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CORPORATE POLITICS:
ESG AND THE FIRST AMENDMENT

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Citizens United not only dramatically expanded corporate free speech protections, but also enshrined a distinctive theory of corporate politics into the United States' constitutional law and popular imagination. The Roberts Court's emphasis on companies' deliberative function, which transforms debates among stakeholders into enterprise-wide values, rejected a competing realist view, analytically rooted in individual executives' incentives and power to dominate political debate within the firm, that had defined First Amendment jurisprudence a generation prior.

This Article explains how both sides of the contemporary debate over ESG policies accepted Citizens United's invitation to view corporations as political actors and internalized the Court's deliberative theory of the firm. Doing so has yielded a host of economic and legal problems for progressives and conservatives alike, from the proliferation of "greenwashing" to looming constitutional challenges to state "fair access" statutes. By reviving the realist conception of corporate politics, this Article uncovers concrete strategies to overcome these pathologies for both ends of the political spectrum.

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INTRODUCTION

Corporations today are manifestly and self-consciously political actors.¹ To appeal to consumers and attract investors, businesses have taken public stances on a wide variety of environmental, social, and governance (“ESG”) issues.² Corporate espousals of social and political principles are so commonplace that their underlying premise—that corporations can hold enterprise-wide values—is increasingly taken for granted.³ But the banality of this premise today belies the bitter contestation that accompanied its ascension in American law and politics just over a decade ago.

Debates over corporations’ capacity to hold values crystallized in *Citizens United v. FEC*,⁴ a landmark First Amendment decision that embraced robust protections for companies’ social and political stances and constitutionalized the Roberts Court’s deliberative conception of corporations as “associations of citizens.”⁵ According to the Court, stakeholders forge corporate values by participating in the transformative debates of “corporate democracy,”⁶ and governance processes like

1. See James R. Bailey & Hillary Phillips, *How Do Consumers Feel When Companies Get Political?*, HARV. BUS. REV. (Feb. 17, 2020), <https://hbr.org/2020/02/how-do-consumers-feel-when-companies-get-political> (“As society became politically polarized, companies became more activist.”); Anna Ir-rera, Jessica DiNapoli & Imani Moise, *Take a Stance or Tiptoe Away? Corporate America’s Battle with Social Activism*, REUTERS (Oct. 27, 2020, 7:56 AM), <https://www.reuters.com/article/usa-companies-activism-analysis/take-a-stance-or-tiptoe-away-corporate-americas-battle-with-social-activism-idUSKBN27C1O3> (“The unprecedented outpour of corporate support for racial justice lately follows several years of companies taking a stand on other issues that activists criticize them about, including climate change, the gender wage gap, and LGBTQ rights.”).

2. See Pierre J. Allegaert, Note, *Codetermination and ESG: Viable Alternatives to Shareholder Primacy?*, 52 N.Y.U. J. INT’L L. & POL. 641, 666–67 (2020); David Freiberg, Jean Rogers & George Serafeim, *How ESG Issues Become Financially Material to Corporations and Their Investors* 4 (Harv. Bus. Sch., Working Paper No. 20-056, 2020), <https://ssrn.com/abstract=3482546>.

3. See Bailey & Phillips, *supra* note 1 (“[P]olitical advocacy has been absorbed to the extent that it is seen as a natural extension of a business model. . . . [I]t’s seen as common practice.”).

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

5. *Id.* at 349; see Jonathan Macey & Leo E. Strine, Jr., *Citizens United as Bad Corporate Law*, 2019 WIS. L. REV. 451, 461.

6. *Citizens United*, 558 U.S. at 370; see Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course: The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335, 363 (2015).

shareholder voting yield ethical positions attributable to the corporation itself, rather than merely the sum of its constituent stakeholder parts.⁷

Citizens United was pathbreaking in its rejection of a competing, realist account of corporate values. In contrast to the Roberts Court's deliberative view, the realist conception understands corporations as neutral collections of stakeholders with differing views on social and political issues.⁸ However, the realist conception also recognizes that because managers wield outsize influence over business operations, corporate values reflect the preferences of managers,⁹ subject to the constraints imposed by a small number of large, informed shareholders.¹⁰ Corporate democracy therefore offers cold comfort to the realist, as most stakeholders lack the power or incentive to intervene in corporations' social and political decision making.¹¹ Although the Supreme Court embraced this realist view in *Austin v. Michigan State Chamber of Commerce*,¹² *Citizens United* overruled *Austin* and repudiated its reasoning.¹³

In the years since *Citizens United*, the Roberts Court's deliberative conception of the corporation has captured the imagination of progressives and conservatives alike.¹⁴ Yet contemporary debates over ESG policies demonstrate the profound flaws of the deliberative account.

7. See Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 2010 Wis. L. Rev. 999, 1043.

8. See David G. Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social Responsibility After Citizens United*, 89 N.C. L. REV. 1197, 1199–1200 (2011). This view is realist in its emphasis on the incentives of individual stakeholders, rather than corporate abstractions. See generally Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 826 (1935) (characterizing realism as rejecting “hidden causes or transcendental principles”).

9. See Richard Hasen, *Citizens United and the Orphaned Antidistortion Rationale*, 27 GA. ST. U. L. REV. 989, 995 (2011).

10. Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 139–140 (2020).

11. See *id.*; FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 67 (Harv. Univ. Press, 1991).

12. See *Austin v. Mich. State Chamber of Com.*, 494 U.S. 652, 660 (1990) (explaining “aggregations of wealth that are accumulated with the help of the corporate form . . . have little or no correlation to the public’s support” for the values espoused by the corporation’s management).

13. *Citizens United v. FEC*, 558 U.S. 310, 319 (2010).

14. See *infra* Part II.

Progressives mounted an unprecedented campaign over the past decade to instill liberal values in major corporations by harnessing the levers of corporate democracy.¹⁵ While the efforts of progressive investors and customers have led major corporations to adopt policies on climate change,¹⁶ racial justice,¹⁷ reproductive rights,¹⁸ and other pressing ESG issues, many on the American left have lamented the lack of substantive change accompanying these announcements. For example, progressives have accused numerous companies of “greenwashing,” whereby corporations proclaim a commitment to the environment yet fail to implement meaningful climate policies in practice.¹⁹ This gap between corporations’ ESG stances and business operations is not an aberration, but rather a telling consequence of progressives’ reliance on the deliberative view.²⁰

Conservatives have responded to the proliferation of ESG policies by enacting state “fair access” statutes that penalize

15. See, e.g., Kai H.E. Liekefett, Holly J. Gregory & Leonard Wood, *Shareholder Activism and ESG*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 29, 2021), <https://corpgov.law.harvard.edu/2021/05/29/shareholder-activism-and-esg-what-comes-next-and-how-to-prepare> (describing “many signs of mounting and effective pressure from investors on public companies to enhance their performance and disclosures on environmental, social, and governance (ESG) criteria”).

16. E.g., Paul Coster, *Corporations Are Stepping in to Combat Climate Change*, JPMORGAN CHASE & CO., <https://www.jpmorganchase.com/news-stories/corporations-are-stepping-in-to-combat-climate-change> (last visited Mar. 30, 2023).

17. See Gillian Friedman, *Here’s What Companies Are Promising to Do to Fight Racism*, N.Y. TIMES (Aug. 23, 2020), <https://www.nytimes.com/article/companies-racism-george-floyd-protests.html>.

18. See Alex Millson & Ella Ceron, *How US Companies Are Supporting Workers on Abortion*, BLOOMBERG (June 26, 2022, 5:33 PM), <https://www.bloomberg.com/news/articles/2022-05-03/how-u-s-companies-are-supporting-workers-on-abortion>.

