to run a campaign. Acquirers and activists will not purchase shares or advocate for changes unless there is a genuine prospect for significant profit, and major institutional and retail investors are unlikely to devote the resources and attention required to identify problems and run a proxy fight.[189]

Similar issues affect other existing mechanisms for shareholders to limit corporate political activities. The shareholders of a corporation might adopt a bylaw,

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[184] *See, e.g.*, Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1429, 1432 (2020) (noting that business people working in the sustainability context apply a distinctive approach to assessing materiality).

[185] Materiality in the securities law context is usually understood as an objective concept focused on the concerns of a "reasonable investor." *See, e.g.*, Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988); TSC Indus. v. Northway, 426 U.S. 438, 449 (1976).

[186] *Citizens United*, 558 U.S. at 361-62.

[187] *See* Pollman, *Constitutionalizing*, *supra* note 18 at 643.

[188] *Id.* at 669-70 ("state corporate law provides no . . . means of bearing the pressure to reconcile diverse religious, social, and political values and beliefs"); *cf.* Kovvali, *Basic*, *supra* note __ at 1270-71 (noting that market mechanisms can neutralize competing economic preferences but not environmental or social preferences); Michael Simkovic, *Natural-Person Shareholder Voting*, 109 CORNELL L. REV. 1525, 1527-28 (2024) (existing voting rules may do a poor job of addressing externalities).

[189] *See* Christie, *supra* note __ at 880 (noting that large players may engage in "rational hypocrisy" and identifying some countervailing mechanisms); *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).

and shareholders and the board acting together might adopt a charter provision, purporting to limit directors' and officers' discretion to engage in political activism.[190] But these tools would not be easy or cheap for an individual shareholder to use. Similarly, a board might impose limits on executives' political activities through negotiation and contracting, but the board may not be willing to do so without a difficult and expensive shareholder voting campaign. Absent tailored mechanisms, shareholders may not have a meaningful opportunity to voice disapproval.

Policymakers have many tools available to enhance shareholder voice to address corporate political activities. First, shareholders might be empowered to place a broader range of proposals on the corporation's proxy.[191] As discussed above, managers can invoke various exclusions to avoid placing shareholder proposals on a variety of fraught political topics on the management proxy.[192] Narrowing the exclusions would enable shareholders to express views on more political topics. But this is a problematic tool, as it would make shareholder voting *more* of a site for political contestation.

Second, shareholders might be asked to vote regularly to approve or condemn the corporation's political activities. One model for this would be the "Say on Pay" mechanism. Reacting to popular outrage over executive compensation and concern that the structure of bankers' pay might have contributed to reckless conduct leading to the global financial crisis, Congress included Section 951 in the Dodd-Frank Wall Street Reform and Consumer Protection Act. Together with the SEC's implementing regulations, this "say on pay" provision enables shareholders to cast an advisory vote that approves or disapproves of the level and structure of executive compensation at least every three years.[193] Although it is an advisory vote, it can be effective in pressuring managers into making changes. Management normally wins, so a failure or a close vote sends a strong signal about shareholder dissatisfaction, which often invites interest from acquirers or activists.

Shareholders might be empowered to cast a similar "Say on Say" vote on corporate political activities. This "Say on Say" regime could be tailored in several ways. A mandatory regime would mean that the corporation would be obligated to obey the result of the shareholder vote. This would give the regime real teeth. But maintaining an advisory regime may be appropriate as market participants gain experience with the new system. If the system was mandatory, policymakers might consider imposing a supermajority requirement, so that political activities would only

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[190] *See* 8 Del C. §§ 109, 242. A charter can also give the board authority to amend the bylaws unilaterally. *Id.* § 109(a).
[191] *Cf.* Pollman, *Citizens Not United*, *supra* note 155 at 57.
[192] *See supra* Part II.B.2.
[193] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) § 951.

be authorized if two-thirds or three-quarters of shares were voted in favor.[194] A vote every year would allow shareholders to react more frequently to the corporation's activities. But voting less frequently would conserve resources and reduce the expense of the system. Voting once every two years would align the system with the federal election cycle. A broad yes or no vote on the corporation's overall program would simplify the system and reduce the need for shareholders to expend resources educating themselves on detailed issues. But a more granular approach that requests approval for specific activity types (speech, lobbying, contributions, independent expenditures) and issue areas (tax, climate, racial equity, international relations, labor and employment law) would allow for tighter control. Similarly, a requirement that the political activity must cross a materiality threshold would help focus the regime on the most important issues, but may leave various moral harms unaddressed.

