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FIDUCIARY BLIND SPOT: THE FAILURE OF INSTITUTIONAL INVESTORS TO PREVENT THE ILLEGITIMATE USE OF WORKING AMERICANS' SAVINGS FOR CORPORATE POLITICAL SPENDING

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ABSTRACT

For decades, American workers have been subjected to increasing pressure to become forced capitalists, in the sense that to provide for

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retirement for themselves, and to pay for college for their children, they must turn part of their income every month over to mutual funds who participate in 401(k) and 529 programs. These "Worker Investors" save for the long term, often hold portfolios that are a proxy for the entire economy, and depend on the economy's ability to generate good jobs and sustainable growth in order for them to be able to have economic security. In recent years, there has been a heartening improvement in the self-awareness of the major mutual fund families—BlackRock, Vanguard, State Street, and Fidelity (the "Big Four")—that have Worker Investors' capital. This Big Four has grown enormously because of the legal pressures that generate capital inflows to them every month from Worker Investors. To their credit, the Big Four recognize that they have a duty to think and act in a way aligned with the interests of Worker Investors by encouraging the public companies in which they invest to implement business plans that will generate sound long-term growth. In fact, the Big Four have recently recognized that unless public companies act in a manner that is environmentally, ethically, and legally responsible, they are unlikely to be successful in the long run. Thus, the Big Four are more willing than ever to second-guess company management to fulfill their fiduciary duties.

In one area, however, the Big Four continue to have a fiduciary blind spot: they let corporate management spend the Worker Investors' entrusted capital for political purposes without constraint. The Big Four abdicate in the area of political spending because they know that they do not have Worker Investors' capital for political reasons and because the funds do not have legitimacy to speak for them politically. But mutual funds do not invest in public companies for political reasons, and public company management has no legitimacy to use corporate funds for political expression either. Thus, a "double legitimacy" problem infects corporate political spending.

This Article identifies and illustrates this double legitimacy problem, and shows why unconstrained corporate political spending is contrary to the interests of Worker Investors. Precisely because Worker Investors hold investments for the long term and have diversified portfolios that track the whole economy, political spending by corporate managers to tilt the regulatory playing field is harmful to them. Worker Investors are human beings who suffer as workers, consumers, and citizens when companies tilt the regulatory process in a way that allows for more pollution, more dangerous workplaces, less leverage for workers to get decent pay and benefits, and more unsafe products and deceptive services. But even as diversified investors, unconstrained corporate political spending is likely to create harm, as both common sense and empirical evidence suggest. Not only that, there is no danger that public companies would have too little voice in the political process if their spending were subject to constraint by

stockholders. Corporations have many other tools, including their own Political Action Commitees ("PACs") funded by voluntary contributions, their lobbying expenditures, and the influence they wield as employers and taxpayers—tools that made business interests predominate in political spending even before Citizens United *let them free to spend treasury funds without inhibition. For these reasons, the case against unconstrained corporate political spending is very strong.*

As of now, however, the Big Four refuse to even support proposals to require the very disclosure they would need if they were to monitor corporate political spending. And their capacity to monitor if they have the information is lacking. But, if the Big Four open their fiduciary eyes and follow the recommendation of the late industry icon Jack Bogle, and vote to require that any political spending from corporate treasury funds be subject to approval of a supermajority of stockholders, they alone could cure the double legitimacy problem of corporate political spending. Because of their substantial voting power, the support of the Big Four would ensure that this check on illegitimate corporate political spending would be put in place and thus make an important contribution to restoring some basic fairness to our political process.

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INTRODUCTION

One heartening development in corporate governance has been Americans' increasing willingness to embrace a rational approach to investing by forsaking a futile search for alpha. Instead, more and more Americans are holding baskets of securities that are a proxy for the entire market, and seeking a sustainable increase in their wealth tied to the economy's overall growth.[1] These "Worker Investors" save primarily for two long-term purposes: to pay for college for their children and retirement for themselves. But American workers' rejection of alpha chasing and focus on index investing is not just driven by rational self interest. Rather, these "Worker Investors" are "forced capitalists"[2] in the sense that they must turn part of their income every month over to the mutual funds who participate in the 401(k) and 529 programs that Worker Investors are encouraged by federal tax policies to use for these long-term purposes.