19. See Evie Liu, *SEC’s Gensler Is Targeting Greenwashing of ESG Funds*, BARRON’S (Mar. 1, 2022), <https://www.barrons.com/articles/sec-gensler-greenwashing-esg-funds-51646166625>; Anmar Frangoul, *Activist Investors and a “Greenwashing” Backlash: Change Is Coming to the Corporate World*, CNBC (Jan. 25, 2022), <https://www.cnbc.com/2022/01/25/activist-investors-greenwashing-backlash-change-is-coming-to-business.html>; Damian Carrington, *“A Great Deception”: Oil Giants Ripped for Greenwashing*, MOTHER JONES (Apr. 21, 2021), <https://www.motherjones.com/environment/2021/04/a-great-deception-oil-giants-ripped-for-greenwashing-campaigns>.

20. See *infra* Section II.A.

firms with progressive corporate values regarding fossil fuels, firearms, and other issues.²¹ Although these laws codify the deliberative conception's attribution of social and political beliefs to corporations, they seek to punish firms for expressing views disfavored by the state government on social issues like firearms and climate change, and are therefore unconstitutional under the expansive First Amendment jurisprudence of *Citizens United* and its progeny.²² Thus, conservatives' adherence to the deliberative account has led them to a strategic dead end.

The advent of ESG policies and fair access laws reveal both the widespread acceptance and significant shortcomings of the deliberative conception articulated in *Citizens United*. This Article therefore urges progressives and conservatives alike to return to the realism of *Austin*. After exploring the clash of the deliberative and realist theories in *Citizens United* and tracing the ensuing debates over corporations' ESG positions, this Article explains how reorienting contemporary discourses on corporate values to focus on the behavior and incentives of individual stakeholders offers a fruitful path forward for progressives seeking concrete gains on ESG issues, as well as conservatives concerned with corporate overreach.

I.

CORPORATE DEMOCRACY IN THE ROBERTS COURT

In 2010 the Supreme Court delivered its decision in *Citizens United v. FEC*, striking down a federal prohibition on independent corporate political expenditures as contrary to the First Amendment.²³ The decision ignited an impassioned debate over the proper role of corporate speakers in the nation's political discourse.²⁴ But the case's polarizing outcome reflected a tectonic shift in perspective on corporate values. Rejecting the realist account that had dominated the Rehnquist

21. See, e.g., TEX. GOV'T CODE ANN. § 2274.002 (2022); TENN. CODE ANN. § 9-4-107 (2022).

22. See *infra* Section II.B.

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

24. See, e.g., Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L. & POL'Y REV. 217 (2010); Richard A. Epstein, *Citizen United v. FEC: The Constitutional Right That Big Corporations Should Have but Do Not Want*, 34 HARV. J.L. & PUB. POL'Y 639 (2011).

Court a generation prior,²⁵ the Roberts Court instead embraced a deliberative view that ultimately achieved currency among American progressives and conservatives alike. By enshrining the deliberative view in First Amendment doctrine, the Roberts Court redefined the debate over corporate values for the following decade.

This historic pivot arose out of a low-budget documentary entitled “Hillary: The Movie,” produced by a corporation named Citizens United.²⁶ The film described then-Senator Clinton’s involvement in a series of alleged scandals in order to provoke opposition to her campaign for the Democratic Party’s 2008 presidential nomination.²⁷ Although Citizens United hoped to promote the film, the Bipartisan Campaign Reform Act of 2002 (“BCRA”)²⁸ prohibited corporations from using general treasury funds for independent expenditures on electioneering communications within 30 days of a primary election.²⁹

Citizens United sued for declaratory and injunctive relief, contending that the BCRA as applied to “Hillary: The Movie” violated the First Amendment.³⁰ A three-judge court for the U.S. District Court for the District of Columbia disagreed, observing that the Supreme Court had upheld restrictions on electioneering communications in *McConnell v. FEC*.³¹ Citizens United appealed to the Supreme Court, inviting the Court to overturn the precedential foundation on which *McConnell* rested: *Austin v. Michigan Chamber of Commerce*.³²

In an opinion by Justice Kennedy, the Supreme Court endorsed Citizen United’s arguments, declaring *Austin* was “an aberration” that had to be overruled despite the principle of stare decisis.³³ Justice Kennedy explained that *Austin* upheld a Michigan law prohibiting the state’s Chamber of Commerce

25. See *Austin v. Mich. State Chamber of Com.*, 494 U.S. 652, 652 (1990).

26. *Citizens United*, 558 U.S. at 319.

27. *Id.* at 319–20.

28. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

29. *Citizens United*, 558 U.S. at 320–21.

30. *Id.* at 321.

31. *Citizens United v. FEC*, 530 F. Supp. 2d 274, 282 (D.D.C. 2008) (citing *McConnell v. FEC*, 540 U.S. 93 (2003)).

32. See *Citizens United*, 558 U.S. at 319.

33. *Id.* at 319, 355.

from spending general treasury funds on ads for specific candidates.³⁴ The *Austin* Court did so by recognizing a compelling governmental interest in preventing corporations from exploiting resources derived from “the economically motivated decisions of investors and customers” to support unrelated political causes.³⁵

This antidistortion principle in *Austin* derived from a realist conception of corporate political activities. According to Justice Marshall’s majority opinion, corporations are value-neutral enterprises that pluralistically join together a variety of different stakeholders with differing social and moral outlooks.³⁶ Stakeholders with conflicting worldviews can nevertheless cooperate in corporate ventures by virtue of their overlapping economic interests.³⁷ Thus, “limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets” are the ties that bind corporations, not a commitment to a common good.³⁸

For the realist, solicitude for corporate values amounts to a category error. Although directors, officers, or employees can express values on a corporation’s behalf,³⁹ the notion that the corporation itself holds those values is a legal fiction.⁴⁰

34. *Id.* at 347 (citing *Austin v. Mich. State Chamber of Com.*, 494 U.S. 652, 695 (1990) (Kennedy, J., dissenting)).

35. *Austin v. Mich. State Chamber of Com.*, 494 U.S. 652, 659 (1990) (Marshall, J.) (citation omitted).

36. *See id.* at 660 (stating the corporate form yields “immense aggregations of wealth” without regard to “the political ideas espoused by corporations”); *see also* Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 940 (1984) (“Pluralist decisionmaking entails compromises between competing constituent groups . . .”).

37. *Austin*, 494 U.S. at 659 (noting corporations’ unique “ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders’ investments”). In certain respects, this account resembles the canonical “nexus of contracts” theory of law and economics. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310 (1976) (describing corporations as “legal fictions which serve as a nexus for a set of contracting relationships among individuals”).

38. *Austin*, 494 U.S. at 658–59.

39. *Id.* at 657.

40. *Cf.* John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 666 (1926) (tracing the nominalist view of corporate personhood as a “fiction” to Thomas Aquinas). Indeed, when subsequently defending this realist account, Justice Stevens claimed it rested on observable stakeholder relations and thus obviated the need for a conceptual approach

Moreover, attributing those statements to each component of the enterprise is at odds with the economic purpose that allows corporations to unite disparate interests.⁴¹ Instead, as Justice Brennan argued in his *Austin* concurrence, expressions of corporate values often reflect the views of executives or domineering shareholders.⁴² Unfettered corporate political activities thereby threaten minority shareholders and other stakeholders who do not share those social and political positions.⁴³ For large businesses with dispersed shareholders, many investors lack an adequate incentive to monitor and intervene in the formulation of corporate values.⁴⁴ Embracing this realist view, the *Austin* Court upheld legal checks on corporate political activities as a legitimate means of protecting the pluralistic nature of business enterprises.⁴⁵

But two decades later, in a defining moment of the Roberts Court's First Amendment jurisprudence, the *Citizens United* majority overruled *Austin* and adopted an antithetical understanding of corporate values.⁴⁶ Justice Kennedy's majority opinion described an "open marketplace of ideas," both on a national level and within individual corporations.⁴⁷ Through the governance processes of "corporate democracy,"⁴⁸ stake-

to corporate law. See *Citizens United v. FEC*, 558 U.S. 310, 465 n.72 (2010) (Stevens, J., dissenting).

41. *Austin v. Mich. State Chamber of Com.*, 494 U.S. 652, 657-59 (1990) ("[T]he power of the corporation may be no reflection of the power of its ideas." (quoting *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 258 (1986))).