Third, courts might reinterpret fiduciary duties to impose a "duty of silence" that obligates directors and officers to refrain from political activities, defined broadly to include all activities touching on politics or narrowly to focus on political activities with a limited connection to core economic interests.[195] While this would be an aggressive intervention, commentators have already called for directors and officers to refrain from political activities.[196] A fiduciary duty of silence would give that approach legal backing.

A duty of silence might already be inferred from the familiar duties of care and loyalty. A corporate director or officer who uses the corporation's resources or credibility to advance a personal political agenda is behaving disloyally. And a corporate director or officer who fails to consider the potential impact of a political stance is acting without due care.

To be clear, it would be extremely challenging for a shareholder to prevail in this type of suit under current law.[197] For example, in the *City of Birmingham v. Good* case discussed above, a majority of the Delaware Supreme Court concluded that

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[194] *See* Bebchuk & Jackson, *supra* note 18 at 116; Brudney, *supra* note 18 at 257.

[195] *See* Will Brown, *Duty of Silence: Crafting a New Corporate Fiduciary Duty in the Age of Social Media* (unpublished manuscript).

[196] Fisch & Schwartz, *supra* note 152 at 355 (proposing a voluntary pledge to refrain from "politically explicit marketing and promotional activities"); Casey & Ginsburg, *Mouths Shut*, *supra* note 94. Because they focus primarily on voluntary measures, these commentators largely avoid the need to define precisely what conduct would trigger a duty of silence.

[197] *See, e.g.*, Pollman, *Citizens Not United*, *supra* note 155 at 56-57; Ann Lipton, *Can't Tesla Shareholders Sue Musk Over This?*, BUS. L. PROF. BLOG (Mar. 21, 2025), https://www.businesslawprofessors.com/2025/03/cant-tesla-shareholders-sue-musk-over-this/. Indeed, existing duty of care and loyalty principles may compel some corporate political activities, or at least sensitivity to politically sensitive topics. *See, e.g.*, Gadinis & Miazad. Important commentators have also suggested that consideration of racial diversity is consistent with existing fiduciary duties. *See* Fletcher & Lovelace, *supra* note 37; Brummer & Strine, *supra* note 37.

Duke Energy's efforts to relax their regulator's oversight was not actionable, even though lack of oversight contributed to a disaster that created massive corporate liability.[198] But changing the law to accommodate this type of suit would not require a fundamental break with existing corporate law ideas. Indeed, then-Chief Justice Strine filed a powerful dissent in the *Good* case that urged that the stockholder lawsuit should not be dismissed.[199]

Courts and legislatures could also tailor the duty regime in ways that limit costs and increase benefits. Substantively, the duty might be limited to political speech that is unrelated to the core economic interests of shareholders.[200] Procedurally, the duty might be understood to allow corporate officers to engage in political activities provided the activities are disclosed and authorized in advance by the board, and the board would be insulated from liability provided it made an informed business decision. The duty might also be understood as waivable using an appropriate charter provision.[201] This would allow a corporation's board and shareholders to determine that corporate political activities are worthwhile and to make an appropriate change.