In partial recognition of this reality, institutional investors are becoming more aware of their fiduciary duty to match their responsibilities as voters and monitors of portfolio companies with the long-term goals of the Worker Investors whose capital they control. Unlike day traders, Worker Investors do not jump in and out of stocks but instead hold a portfolio that is a rough proxy for the overall economy. They, therefore, cannot profit from bubbles that burst, but only from durable increases in corporate profits. That is, Worker Investors need companies to make money the old fashioned way: by selling useful products and services, rather than by using gimmicks or by slighting things like environmental compliance and worker safety to get a short-term edge.

For too many years, institutional investors did not take into account the unique perspective of stuck-in, long-term investors. Instead they voted their shares in a manner more consistent with the momentary impulses of alpha

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1. To quickly put a few numbers on the trend: in 2017 alone, investment in "passive" funds increased $220 billion, but investors withdrew $207 billion from actively managed equity mutual funds. Alina Lamy, *Morningstar Direct Asset Flows Commentary: United States*, MORNINGSTAR 1 (Jan. 18, 2018), https://www.morningstar.com/content/dam/marketing/shared/Company/LandingPages/Research/Documents/Morningstar_Fund_Flows_Commentary_Dec_2017.pdf. [https://perma.cc/YQU9-CWEV]. The same is true for 2016, with investors withdrawing $340 billion from active funds and investing an additional $553 billion into passive funds. Tom Lauricella & Alina Lamy, *Morningstar Direct Asset Flows Commentary: United States*, MORNINGSTAR 2 (Jan. 11, 2017), https://s21.q4cdn.com/198919461/files/doc_news/archive/AssetFlowsJan2017.pdf [https://perma.cc/DYF4-FNY8].

2. Leo E. Strine, Jr., *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance*, 33 J. CORP. L. 1, 4–5 (2007).

chasers and folks more focused on the next trading day rather than the next year or the next decade.[3] The awareness of institutional investors that they need to better align their behavior as fiduciaries with the economic interests of Worker Investors is not just welcome, but long overdue.

And the center-of-plate investment funds also deserve credit for increasing their focus on sustainable, responsible corporate growth. These institutional investors have recognized that Worker Investors do not benefit when corporations engage in regulatory short-cuts to gain advantage, rather than outcompeting other businesses by delivering a better product or service.[4] Short-cuts get found out. And companies that externalize costs to society and other companies do not benefit Worker Investors who pay for those externalities as investors in a portfolio reflecting the entire market, and as human beings who breathe air, consume products, and pay taxes.[5]

But institutional investors need to do more to fulfill their fiduciary duty to align their voting policies with the interests of the Worker Investors whose capital they control. In virtually every other area, institutional investors have applied increasing scrutiny to the behavior of corporate managers.

But in one area, institutional investors have a huge fiduciary blind spot and still let corporate managers run free of responsible oversight. That area is incredibly important to whether our economy and society works for everyone: political spending.

I. THE ODDMENT OF BIG FOUR POLITICAL SPENDING POLICIES: THE PERSISTENCE OF OLD-SCHOOL DEFERENCE TO MANAGEMENT DESPITE OTHERWISE INDEPENDENT AND SKEPTICAL VOTING POLICIES

A. The Big Four's Increasing Clout and Skepticism of Management

To provide context for discussing this blind spot, some important realities, such as the current voting policies of the largest investment managers, must be understood.

The history of mutual fund behavior in monitoring portfolio companies is complicated. For the purposes of this Article, it is enough to say that mainstream mutual funds were not anxious to spend money voting their

3. *See* Leo E. Strine, Jr., *Can We Do Better by Ordinary Investors? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law*, 114 COLUM. L. REV. 449, 478 (2014) (noting that index funds vote inconsistently in a manner that is "reflective of a lack of judgment being exercised by the index fund on behalf of its specific investors and their interests").

4. *See, e.g.*, Larry Fink, *Larry Fink's 2017 Letter to CEOs*, BLACKROCK, https://www.blackrock.com/corporate/investor-relations/2017-larry-fink-ceo-letter [https://perma.cc/4KZX-Q2L9] (reminding corporate leaders that responding to rising inequality, environmental challenges, and labor concerns is crucial to building long-term sustainable profits).