42. See *id.* at 675 (Brennan, J., concurring) (citing Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 *YALE L.J.* 235, 247 (1981)).

43. *Id.* ("[T]he State surely has a compelling interest in preventing a corporation it has chartered from exploiting those who do not wish to contribute to the [corporation's] political message.").

44. *Id.* at 674 n.5 ("[S]hareholders in a large business corporation may find it prohibitively expensive to monitor the activities of the corporation to determine whether it is making expenditures to which they object."); accord Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 *J.L. & ECON.* 395, 395 (1983) (citing ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 129 (rev. ed. 1967)).

45. *Austin*, 494 U.S. at 668-69.

46. *Citizens United v. FEC*, 558 U.S. 310, 365 (2010).

47. *Id.* at 354 (internal quotation marks omitted).

48. *Id.* at 362; see also Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 *HARV. L. REV.* 833, 837 (2005) ("[S]hareholders in the American public corporation have the right to vote on the election of direc-

holders forge common values as “associations of citizens.”⁴⁹ Contrary to the *Austin* Court’s neutral and economic vision of corporations, *Citizens United* recast business entities as social, moral, and political ventures, not just financial ones.

From the foundational premise that stakeholders join corporate enterprises both to promote values and to pursue profits, *Citizens United* constructed a theoretical justification for the legitimacy of corporations’ espousal of social and political views. A company’s stakeholders necessarily participate in and thereby consent to its deliberative project;⁵⁰ thus, the values that arise out of corporate democratic processes are attributable to the corporation as a whole.⁵¹

Citizens United’s conception of corporations as sites of meaningful debates over non-economic values rejected the twin pillars of *Austin*’s realist account. First, because stakeholders tacitly consent to corporations’ deliberative function, a company’s free-standing values depend only indirectly on the views of individual stakeholders. Accordingly, the government lacks a compelling interest in restricting corporate political activities even if “enabled by economic transactions with persons or entities who disagree with the [corporation’s] ideas.”⁵² Second, corporate democracy translates debates among shareholders into collective values. Because minority shareholders contribute to the marketplace of ideas from which corporate values emerge, the government likewise lacks a compelling interest in “protecting dissenting shareholders” when the com-

tors. The U.S. corporation can be regarded as a ‘representative democracy’ . . .”).

49. *Citizens United*, 558 U.S. at 362. For a comparison of deliberative and nondeliberative models in democratic theory, see Robert P. George, *Law, Democracy, and Moral Disagreement*, 110 HARV. L. REV. 1388, 1393 (1997).

50. Cf. Guido Palazzo & Andreas Georg Scherer, *Corporate Legitimacy as Deliberation: A Communicative Framework*, 66 J. BUS. ETHICS 71, 82 (characterizing “the corporation as a political player whose legitimacy is based on civil society discourses”).

51. See *Citizens United*, 558 U.S. at 361–62 (rejecting a state interest in protecting dissenting shareholders because their views are incorporated “through the procedures of corporate democracy”); see also Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1641–42 (discussing the “real entity” theory that “describe[s] the corporation as greater than the sum of its parts”).

52. *Citizens United*, 558 U.S. at 351.

pany's ultimate convictions do not mirror the views of each participant in the corporate venture.⁵³

Justice Kennedy therefore concluded that the *Austin* Court erred in "permit[ing] the Government to ban the political speech of millions of associations of citizens."⁵⁴ Having rejected the compelling governmental interests recognized in *Austin*, the *Citizens United* majority overruled *Austin*, as well as its progeny, *McConnell*.⁵⁵ The Court held that the BCRA restrictions on Citizens United's independent expenditures infringed on its right to free speech and violated the First Amendment.⁵⁶

In radically revising the conception of corporate values underlying First Amendment doctrine, *Citizens United* transformed American law and politics. While the government was previously free to limit corporate expressions of value to protect the economic neutrality of business organizations and differing views of disempowered stakeholders, the Roberts Court's full-throated endorsement of the deliberative view instead invited the public to pursue change from within corporations.⁵⁷ Foreclosing legislative paths to define corporate values, the Court instead entrusted future debates on the social and political stances of businesses to the machinery of corporate democracy.⁵⁸

II.

THE REIGN OF THE DELIBERATIVE VIEW

Citizens United initially sparked protest and opprobrium among American progressives, who lamented the Court's *laissez faire* approach to campaign finance.⁵⁹ But a curious and yet-

53. *Id.* at 361.

54. *Id.* at 354.

55. *Id.* at 365–66.

56. *Id.*

57. *See id.* at 372 (stating decisions concerning corporate values "are not for the Government to make").

58. *Id.* at 362.

59. *See, e.g.*, Ian Millhiser, *Citizens United Decision: A Rejection of the Common Sense of the American People*, THINKPROGRESS (Jan. 21, 2010, 8:34 PM), <https://archive.thinkprogress.org/citizens-united-decision-a-rejection-of-the-common-sense-of-the-american-people-d7b83c583b1b/>; Mike Ludwig, *The Movement to Overturn Citizens United Takes Form*, TRUTHOUT (Jan. 18, 2012), <https://truthout.org/articles/the-movement-to-overturn-citizens-united-takes-form>.

unremarked shift occurred in the decade following the decision: with other avenues for shaping corporate values foreclosed, progressives took up Justice Kennedy's invitation to embrace the deliberative conception and use the levers of corporate democracy to instill liberal values in companies. Thus, the nascent ESG movement blossomed into a defining feature of the current economy, prompting corporations to adopt progressive stances on a number of social, ethical, and political issues.⁶⁰

More recently, conservatives have responded to the proliferation of progressive ESG policies by enacting a suite of state "fair access" laws that penalize firms for adopting liberal policies on climate change, firearm manufacturing, and other controversial subjects.⁶¹ By punishing corporations for expressing particular values, these fair access statutes reflect the deliberative theory's insistence that corporations channel internal debates among stakeholders into views properly attributed to the company as a whole.

Both sides of the debate over ESG policies have thus internalized the Roberts Court's deliberative conception of corporate politics, rendering the realist theory little more than a legal relic. But emerging challenges to the current strategies of progressives and conservatives alike demonstrate the deficiencies of the deliberative view. For liberals, the fixation on propagating corporate values has led to a crisis of under-implementation and created a gap between bold ESG statements and halfhearted action, as evinced by growing concerns over greenwashing. And although conservatives' state fair access laws treat business entities as associations of citizens, these statutes defy the First Amendment doctrine developed in *Citizens*

60. See Tom Quaadman, *The Role of ESG in the Business Community*, U.S. CHAMBER COMM. (July 22, 2020), <https://www.centerforcapitalmarkets.com/the-role-of-esg-in-the-business-community/>; Kosmas Papadopoulos & Rodolfo Araujo, *Top 10 ESG Trends for the New Decade*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 2, 2020), <https://corpgov.law.harvard.edu/2020/03/02/top-10-esg-trends-for-the-new-decade>.

61. See Zack Colman & Jordan Wolman, *Climate Investing 'Boycott Bills' Flood State Capitals*, POLITICO (Feb. 15, 2022, 10:44 AM), <https://www.politico.com/news/2022/02/15/climate-investing-boycott-bills-flood-state-capitals-00008641>; Stephen Gandel, *The Texas Law That Has Banks Saying They Don't 'Discriminate' Against Guns*, N.Y. TIMES (May 28, 2022), <https://www.nytimes.com/2022/05/28/business/dealbook/texas-banks-gun-law.html>.

United and its progeny and are therefore unconstitutional under current jurisprudence. This Part explains how the deliberative conception's ascendancy bred these obstacles across the political spectrum.

A. ESG Policies

Embracing the deliberative conception of corporate values, progressives have induced companies to adopt liberal stances on a wide range of ESG issues. But rising concerns with greenwashing reveal a profound shortcoming of the deliberative theory: its paramount focus on changing corporate values underemphasizes the role of individual personnel in implementing those commitments.