While we do not advocate for a judicially-enforceable duty of silence here, we do note that there may also be an increasing appetite for this type of intervention. Corporations themselves appear to have concluded that aggressive political activities generated risks that were not justified by the potential rewards. Even before the reelection of Donald Trump, many corporations had dialed back DEI and ESG activities.[202] The second Trump Administration may have also exposed a more basic reason for reluctance to tolerate corporate political activities: existing corporate leaders are just not very good at politics. Elon Musk's actions as part of the newly-minted Department of Government Efficiency appear to have badly damaged Tesla, the publicly-traded corporation that he is charged with leading.[203] Musk's subsequent (and widely predicted) falling out with Trump also created risks for his businesses.[204] Many business leaders and investors supportive of Donald Trump's presidency also do not appear to have recognized the potential for damaging tariffs, despite the prominence of the issue in Trump's campaign. While corporate leaders

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[198] *See supra* notes 98 to 99 and accompanying text.
[199] *Good*, 177 A.3d at 65 (Strine, C.J., dissenting) (urging that at the motion to dismiss phase, plaintiffs should be permitted to proceed).
[200] For efforts to define this category, see *supra* Part II.D.
[201] This could be accomplished with a new statutory provision. *See* 8 Del. C. § 102(b)(7). But it might also be accomplished through a creative understanding of existing rules. *See* McRitchie v. Zuckerberg, 315 A.3d 518, 577 (Del. Ch. 2024) (suggesting that a Delaware corporation's charter could tailor the duty of loyalty to focus on diversified investors as opposed to the corporation alone).
[202] *See supra* Part I.A.
[203] *See* Lipton, *supra* note 191.
[204] Rebecca Ballhaus & Alex Leary, *A Star-Crossed Bromance Comes Apart at the Seams*, WALL ST. J. (June 6, 2025), https://www.wsj.com/politics/policy/elon-musk-trump-bromance-fight-40ca745c.

may be equipped to make good decisions on a variety of business matters, they have not invariably demonstrated a special capacity to handle political strategies. Silence might be golden.

3. Exit and Damages

Another set of reforms would enable a shareholder to withdraw their capital from the corporation to prevent its use in political activities they disapprove of. Although this approach would represent a significant departure from current law, this type of exit right would be modest in some respects. Dissenting shareholders would not be empowered to prevent the corporation from engaging in political activities. Instead, they would simply prevent the corporation using their capital to fund political activities. Policymakers might prefer this approach due to the difficulty of defining political activity, a desire to strike a reasonable compromise between competing interests, or constitutional concerns about a regime that effectively prohibits corporate political activity.

An exit right might be structured in several ways. *First*, shareholders might be granted an appraisal-style remedy pegged to their votes. A normal appraisal occurs in certain types of fundamental transactions, such as certain mergers. A shareholder who disapproves of the merger and votes against it can perfect appraisal rights and petition a court to determine the value of their shares, then order the corporation to pay out that value in money damages. The structure of this approach would follow from the structure of a "say on say" regime.[205] If the corporation engages in political activities that trigger a vote, a shareholder who votes against political activities to collect the pro rata dollar value of those activities.[206] This right might be structured as an automatic dividend, with an opportunity for dissenting shareholders to challenge the corporation's calculation, or it might be structured as a right of dissenting shareholders to petition for an award on a class or individual basis.[207] Either way, this approach would be well tailored to the danger of dissenters' capital being used to support political activities that they disapprove of.

Second, shareholders might be permitted to extract damages if corporate political activities cause harm. The scope of liability and measure of damages could both be tailored. Nominal damages might be made broadly available whenever a dissenter has a moral objection to the corporation's political activities. More extensive damages might be made available when a corporation's political activities cause more acute economic harms.

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[205] *See supra* Part IV.A.2.

[206] *Cf.* Sachs, *Opt-Out*, *supra* note 1 at 864.

[207] Naturally, policymakers should design the regime in a way that minimizes unnecessary costs. An automatic payment with a right to petition a court for a class-wide recalculation of the proper amount would be reasonable.

B. Labor Law Reforms

Labor law could also be reformed to provide for additional disclosure, to make union operations more responsive to the interests of dissenting workers, and to make it easier for dissenting workers to ensure that their dues monies are not used for political purposes and bolster the union's duty of fair representation (DFR) to include protection of political dissenters.

1. Disclosure

In general, we favor efforts to create a richer body of information on union political activities. First, the NLRA and RLA should be amended to require employers to post a notice of rights workers have under those laws and rights they have to object to, and seek rebate of, union political expenditures under *Beck v. Communication Workers of America*, as well other statutory rights they have.