5. *See infra* Part V.

shares,[6] preferred the Wall Street rule of moving on,[7] and are late arrivals at the corporate governance hooha party, i.e., the party thrown by interests who believe that there should be a much higher amount of stockholder activism, election contests, business shakeups, and even litigation.[8] The late founder of Vanguard, Jack Bogle, has described the mindset of traditional money managers well: "for decades, with a handful of exceptions, the participation of our institutional money managers in corporate governance has been limited, reluctant and unenthusiastic."[9]

But, in recent decades, goaded by certain federal policies and other pressures,[10] mainstream mutual funds have become more active.[11] Mutual funds, and in particular index funds, have displayed a willingness to support the initiatives of other activist investors in dismantling takeover defenses,

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6. *See, e.g.*, Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies, 68 Fed. Reg. 6564, 6568 (Feb. 7, 2003) (to be codified at 17 C.F.R. pts. 239, 249, 270, 274) (noting that in advance of the rule being promulgated "many commenters, including a large number of fund industry participants, strongly opposed any requirement for a fund to provide disclosure of its actual proxy votes cast").

7. *See* John C. Coffee, Jr. & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 41 J. CORP. L. 545, 553 (2016) (explaining that the "Wall Street Rule" consists of dissatisfied institutional investors selling their stock and moving on).

8. *See* James Cotter et al., *ISS Recommendations and Mutual Fund Voting on Proxy Proposals*, 55 VILL. L. REV. 1, 2 (2010) ("Although mutual funds historically followed the 'Wall Street rule,' selling their shares in underperforming portfolio companies rather than engaging in shareholder activism, the landscape may be changing.").

9. John C. Bogle, Opinion, *The Supreme Court Had Its Say. Now Let Shareholders Decide.*, N.Y. TIMES (May 14, 2011), https://www.nytimes.com/2011/05/15/opinion/15bogle.html [https://perma.cc/K6YC-K45X].

10. *See, e.g.*, Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies, 68 Fed. Reg. at 6565–66 (requiring mutual fund companies to provide disclosures on proxy voting policies relating to portfolio securities they hold); U.S. Dep't of Labor, Opinion Letter on Proxy Voting by Plan Fiduciaries to Helmuth Fandl, Avon Products, Inc. (Feb. 23, 1988) [hereinafter *Avon Letter*] (finding that voting rights are a plan asset that the fiduciary must exercise "solely in the interest of the plan's participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries"), *reprinted in* 15 PENS. REP. (BNA) 391, 392 n.4 (1988). "The so-called Avon Letter, issued by the DOL in 1988, has been widely heralded in corporate governance circles as signifying that the prudent exercise of proxy voting is not optional." Richard H. Koppes & Maureen L. Reilly, *An Ounce of Prevention: Meeting the Fiduciary Duty to Monitor an Index Fund Through Relationship Investing*, 20 J. CORP. L. 413, 430 (1995).

11. *See* Coffee & Palia, *supra* note 7, at 572 (finding that activists' influence is growing in part because of their ability to partner with pension funds and mutual funds); Lyman Johnson, *A Fresh Look at Director "Independence": Mutual Fund Fee Litigation and* Gartenberg *at Twenty-Five*, 61 VAND. L. REV. 497, 534 n.228 (2008) ("Mutual fund culture may currently be changing in another respect, as well—the increased willingness of mutual funds to be more 'activist' investors, just as public pension funds and other institutional investors have been doing for some time on various corporate governance issues."); Marcel Kahan & Edward Rock, *Embattled CEOs*, 88 TEX. L. REV. 987, 995 (2010) (noting "the change by mutual funds and public pension funds to a more confrontational mode of activism"); Christopher Whittall, *Activist Investors Are Spending More and Shifting Their Strategies*, WALL ST. J. (Dec. 6, 2018, 8:00 AM), https://www.wsj.com/articles/activist-investors-are-spending-more-and-shifting-their-strategies-1544101200 [https://perma.cc/LW58-EX9S] ("Some activist victories have come from getting passive shareholders to support their demands, adding additional pressure. Passive funds, which account for 20% of global investment-fund assets versus 8% a decade earlier, can be helpful allies for activists looking to overcome board-level resistance . . . .").

voting against certain pay policies when the company has a bad earnings year, pressuring companies to sell, and even helping activist investors replace board members and corporate management.[12] But institutional investors are not just getting involved in boardroom battles. Importantly, some prominent mutual funds have now expressed the view that their portfolio companies should act with sufficient regard for the law and general social responsibility.[13] That is, in the area of corporate social responsibility, the largest institutional investors seem to be evolving in a positive direction.