Citizens United's clarion call for corporate debates on political questions arrived at a time when interest in businesses' ESG policies remained inchoate.⁶² Over the following decade, however, progressives mounted a remarkable campaign to push major companies to take stands on a broad array of ESG issues, including climate change,⁶³ gun violence,⁶⁴ reproduc-

62. See *History of ESG*, PREQIN (Sept. 2022), <https://www.preqin.com/preqin-academy/lesson-5-esg/history-of-esg>.

63. E.g., *Intel Climate Change Policy Statement*, INTEL (Jan. 2020), <https://www.intel.com/content/www/us/en/corporate-responsibility/environment-climate-change-policy.html>; *Climate Change*, WALMART (2022), <https://corporate.walmart.com/planet/climate-change>; *Climate Action*, COCA-COLA CO. (2022), <https://www.coca-colacompany.com/sustainability/climate>.

64. See *American Businesses Are Taking a Stand on Gun Violence*, EVERYTOWN FOR GUN SAFETY (2022), <https://everytownsupportfund.org/initiatives/business-leaders/businesses-taking-a-stand> (describing corporate policies to reduce firearm violence). Many of these policies followed the mass shooting at Marjory Stoneman Douglas High School in Parkland, Florida. See Brian Berkeley, Eric Orts & Robert Hughes, *Gun Control After Parkland: What Can Firms Really Do?*, KNOWLEDGE AT WHARTON (Mar. 12, 2018), <https://knowledge.wharton.upenn.edu/article/ethical-debate-guns>.

tive health,⁶⁵ gender-affirming care,⁶⁶ racial justice,⁶⁷ and voting rights.⁶⁸

A primary engine of the ESG movement has been the growth of mutual and exchange-traded funds dedicated to investing in companies with particular ESG policies.⁶⁹ These funds not only created a powerful incentive for firms to adopt ESG policies to attract capital,⁷⁰ but also leveraged investors' proxy votes to advocate for ESG initiatives.⁷¹

Progressives also shaped companies' deliberations through other facets of corporate democracy. Customers have harnessed their purchasing power to support brands with ESG

65. See Maggie McGrath & Jena McGregor, *These Are the U.S. Companies Offering Abortion-Related Benefits*, FORBES (May 7, 2022, 6:30 AM), <https://www.forbes.com/sites/maggiemcgrath/2022/05/07/these-are-the-us-companies-offering-abortion-related-benefits>.

66. E.g., Amelia Lucas, *Starbucks to Cover Employees' Travel Expenses for Abortions, Gender-Affirming Surgeries*, CNBC (May 16, 2022, 9:00 AM), <https://www.cnbc.com/2022/05/16/starbucks-to-cover-employees-travel-expenses-for-abortions-gender-affirming-surgeries.html>.

67. See Earl Fitzhugh, JP Julien, Nick Noel & Shelley Stewart, *It's Time for a New Approach to Racial Equity*, MCKINSEY & CO. (May 25, 2021), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/its-time-for-a-new-approach-to-racial-equity>.

68. See, e.g., David Gelles & Andrew Ross Sorkin, *Hundreds of Companies Unite to Oppose Voting Limits, but Others Abstain*, N.Y. TIMES (May 27, 2021), <https://www.nytimes.com/2021/04/14/business/ceos-corporate-america-voting-rights.html>.

69. See *ESG Investing: Practice, Progress and Challenges*, OECD 3 (2020), <https://www.oecd.org/finance/ESG-Investing-Practices-Progress-Challenges.pdf>; Int'l Monetary Fund, *Investment Funds: Fostering the Transition to a Green Economy*, in GLOBAL FINANCIAL STABILITY REPORT: COVID-19, CRYPTO, AND CLIMATE: NAVIGATING CHALLENGING TRANSITION 59, 60 (Oct. 2019), <https://www.imf.org/-/media/Files/Publications/GFSR/2021/October/English/ch3.ashx>.

70. See *ESG and Corporate Purpose in a Disrupted World*, DELOITTE 3 (July 2020), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/center-for-board-effectiveness/us-deloitte-ESG-corporate-purpose-in-disrupted-world.pdf>.

71. See Quinn Curtis, Jill Fisch & Adriana Z. Robertson, *Do ESG Mutual Funds Deliver on Their Promises?*, 120 MICH. L. REV. 393, 435–36 (2021); Matteo Tonello, *2022 Proxy Season and Shareholder Voting Trends*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 30, 2022), <https://corpgov.law.harvard.edu/2022/03/30/2022-proxy-season-and-shareholder-voting-trends> (explaining “institutional investors move[d] faster than ever before to implement their [ESG] views through their voting”).

commitments⁷² and voiced concerns when corporations remained silent on pressing issues.⁷³ In other cases, employees have persuaded companies to change their stances on politically controversial subjects.⁷⁴

Progressives' multi-stakeholder approach to ESG advocacy has proven transformative. Today, approximately \$38 trillion are invested in ESG funds.⁷⁵ Major companies across economic sectors have espoused liberal values on an ever-widening range of issues.⁷⁶ As BlackRock Chairman and CEO Larry Fink wrote in his 2022 Letter to CEOs: "The stakeholders your company relies upon . . . need to know where we stand on the societal issues intrinsic to our companies' long-term success."⁷⁷ The left's sustained effort to instill progressive values in American companies thus cultivated ESG policies from a marginal curiosity to a business necessity in the years since *Citizens United*.

72. See Sara Savat, *Consumer Values, Brand Expectations Change in 2020*, WASH. U. ST. LOUIS (May 19, 2021) ("Today's consumers are more attuned to brands' values and willing to pay a premium to support companies that share their values, according to new research from the Bauer Leadership Center at Washington University in St. Louis"); *ESG Metrics Influence Buying Decisions*, PwC (Apr. 2021), <https://www.pwc.com/us/en/industries/consumer-markets/library/esg-metrics-influence-buying.html>.

73. See, e.g., David Gelles, *Delta and Coca-Cola Reverse Course on Georgia Voting Law, Stating 'Crystal Clear' Opposition*, N.Y. TIMES (Apr. 5, 2021), <https://www.nytimes.com/2021/03/31/business/delta-coca-cola-georgia-voting-law.html>.

74. See, e.g., Sara Fischer, *Disney Employees Walk out over Response to "Don't Say Gay" Bill*, AXIOS (Mar. 22, 2022), <https://www.axios.com/2022/03/22/disney-employees-walkout-dont-say-gay>.

75. Adeline Diab & Gina Martin Adams, *ESG Assets May Hit \$53 Trillion by 2025, a Third of Global AUM*, BLOOMBERG INTELLIGENCE (Feb. 23, 2021), <https://www.bloomberg.com/professional/blog/esg-assets-may-hit-53-trillion-by-2025-a-third-of-global-aum/>.

76. Even companies in industries traditionally viewed as hostile to progressive causes have embraced ESG policies. See, e.g., *Advancing a Lower Carbon Future*, CHEVRON (2022), <https://www.chevron.com/sustainability>; *ESG Portal*, LOCKHEED MARTIN (2022), <https://sustainability.lockheedmartin.com/sustainability/esg-portal/index.html>; *Moving Beyond Smoking: Reduce the Harm of Tobacco Products*, ALTRIA (2022), <https://www.altria.com/moving-beyond-smoking/reduce-the-harm-of-tobacco-products>.

77. Larry Fink, *2022 Letter to CEOs: The Power of Capitalism*, BLACKROCK (Jan. 18, 2022), <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter>.

The success of the ESG movement demonstrates the ascendancy of the deliberative conception of corporate values, even among progressives. Consistent with the Roberts Court's characterization of business entities as sites of robust debates on social, moral, and political issues,⁷⁸ progressive proponents of ESG policies have pushed corporations to take stands on subjects beyond the narrow ambit of their immediate economic concerns. Moreover, to achieve this end, progressives followed the program proposed by Justice Kennedy—harnessing corporate democracy to generate companies' values.