Second, federal and state election laws should also be amended to require disclosure of all nontrivial financial or in-kind contributions by unions to political candidates and campaigns and nontrivial independent financial or in-kind expenditures to political candidates and campaigns.

2. Fair Representation

Labor law could also be tailored to ensure the protection of union political dissenters. First, unions are currently subject to a DFR: when a union is an exclusive representative of a worker, it must represent that worker fairly in collective bargaining, handling grievances, and in all contexts where the union exercises its exclusive agency authority. It should be made clear this obligation extends to all political dissenters, whether they are opposing union incumbents for internal office or objecting to political activism by the union.

Second, the law should be clarified that a union has an affirmative obligation, along with the employer, to maintain a workplace environment free of harassment, by coworkers or management or union officials, of political dissenters. Title VII may provide a template for this type of obligation, as unions and employers are already barred from engaging in discrimination or tolerating harassment on grounds of race, sex, national origin, or religion.[208] A similar shared obligation to prevent harassment of political minorities would be a worthwhile change. Admittedly, this may place a union in an uncomfortable position as some workers seek to take political stances in

[208] In some instances, there may be overlap between a political position and a protected status. For example, the Brandeis Center has alleged that a UAW local supported antisemitic discrimination violative of Title VII of the Civil Rights Act of 1964, 42 U,S,C, § 2000e et seq, by using the grievance-arbitration process to prevent an employer from adopting a viewpoint neutral prohibition on workplace signs regarding Gaza. *See Brandeis Center Files Discrimination Charges Against UAW's 'Legal Aid' Union for Anti-Semitic Discrimination Against Its Jewish Members at NYLAG*, BRANDEIS CTR. (May 7, 2025), https://brandeiscenter.com/nylag-filing-press-release/; *Levine*, 2025 WL 1795961, at *1.

the workplace while others assert that the political activities constitute harassment, and both groups claim that the union owes them a duty of fair representation. There may be a division of views among workers, but as in the discrimination context, the union has an obligation not to encourage or facilitate harassment of political dissenters.

3. Exit and Fees

Labor law can also be reformed to enhance the ability of workers to reject the political activities of unions without surrendering other benefits. First, *Beck* rights should be extended to full union members. At present, a worker can invoke *Beck* rights under the NLRA and RLA only if they have resigned from the union. This prerequisite is not required by these laws, and a union-represented worker should not have to surrender their voice and involvement in the union's economic activities, such as strike authorization and contract ratification votes, simply because they object to the use of their union dues for political causes they do not share or abhor. Requesting a rebate under *Beck* is not a form of disloyalty to the union enterprise. It is merely an insistence that the union's dues or fees requirement should be limited to the costs of contract negotiation and administration.

Workers with a good-faith political objection to union membership or the union's political activities should be granted additional rights. Section 19 of the NLRA provides a ready template by permitting workers who adhere to bona fide conscientious religious objections to union representation are permitted to opt out, provided they make a charitable donation in lieu of periodic dues and initiation fees.[209] Exit rights would be strengthened by expanding this mechanism to include conscientious political objection to joining the union or to the political activities of the union, and to enlarge the range of non-profit, non-partisan charities to which fees can be donated in lieu of dues.

Conclusion

Unions and corporations are formed to advance the collective economic interests of their members. This economic mission can sometimes justify overriding the preferences or decisions of dissenting members. A strike or transaction will rarely command unanimous support from workers or shareholders, but unions or corporations may need to act anyway. Some political activities can have this character. As unions and corporations take controversial stances, however, on a broader range of political issues, some only tenuously connected to their economic missions, the calculus shifts. Dissent on these topics may represent more than a disagreement about economic strategy, but rather a matter of deep moral principle. And the economic benefits of these political activities are at best unclear. Against

[209] 29 U.S.C.§ 169.

this backdrop, members should be granted a meaningful right to exit and exercise voice. By considering existing labor and corporate law mechanisms together, it becomes possible to identify related failings and potential solutions.