Key mutual fund managers, like BlackRock, Vanguard, and State Street, justify their new concern about Environmental, Social, and Governance ("ESG") in terms of their duty as fiduciaries to generate quality long-term returns for their investors.[14] In other words, these funds view ESG through the narrower lens of long-term profit enhancement, rather than from the broader viewpoint of human citizens with a full range of values.[15]

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12. Coffee & Palia, *supra* note 7, at 556, 572 (observing that activists investors "are winning [proxy] fights, securing partial or complete victories in 19 of the 24 contests they initiated in 2013" in part because of activists investors' increasing success in "partnering up with pension funds and mutual funds"); *see generally* Simi Kedia et al., Institutional Investors and Hedge Fund Activism (Nov. 2016) (unpublished manuscript) (manuscript at 34), https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=AFA2018&paper_id=342 [https://perma.cc/YN3Z-RTXW] (finding that "institutional ownership increases the likelihood of being targeted by hedge fund activists"); *see also* David Benoit & Kirsten Grind, *Activist Investors' Secret Ally: Big Mutual Funds*, WALL ST. J. (Aug. 9, 2015, 10:38 PM), https://www.wsj.com/articles/activist-investors-secret-ally-big-mutual-funds-1439173910 [https://perma.cc/J4ML-K42G] (discussing how "mutual funds often are siding with activists" and that large mutual funds "have backed some of the most prominent activist campaigns"). One recent and prominent example of large mutual funds backing activist investors is BlackRock and State Street's support of Nelson Peltz's proxy contest for seats on Proctor & Gamble's board. Lauren Hirsch, *P&G Says Shareholders Reject Peltz's Bid for Board Seat by Slim Margin, Activist Says Vote a Dead Heat*, CNBC (Oct. 10, 2017, 10:33 AM), https://www.cnbc.com/2017/10/10/procter-gamble-shareholders-vote-against-adding-nelson-peltz-to-board.html [https://perma.cc/ZRS6-L7KH] ("Of P&G's top three shareholders, State Street Global Advisors and BlackRock sided with Peltz, while Vanguard backed P&G, according to sources familiar with the matter.").

13. *See* Tiffany Hsu, *Larry Fink: Social Responsibility Push Is Not a Fad*, N.Y. TIMES (Nov. 1, 2018), https://www.nytimes.com/2018/11/01/business/dealbook/larry-fink-social-responsibility-dealbook.html [https://perma.cc/H7DT-YCKM].

14. To be candid, institutional investors have been less vocal in giving priority to the "missing E" in the term "Environmental, Social, and Governance," which is the best interests of employees. Employees are of course the very Worker Investors whose capital big mutual funds such as the Big Four hold.

15. *See, e.g.*, *Proxy Voting Guidelines for U.S. Securities*, BLACKROCK 12 (Jan. 2019), https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf [https://perma.cc/89Q9-GW6E] [hereinafter BLACKROCK *Proxy Voting Guidelines*]; *2019 Proxy Voting and Engagement Guidelines: North America (United States & Canada)*, STATE STREET GLOBAL ADVISORS (Mar. 18, 2019), https://www.ssga.com/global/en/our-insights/viewpoints/2019-proxy-voting-and-engagement-guidelines-north-america.html [https://perma.cc/QE7C-F5DQ] [hereinafter STATE STREET *Proxy Voting Guidelines*] ("As a fiduciary, State Street Global Advisors takes a comprehensive approach to engaging with our portfolio companies about material environmental and social (sustainability) issues. . . . When voting, we fundamentally consider whether the adoption of a shareholder proposal addressing a material sustainability issue would promote long-term shareholder value in the context of