But the ESG movement's deliberative and intense focus on instilling liberal values in major corporations has resulted in an implementation gap. The discrepancy between businesses' bold stances and lackluster performance on ESG issues is particularly evident in the realm of sustainability, where it is known as greenwashing.⁷⁹

Concerns over greenwashing have grown in recent years, as the public's interest in climate-conscious companies has made sustainable branding more lucrative.⁸⁰ Indeed, empirical studies of large firms' environmental policies have identified widespread gaps between the appearance and reality of corporate sustainability pledges.⁸¹

Under the leadership of Chair Gary Gensler, the Securities and Exchange Commission ("SEC") has made greenwashing and other misleading ESG practices a regulatory and enforcement priority.⁸² In addition to proposing rules that would

78. See *supra* Part I.

79. See generally Ellen Pei-Yi Yu, Bac Van Luu & Catherine Huirong Chen, *Greenwashing in Environmental, Social and Governance Disclosures*, 52 *RSCH. INT'L BUS. & FIN.* 101192 (2020).

80. See Beau River, *The Increasing Dangers of Corporate Greenwashing in the Era of Sustainability*, *FORBES* (Apr. 29, 2021), <https://www.forbes.com/sites/beauriver/2021/04/29/the-increasing-dangers-of-corporate-greenwashing-in-the-era-of-sustainability> ("One impact of the groundswell towards global sustainability is that the consequences of corporate greenwashing are becoming more dire.").

81. THOMAS DAY ET AL., *CORPORATE CLIMATE RESPONSIBILITY MONITOR 5* (2022), <https://newclimate.org/sites/default/files/2022/02/CorporateClimateResponsibilityMonitor2022.pdf>; Georgina Rannard, *Climate Change: Top Companies Exaggerating Their Progress*, *BBC* (Feb. 7, 2022), <https://www.bbc.com/news/science-environment-60248830>.

82. See Gary Gensler, *Statement by Chair Gensler on ESG Disclosures Proposal*, *HARV. L. SCH. F. ON CORP. GOVERNANCE* (May 26, 2022), <https://>

require climate risk disclosures by public companies⁸³ and greater ESG transparency among investment advisers,⁸⁴ the SEC established a Climate and ESG Task Force within the Division of Enforcement dedicated to ESG-related misrepresentations.⁸⁵ The Task Force has already brought an enforcement action against BNY Mellon⁸⁶ and is reportedly investigating numerous other firms for deceptive ESG commitments.⁸⁷ According to the SEC, these expressions of corporate values transgress the limits of the First Amendment and instead constitute fraud.⁸⁸

corp.gov.law.harvard.edu/2022/05/26/statement-by-chair-gensler-on-esg-disclosures-proposal/.

83. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249); see Gary Shorter & Rena S. Miller, Cong. Rsch. Serv., IF12108, Overview of the SEC Climate Risk Disclosure Proposed Rule (2022), <https://crsreports.congress.gov/product/pdf/IF/IF12108>.

84. Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. 36654 (proposed June 17, 2022) (to be codified at 17 C.F.R. pts. 200, 230, 232, 239, 249, 274, 279); see Katanga Johnson & Ross Kerber, *U.S. SEC Unveils Rules to Ensure ESG Funds Follow Through on Investments*, REUTERS, <https://www.reuters.com/markets/us/us-sec-unveil-rule-crackdown-funds-greenwashing-2022-05-25/> (May 27, 2022).

85. See *SEC Announces Enforcement Task Force Focused on Climate and ESG Issues*, U.S. SEC. & EXCH. COMM'N (Mar. 4, 2021), <https://www.sec.gov/news/press-release/2021-42>.

86. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges BNY Mellon Investment Adviser for Misstatements and Omissions Concerning ESG Considerations (May 23, 2022), <https://www.sec.gov/news/press-release/2022-86> ("BNY Mellon Investment Adviser represented or implied in various statements that all investments in the funds had undergone an ESG quality review, even though that was not always the case.").

87. See Lananh Nguyen & Matthew Goldstein, *Goldman Sachs Is Being Investigated over E.S.G. Funds*, N.Y. TIMES (June 12, 2022), <https://www.nytimes.com/2022/06/12/business/sec-goldman-sachs-esg-funds.html>; Patricia Kowsmann, Corinne Ramey & Dave Michaels, *U.S. Authorities Probing Deutsche Bank's DWS over Sustainability Claims*, WALL ST. J. (Aug. 25, 2021), <https://www.wsj.com/articles/u-s-authorities-probing-deutsche-banks-dws-over-sustainability-claims-11629923018>; Chris Prentice, *SEC's Texas Office Probes Banks over Disclosures on Guns, Fossil Fuels*, REUTERS (Jan. 5, 2022), <https://www.reuters.com/markets/us/exclusive-secs-texas-office-probes-banks-over-disclosures-guns-fossil-fuels-2022-01-05>.

88. As a general matter, "[p]unishing fraud, whether it be common law fraud or securities fraud, simply does not violate the First Amendment." SEC v. Pirate Investor LLC, 580 F.3d 233, 255 (4th Cir. 2009).

While embracing the deliberative approach has enabled progressives to instill liberal values in major companies, the increasingly pressing problem of greenwashing and similar misconduct reveals a crack in the ESG movement's theoretical foundation. Stakeholder pressure can lead a company to endorse social and political views in press releases and policies, but to facilely attribute those beliefs to the corporation as a whole is to embrace *Citizens United's* lulling legal falsehood.⁸⁹ Once a company proclaims its commitment to a progressive cause, the deliberative view invites advocates to declare victory and move on. Yet the prevalence of greenwashing shows that faith in the enterprise-wide sincerity of corporate values is often misplaced, since those values can only be realized through the acts of individual corporate agents. Because resistant executives, managers, or employees can thwart concrete action on ESG issues, corporate press releases are never the last word. Thus, despite successes in propagating liberal values through corporate democracy, progressives' deliberative approach to ESG has faltered due to a failure to focus on individual execution.

B. *State Fair Access Laws*

In the past two years, conservatives have responded to the ESG movement's ascendancy by enacting "fair access" statutes in numerous states.⁹⁰ These laws penalize firms with progressive stances on issues like climate change and firearms by banning those companies from government contracts and requiring public pension funds to divest from their securities.⁹¹

State fair access regimes' entity-level punishments demonstrate a commitment to the deliberative conception of corporate politics. While a realist would stress the outsize influence of individual managers and directors on businesses' values,⁹² state fair access laws—much like ESG policies—attribute social

89. See *supra* notes 50–51 and accompanying text.

90. See *infra* notes 100–109 and accompanying text; Joshua A. Lichtenstein et al., *Navigating State Regulation of ESG Investment by Investment Managers: A Rapidly Evolving and Contradictory Landscape*, ROPES & GRAY (June 30, 2021), <https://www.ropesgray.com/en/newsroom/alerts/2021/June/Navigating-State-Regulation-of-ESG-Investments-by-Investment-Managers-A-Rapidly-Evolving>.

91. See, e.g., S. B. 205 (Ky. 2022) (enacted).

92. See *supra* note 42 and accompanying text.

and political views to entire corporate enterprises. Accordingly, fair access proponents impose firm-wide costs on businesses, without concern for the consequences for the shareholders, employees, and other stakeholders who oppose their companies' ESG commitments.

Although state fair access laws represent a logical extension of the deliberative theory, their use of state power to stifle the social and political views of corporations violates the Roberts Court's robust First Amendment protections for business entities.⁹³ Because these statutes cannot withstand judicial scrutiny, they offer conservatives a fleeting yet false sense of achievement in the debate over ESG policies.

Structurally, the earliest antecedents of state fair access laws were the "MacBride" statutes enacted in the 1980s and 1990s, named after a set of religious toleration principles.⁹⁴ These laws prohibit state and local agencies from contracting with businesses that operate in Northern Ireland yet fail to certify their commitment to non-discrimination against Catholics.⁹⁵ Despite their narrow ambit, MacBride laws provided a key precedent for future applications of state power to shape corporate values.

In late 2020, conservative concern with the proliferation of progressive values among financial institutions prompted the Office of the Comptroller of the Currency ("OCC") to promulgate a rule prohibiting large national banks from refusing to serve customers based on categorical ESG policies.⁹⁶ The OCC finalized this fair access rule in the final days of the

93. See *infra* notes 112–121 and accompanying text.

94. See *The Nine MacBride Principles*, IRISH TIMES (Mar. 2, 1996), <https://www.irishtimes.com/news/the-nine-macbride-principles-1.32756> ("The 1984 MacBride Principles are nine equal opportunity guidelines for US firms in Northern Ireland. Companies are called on to increase job opportunities for underrepresented religious groups, ban political and religious symbols from the workplace and ensure safe travel for employees.").

95. *E.g.*, MASS. GEN. LAWS ch. 7, § 22C (2022); N.J. STAT. ANN. § 52:34-12.2 (West 2022); see also Douglass Cassel, *Corporate Initiatives: A Second Human Rights Revolution?*, 19 FORDHAM INT'L L.J. 1963, 1972 (1996) ("Sixteen states and more than forty cities have enacted MacBride Principles laws.").

96. Fair Access to Financial Services, 85 Fed. Reg. 75261 (Nov. 25, 2020) (to be codified at 12 C.F.R pt. 55).

Trump administration⁹⁷ but halted its application just two weeks later following the inauguration of President Biden.⁹⁸ With Democratic control of the White House and both chambers of Congress, conservatives sought a new arsenal to combat the ESG movement—state law.

Drawing heavily on MacBride statutes,⁹⁹ legislators in Texas passed a bill that revolutionized efforts to push back on ESG policies and inspired similar laws in other states.¹⁰⁰ Texas's fair access regime requires contracts worth at least \$100,000 between governmental entities and companies with ten or more employees to include a certification that the contractor "does not have a practice, policy, guidance, or directive that discriminates against a firearm entity or firearm trade association."¹⁰¹ Refusing to deal with a customer "based solely on its status as a . . . firearm trade association" constitutes discrimination under the statute.¹⁰²

Whereas the OCC's short-lived fair access rule applied only to large national banks, Texas's statute is significantly further reaching. To serve state and local agencies, businesses in *any* sector must eschew impermissible ESG policies on firearms, if minimal employee and contract-value requirements are met. Underwriters for Texas's multibillion-dollar municipal bond market¹⁰³ therefore fall within the law's ambit, a fact

97. Press Release, Off. of the Comptroller of the Currency, OCC Finalizes Rule Requiring Large Banks to Provide Fair Access to Bank Services (Jan. 14, 2021), <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-8.html>.

98. Press Release, Off. of the Comptroller of the Currency, OCC Puts Hold on Fair Access Rule (Jan. 28, 2021), <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-14.html>.

99. See David H. Webber, *It's Time for ESG to Fight Back*, BARRON'S (Nov. 11, 2022), <https://www.barrons.com/articles/esg-investing-blackrock-profits-51668185876> (stressing the similarities between Texas's anti-ESG legislation and "the MacBride Principles countering anti-Catholic discrimination in the struggle over Northern Ireland").

100. See Maxine Joselow & Vanessa Montalbano, *Bills in Red States Punish Climate Conscious Businesses*, WASH. POST (June 1, 2022), <https://www.washingtonpost.com/politics/2022/06/01/bills-red-states-punish-climate-conscious-businesses/> ("Like many conservative causes, the trend [of anti-ESG legislation] started in Texas . . .").

101. TEX. GOV'T CODE ANN. § 2274.002 (West 2022).

102. TEX. GOV'T CODE ANN. § 2274.001(3)(A) (West 2022).

103. See Richard Williamson, *Texas Expects 56% Increase in Debt Issuance in 2022*, BOND BUYER (Dec. 27, 2021, 10:11 AM), <https://www.bondbuyer.com/>

that forced many ESG-conscious investment firms to reevaluate their operations in the state.¹⁰⁴

Texas's firearm fair access rule quickly proved influential among conservative legislators. After Texas passed a similar law disqualifying companies with certain fossil-fuel ESG stances from state and local contracts,¹⁰⁵ Kentucky,¹⁰⁶ Oklahoma,¹⁰⁷ Tennessee,¹⁰⁸ and West Virginia¹⁰⁹ enacted fair access statutes of their own that mirrored the Texas regime.

Much like the ESG policies these statutes seek to suppress, state fair access laws exhibit a fundamental commitment to the deliberative conception of corporate values. First, by penalizing disfavored ESG policies at the entity level, these laws attribute progressive values directly to firms, instead of focusing on the individual executives and directors who shape companies' ESG commitments.¹¹⁰ State fair access regimes also disregard the interests of dissenting shareholders and employees, reflecting a conception of firms as socio-political ventures to which stakeholders lend their tacit support. Finally, state fair access laws exhibit a profound skepticism towards the notion that economic self-interest is the ultimate and unyielding aim of for-profit enterprises.¹¹¹ The asserted need for governmental checks on values-driven decisions by companies presupposes that business decisions are often ethically and politically motivated. For proponents of fair access laws, because corporations are sites of moral deliberation, state intervention is not a mis-

news/texas-expects-56-increase-in-debt-issuance-in-2022 ("Texas agencies expect to issue about \$8.05 billion in bonds, commercial paper and notes in fiscal year 2022 . . .").

104. See Danielle Moran & Amanda Albright, *Texas Forces Companies to Be Neutral on Guns, or Lose Business*, BLOOMBERG (May 25, 2022, 4:28 PM), <https://www.bloomberg.com/news/articles/2022-05-25/texas-forces-companies-to-be-neutral-on-guns-or-lose-business>; Dan Primack, *Texas Targets Private Equity with Gun "Anti-Discrimination" Law*, AXIOS (June 2, 2022), <https://www.axios.com/2022/06/02/texas-targets-private-equity-with-gun-anti-discrimination-law>.

105. TEX. GOV'T CODE ANN. § 2274.002 (West 2022).

106. S.B. 205, 2022 Reg. Sess. (Ky. 2022).

107. H.B. 2034, 2022 Leg., 58th Sess. (Okla. 2022).

108. S.B. 2649, 112th Gen. Assemb., Reg. Sess. (Tenn. 2022).

109. S.B. 262, 2022 Reg. Sess. (W. Va. 2022).

110. See *supra* notes 50–51 and accompanying text.

111. For the contrary realist view, see *supra* notes 36–38 and accompanying text.

placed engrafting of politics onto business, but rather a congruent solution to the problematic rise of ESG policies.

While Texas's firearm fair access law and its imitators embody the deliberative theory of corporate values that animated *Citizens United*, these statutes nevertheless violate the letter of the Roberts Court's First Amendment jurisprudence. Three years after *Citizens United*, the Roberts Court continued its expansion of corporate free speech rights in *Agency for International Development v. Alliance for Open Society International, Inc.*¹¹² That case concerned a program Congress created to combat HIV/AIDS by funding nongovernmental organizations around the globe.¹¹³ However, Congress stipulated that any organization without "a policy explicitly opposing prostitution and sex trafficking" was ineligible for funding.¹¹⁴ To administer this condition, the Department of Health and Human Services and U.S. Agency for International Development required participating organizations to certify their opposition to prostitution and sex trafficking.¹¹⁵

Several domestic nonprofit corporations sued, arguing the mandatory certification violated their free speech right to hold contrary values under the First Amendment.¹¹⁶ Writing for the Court's majority, Chief Justice Roberts agreed. He explained that the certification requirement constituted an "unconstitutional condition" on plaintiffs' free speech rights because it went beyond merely "defin[ing] the limits of the government spending program" and instead sought "to leverage funding to regulate speech outside the contours of the program itself."¹¹⁷ The Court held that in doing so, Congress had interfered in the corporations' deliberative function and transgressed a boundary protected by the First Amendment.¹¹⁸

112. *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013).

113. *Id.* at 208.

114. *Id.* at 210 (quoting 22 U.S.C. § 7631(f) (2012)).

115. *Id.* (quoting 45 C.F.R. § 89.1(b) (2012)).