Larry Fink, BlackRock's CEO, argues that "[t]o prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society."[16] BlackRock also "expect[s] the board of directors to promote and protect shareholder interests by . . . addressing business issues including social, ethical and environmental issues when they have the potential to materially impact company reputation and performance."[17] Vanguard likewise "actively engages with portfolio companies and their boards to discuss material risks, ranging from business and operational risks to environmental and social risks," but understands that it "is required to manage [its] funds in the best interests of shareholders and obligated to maximize returns in order to help shareholders meet their financial goals."[18] And State Street emphasizes that "[w]ell-developed environmental and social management systems . . . generate efficiencies and enhance productivity, both of which impact shareholder value in the long-term."[19]

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the company's existing practices and disclosures as well as existing market practice."); *Proxy Voting Guidelines for U.S. Portfolio Companies*, VANGUARD 10 (effective Apr. 1, 2019), https://about.vanguard.com/investment-stewardship/portfolio-company-resources/proxy_voting_guidelines.pdf [https://perma.cc/K6ME-XGSE] [hereinafter VANGUARD *Proxy Voting Guidelines*].

16. Larry Fink, *A Sense of Purpose: Larry Fink's 2018 Letter to CEOs*, BLACKROCK, https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter [https://perma.cc/A3P4-AFZY].

17. *Global Corporate Governance & Engagement Principles*, BLACKROCK 4 (June 2014), https://www.sec.gov/Archives/edgar/data/890393/000119312515334865/d25691dex99corpgov.htm [https://perma.cc/3YUF-2XVZ]. "BlackRock's number one focus, as a fiduciary investor, is on generating the long-term sustainable financial returns on which our clients depend to meet their financial goals." BLACKROCK, BLACKROCK INVESTMENT STEWARDSHIP: 2018 ANNUAL REPORT 1 (2018), https://www.blackrock.com/corporate/literature/publication/blk-annual-stewardship-report-2018.pdf [https://perma.cc/358W-X9ES]. And BlackRock also frames its policy on environmental and social issues as one of fiduciary duty:

> [o]ur fiduciary duty to clients is to protect and enhance their economic interest in the companies in which we invest on their behalf. It is within this context that we undertake our corporate governance activities. We believe that well-managed companies will deal effectively with the material environmental and social ("E&S") factors relevant to their businesses.

BLACKROCK *Proxy Voting Guidelines*, *supra* note 15, at 12.

18. *Investment Stewardship Policies and Guidelines: Envrionmental and Social Matters*, VANGUARD (2018), https://web.archive.org/web/20190220221801/https://about.vanguard.com/investment-stewardship/policies-and-guidelines/ [https://perma.cc/CH3U-79B5].

19. *Proxy Voting and Engagement Guidelines, North America (United States and Canada)*, STATE STREET GLOBAL ADVISERS 8 (Mar. 2018), https://web.archive.org/web/20180723160412/https://www.ssga.com/investment-topics/environmental-social-governance/2018/03/Proxy-Voting-and-Engagement-Guidelines-NA-20180301.pdf. State Street also emphasizes a similar theme on voting,

> seek[ing] to vote director elections in a way which we, as a fiduciary, believe will maximize the long-term value of each portfolio's holdings. . . . [T]he role of the board, in [State Street]'s view, is to carry out its responsibilities in the best long-term interest of the company and its shareholders.

Global Proxy Voting and Engagement Principles, STATE STREET GLOBAL ADVISERS 4 (Mar. 2016), https://www.ssga.com/investment-topics/environmental-social-governance/2016/Global-Proxy-Voting-and-Engagement-Principles-20160301.pdf [https://perma.cc/K7D9-XX5B].