116. *Id.* at 212.

117. *Id.* at 214–16.

118. *See id.* at 220–21 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." (quoting *Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943))).

Texas's firearm fair access statute and the numerous state laws that share its structure have the same constitutional infirmities as the certification requirement at issue in *Agency for International Development*. The Texas legislature has disqualified firms with disfavored stances on firearm commerce from participating in state and local spending programs.¹¹⁹ To administer this ban, government agencies must acquire "written verification[s]" from contracting firms that they do not have impermissible ESG policies.¹²⁰ And even more plainly than the HIV initiative in *Agency for International Development*, the firearm fair access law's certification provision seeks to leverage funding from every state and local procurement program to promote a preference for firearms, without regard to the purpose of the specific expenditure. Requiring domestic corporations to attest that they do not "discriminate against a firearm entity" in order to provide underwriting services to counties or pencils to public schools constitutes an unconstitutional condition under the First Amendment. Thus, under the Roberts Court's corporate free speech jurisprudence, these state fair access laws "cannot be sustained."¹²¹

By adopting the same deliberative conception of corporate politics that underlies the ESG movement yet marshaling the coercive power of state governments to override those deliberations, conservative proponents of fair access laws have erred. Corporations with progressive ESG policies have indeed reconsidered their operations in states with fair access regimes,¹²² but these short-term developments belie the unconstitutionality of anti-ESG certification requirements unrelated to the state and local contracts in which they appear. Attempting to punish corporations at the entity level for their commitments to progressive values represents a logical extension of Justice Kennedy's invitation in *Citizens United* to view business entities as social and moral ventures; however, precisely because the Supreme Court has championed the political function of corporations, the legal strategy employed by propo-

119. See TEX. GOV'T CODE ANN. § 2274.002(b) (West 2022).

120. *Id.*

121. *Agency for Int'l Dev.*, 570 U.S. at 221.

122. See, e.g., Lydia Beyoud & Nushin Huq, *Texas Puts Banks in Tight Spot with New Law Backing Gunmakers*, BLOOMBERG L. (Sept. 1, 2021), <https://news.bloomberglaw.com/banking-law/texas-puts-banks-in-tight-spot-with-new-law-backing-gunmakers>.

nents of fair access laws is a constitutional dead end. The growing state fair access movement is therefore an unfruitful path for conservative opponents of ESG policies, who remain ensnared in an understanding of corporations that precludes the very means of controlling corporate values that fair access proponents believe the deliberative theory demands.

III.

RETURNING TO REALISM

The deliberative conception of corporate politics has served as a cornerstone for progressives and conservatives alike in contemporary debates over ESG commitments. Yet looming threats from greenwashing¹²³ and free speech doctrine¹²⁴ demonstrate the deliberative theory's fatal flaw: in treating the corporation as an ideal *tabula rasa* for social discourse, it overlooks the essential role of concentrated power in the corporate form. The separation of ownership and control necessarily empowers the directors and executives who manage corporate operations,¹²⁵ at the expense of dispersed shareholders who lack the incentives to monitor and intervene in companies' daily affairs.¹²⁶ Officers and directors therefore enjoy an outsize voice in corporate democracy, skewing deliberations towards their interests.

By reviving the realist conception of corporate values articulated in *Austin*, both ends of the political spectrum can reorient their strategies to focus on the personnel who dominate business decisions. This Part explains how doing so illuminates several concrete solutions to the aforementioned issues progressives and conservatives currently face.

A. *ESG for Individuals*

In light of the ESG movement, major corporations have issued bold espousals of progressive values, but many of these corporations have failed to deliver tangible results that match their promises.¹²⁷ This inconsistency demonstrates the deliber-

123. See *supra* Section II.A.

124. See *supra* Section II.B.

125. See generally BERLE & MEANS, *supra* note 44 (offering a canonical account of the separation of ownership and control in corporations).

126. See EASTERBROOK & FISCHEL, *supra* note 11, at 67.

127. See *supra* Section II.A.

ative theory's overemphasis on corporate values and underemphasis on the individuals responsible for implementing them. Moreover, the preoccupation with corporations' social and moral functions has blinded progressives to the reality that officers and directors have the incentives to sacrifice ESG priorities in favor of the financial bottom line, as illustrated by the prevalence of greenwashing and similar misconduct.¹²⁸ ESG proponents should therefore revitalize their efforts by embracing the following individual-focused reforms.

First, ESG policies should consistently combine expressions of corporate values with concrete, incentive-shaping measures. For example, tying a portion of executive compensation to ESG performance would help align managerial focus with corporate commitments.¹²⁹ Likewise, to ensure reluctant employees are not undermining values-driven initiatives, internal audit and compliance functions should develop metrics to monitor progress on ESG goals across corporate departments.¹³⁰ Integrating ESG factors into routine job performance evaluations would further strengthen implementation down the corporate ladder.

In addition to adopting traditional methods for crafting incentives, a realist ESG movement should leverage behavioral insights into how individual executives, directors, and employees actualize corporate values and policies.¹³¹ Notably, when a corporation adopts a progressive stance on an issue, confirmation bias will influence the firm's leadership to pay greater at-

128. See *supra* notes 79–81 and accompanying text.

129. Cf. Lucian Arye Bebchuk & Jesse M. Fried, *Executive Compensation as an Agency Problem*, 17 J. ECON. PERSPS. 71, 82–83 (2003) (advocating for performance-based compensation to reduce agency costs among corporate executives). For a recent empirical analysis of how say-on-pay regimes for executive compensation impact ESG outcomes, see Mary Ellen Carter, Andrea Pawliczek & Rong Zhong, *Say on ESG: The Adoption of Say-on-Pay Laws and Firm ESG Performance* (Oct. 17, 2022) (unpublished manuscript), <https://ssrn.com/abstract=4125441>.

130. To date, the ESG movement has primarily developed metrics for external investors, rather than internal monitoring. See, e.g., Daniel C. Esty, *Creating Investment-Grade Corporate Sustainability Metrics*, in *VALUES AT WORK: SUSTAINABLE INVESTING AND ESG REPORTING* 51 (Daniel C. Esty & Todd Cort eds., 2020).

131. For a seminal article on the salience of cognitive insights for law and economics, see Cass R. Sunstein, Christine Jolls & Richard H. Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

tention to data supporting the corporation's commitment to that position, instead of any information suggesting the business has fallen short on that stance.¹³² Training leadership on this form of confirmation bias may reduce its distorting effects.¹³³ Cognitive insights also reinforce traditional strategies. Because self-serving bias leads individuals to overestimate their positive contributions and overlook failures,¹³⁴ officers, directors, and employees likely have undue confidence in their execution of ESG policies. Having internal audit and compliance functions, or even third-party auditors offer independent assessments of individuals' ESG progress would help offset self-serving bias.¹³⁵

Finally, in keeping with the realist view, the SEC and other law enforcement agencies should prioritize individual liability over entity-level penalties when combatting greenwashing and other ESG-related misconduct. Punishing specific officers, directors, and employees who engage in wrongdoing not only provides a significant incentive to maintain honest

132. Cf. Daniel F. Stone & Daniel H. Wood, *Cognitive Dissonance, Motivated Reasoning, and Confirmation Bias: Applications in Industrial Organization*, in HANDBOOK OF BEHAVIORAL INDUSTRIAL ORGANIZATION 114, 115 (Victor J. Tremblay et al. eds., 2018) (exploring confirmation bias in firms).

133. See Anne Laure Sellier, Irene Scopelliti & Carey K. Morewedge, *Debiasing Training Improves Decision Making in the Field*, 30 PSYCH. SCI. 1371, 1372 (2019) (discussing "warning about bias" as a debiasing technique).

134. See Bruce Blaine & Jennifer Crocker, *Self-Esteem and Self-Serving Biases in Reactions to Positive and Negative Events: An Integrative Review*, in SELF ESTEEM 55, 55 (Roy F. Baumeister, ed., 1993) ("The self-serving bias refers to the tendency of people to interpret and explain outcomes in ways that have favorable implications for the self.").

135. See Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109, 115 (1997) (describing "research in psychology showing that biases are diminished when subjects question their own judgment").

and transparent ESG policies,¹³⁶ but also avoids inflicting costs on innocent stakeholders.¹³⁷

B. *A Conservative Case for Corporate Law Reform*

Driven by the deliberative account of corporate politics, conservatives have enacted state fair access laws that impose entity-level penalties on firms with progressive stances on contentious social issues. But the deliberative view's attribution of corporate values to entire business ventures elides the intra-firm relations that actually produce ESG policies. Resurrecting the realist theory of *Austin* would enable conservatives to recognize the disproportionate influence of elite executives, directors, and asset managers on businesses' ESG commitments. Because the Roberts Court's First Amendment precedents effectively preclude the use of state power to curb the proliferation of progressive values among firms,¹³⁸ any check on left-leaning corporate leadership must come from private parties, absent a change in U.S. constitutional law. Accordingly, conservatives should consider how reforms to corporate law could empower less-elite stakeholders, who may not share executives' progressive views,¹³⁹ to exert greater influence over companies' values and ESG stances.

136. Under the Biden administration, individual liability has increasingly become a central tenet in the Department of Justice's strategy for combating corporate misconduct. See, e.g., Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime, U.S. DEP'T OF JUST. (Oct. 28, 2021) ("Accountability starts with the individuals responsible for criminal conduct. Attorney General Garland has made clear it is unambiguously this department's first priority in corporate criminal matters to prosecute the individuals who commit and profit from corporate malfeasance.").

137. See, e.g., John C. Coffee, Jr., "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386, 401 (1981) (explaining how "stockholders bear the penalty in the reduced value of their securities"). This concern for the welfare of dispersed shareholders, uninvolved in day-to-day corporate operations, parallels Justice Brennan's concurrence in *Austin*. See *supra* notes 42–44 and accompanying text.

138. See *supra* notes 112–21 and accompanying text.

139. Cf., e.g., Nate Cohn, *Poll Shows Tight Race for Control of Congress as Class Divide Widens*, N.Y. TIMES (July 13, 2022), <https://www.nytimes.com/2022/07/13/upshot/poll-2022-midterms-congress.html> (finding strong Democratic support among college-educated voters and Republican support among voters without a four-year degree).

To enhance the power of investors who disagree with ESG policies that purport to speak for entire firms, conservatives should bolster shareholders' voice and exit rights.¹⁴⁰ Through state or federal legislation, conservatives could require shareholder votes to approve ESG policies, much like the say-on-pay requirement for executive compensation under the Dodd-Frank Act.¹⁴¹ However, asset managers like BlackRock vote a large proportion of the shares at many companies,¹⁴² so conservatives may want to strengthen shareholders' exit rights as well. For public companies, dissenting shareholders can simply sell their shares if they disagree with a company's values.¹⁴³ But doing so is far more difficult for shareholders in private companies that lack thick equity markets.¹⁴⁴ While state corporate codes provide a statutory right of appraisal for dissenting shareholders in mergers and acquisitions,¹⁴⁵ conservatives could extend a similar right to private-company shareholders who disagree with a company's adoption of ESG policies.

Employees are another less-elite cohort that could serve as a counterweight to progressive corporate leadership. Conservatives could therefore amend state law to require employee

140. See generally ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS ORGANIZATIONS AND STATES* 21–44 (1970) (describing voice and exit rights).

141. 15 U.S.C. § 78n–1(a) (2020).

142. See Eric Rosenbaum, *A New BlackRock Shareholder Power That May Tilt Proxy Battles of the Future*, CNBC (Mar. 1, 2022), <https://www.cnbc.com/2022/03/01/a-blackrock-shareholder-vote-that-may-control-future-proxy-battles.html> (“On average, over 15% of outstanding shares in corporations are held by the top four or five asset managers including BlackRock, Vanguard and State Street Global Advisors, according to data from Broadridge Financial Solutions. For some publicly traded companies, the top three fund companies can hold as much as one-third of investor shares.”).

143. Accordingly, most states deny appraisal rights to dissenting investors in public companies. See Gil Matthews, *The “Market Exception” in Appraisal Statutes*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 30, 2020), <https://corpgov.law.harvard.edu/2020/03/30/the-market-exception-in-appraisal-statutes/> (“38 states now restrict the appraisal rights of shareholders of public companies through a provision in their appraisal statutes called a ‘market exception’ [T]hese statutes deny shareholders of publicly traded companies the right to the court-awarded assessment to which similarly-situated private company shareholders are entitled.”).

144. See *id.* (noting “courts need to assess fair value for private company shareholders because no established market price for private company shares exists”).

145. *E.g.*, DEL. CODE ANN., tit. 8, § 262(a) (2022).

representation in corporate governance, as is the case in numerous European jurisdictions.¹⁴⁶ Limiting employee participation to questions of ESG policies and corporate values would ensure that this reform is narrowly tailored to conservatives' concerns.

As a more radical measure, conservatives could reconsider the permissive approach to corporate purpose that has dominated modern business law. The dormant doctrine of *ultra vires*, by which shareholders enjoin actions outside the express purpose in a company's charter,¹⁴⁷ would provide a potent mechanism for limiting firms' abilities to act on social values beyond their profit-seeking function. Requiring more specific statements of purpose—in contrast to the “any permissible purpose” boilerplate that dominates such statements today¹⁴⁸—would allow conservatives to draw on a well-developed body of nineteenth century precedents. While the consequences and costs associated with reversing such a foundational principle of business law would make this strategy unappealing to many,¹⁴⁹ a restrictive approach to corporate purpose likely represents conservatives' most formidable means of limiting ESG policies within the bounds of current First Amendment jurisprudence.

Although restructuring relationships among stakeholders within firms offers a compelling means of checking the influence of elite corporate leadership on businesses' values, reforms to governance processes cannot guarantee particular outcomes in debates over ESG issues. Thus, for conservatives committed to public oversight of the ESG movement through state coercion, overturning the Roberts Court's expansive corporate First Amendment precedents—whether through subse-

146. See Grant M. Hayden & Matthew T. Bodie, *Codetermination in Theory and Practice*, 73 FLA. L. REV. 321, 324 (2021) (discussing worker participation in corporate governance in several European countries).

147. See Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (with Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1307–08 (2001).

148. See David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181, 185 (2014) (describing this phenomenon).

149. See Greenfield, *supra* note 147, at 1310–11 (describing the history of strategic uses of the *ultra vires* doctrine to avoid contracts, creating hold-up costs); Benjamin T. Seymour, *Corporate Purpose and the Separation of Powers*, 36 B.Y.U. J. PUB. L. 113, 142–44 (2022).

quent Supreme Court decisions or a constitutional amendment—may represent the best path forward.

CONCLUSION

This Article traces a tension inherent in *Citizens United's* deliberative conception of corporate politics, both as a matter of social dynamics and legal doctrine. The Roberts Court's majority opinion invited the public to understand corporations as political actors; however, the decision offered an unrealistically optimistic view of how business enterprises internalize social and ethical convictions. Moreover, the Court's corresponding solicitude for corporations' free speech rights effectively precluded exercises of state power to shape companies' values. As progressives and conservatives alike have embraced the deliberative view, these latent issues have blossomed into growing frustration with firms' stances and actions on ESG issues. Amid this rising tide of discontent, both ends of the political spectrum have only grown more entrenched, demanding further social and moral commitments from businesses.

Returning to the realist view of *Austin* could help break the chain of ever-greater politicization of corporate legal fictions by enabling progressives and conservatives to recognize that business entities are not themselves political; rather their individual stakeholders are. A less abstract approach illuminates several solutions to the deliberative conception's shortcomings, which currently beset both sides of the debate over ESG policies. Accepting the realist tenet that individuals are the ultimate units of corporate politics should spur not only a more efficacious pursuit of liberals and conservatives' current goals, but also greater reflection on what those ends are, and whether business enterprises are the best vehicles for attaining them.