This focus on long-term returns characterizes not just the so-called Big Three index fund managers,[20] BlackRock, Vanguard and State Street, but also the other huge player that has enormous amounts of Worker Investors' capital: Fidelity. Although Fidelity is more known for its actively managed funds, it also professes to focus on the long-term in its investment focus because it has the money of retirement investors and others seeking to build durable wealth.[21] Thus, Fidelity "think[s] generationally and invest[s] for the long term."[22] And Fidelity is increasingly competing with the Big Three in the index space.[23] To illustrate how important mainstream mutual funds can be to addressing unconstrained corporate political spending, this Article focuses on the "Big Four": BlackRock, Vanguard, State Street, and Fidelity.[24]

This focus on the Big Four reflects the clout they wield in corporate elections. In most public companies, the Big Four are the largest

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20. *See, e.g.*, Jan Fichtner et al., *Hidden Power of the Big Three? Passive Index Funds, Re-Concentration of Corporate Ownership, and New Financial Risk*, 19 BUS. & POL. 298, 298 (2017); Lucian A. Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. (forthcoming Dec. 2019) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3282794 [https://perma.cc/VS99-B8E8] ("BlackRock, Inc. (BlackRock), State Street Global Advisors, a division of State Street Corporation (SSGA), and the Vanguard Group (Vanguard), [are] often referred to as the 'Big Three.'").

21. And even Fidelity's actively managed funds likely have a large passive or indexed component to them, as would those of other fund families. *See* John C. Coates IV, *The Future of Corporate Governance Part I: The Problem of Twelve* 11 (Harvard Pub. Law Working Paper No. 19-07, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3247337 [https://perma.cc/A65Y-ZW5F] ("Active funds commonly minimize management costs by essentially holding an index and selecting a few companies to over- or under-weight. This allows them to distinguish themselves from the index funds, while not attempting to engage in serious analysis of the value of each portfolio company. The 'active share,' as the portion of active funds that is significantly different from what would follow from a passive indexing strategy is commonly estimated to exceed 50% at many funds, resulting in an additional chunk of the market being fairly understood as indexed and truly passive."). For this reason, Worker Investors who have actively traded funds in their portfolios have largely the same interests as those who solely invest in index funds. In fact, even if one solely buys actively traded funds, but does so for generations, it is difficult to avoid the need for a governance system that fosters widespread growth of the economy, as most funds have diverse holdings that cover many sectors of the economy.

22. *About Us*, FIDELITY INT'L (June 30, 2019), https://fidelityinternational.com/about-us/ [https://perma.cc/H6UL-XYNZ].

23. *See* Justin Baer, *Fidelity Eliminates Fees on Two New Index Funds*, WALL ST. J. (Aug. 1, 2018, 5:20 PM), https://www.wsj.com/articles/fidelity-index-fund-fees-tumble-to-zero-1533141096 [https://perma.cc/6BWJ-G8RS] (noting that Fidelity cut fees on its index funds to compete against Vanguard and other, more traditional, index fund providers); Eric Rosenbaum, *Fidelity's New No-Fee Index Funds Bring in $1 Billion in First Month*, CNBC (Sept. 4, 2018, 3:44 PM), https://www.cnbc.com/2018/09/04/fidelity-offers-first-ever-free-index-funds-and-1-billion-follows.html [https://perma.cc/2J4P-XNZF] (noting that Fidelity's reduction in fees on its index funds is seeking "to grab market share from . . . Vanguard").

24. Of course, my focus on the Big Four does not mean other large asset managers like T. Rowe Price, American Funds, Putman, or Bank of New York Mellon should not be accountable for addressing the problem I discuss. But showing how important a change in behavior by the Big Four could be illustrates just how influential the huge mutual fund families holding Worker Investors' capital could be in improving the integrity of our political process.

stockholders and together comprise 15 percent or more of the vote.[25] BlackRock, Vanguard, and State Street alone "hold so many shares in America's public companies that they each control one of the five largest stakes in 24 of the 25 largest U.S. corporations," and are "collectively . . . the largest shareholder in 88% of all firms on the S&P 500."[26] Fidelity is a 5 percent stockholder in about a quarter of all publicly traded companies.[27] And their clout is enhanced because on most corporate governance issues, these families vote all their funds identically, and not on a fund-specific basis.[28] They do so based on arguments that their position on the issue is the one most favorable to long-term investors in general.[29]

If the Big Four flexes its voting muscles, it controls the swing votes and can galvanize corporate America to bend to its will.[30] In other words, if the Big Four unite on a corporate governance policy and support its adoption across the board, it will become the market standard, as issues like classified boards, poison pills, and so-called majority voting demonstrate.[31] When the

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25. Coates, *supra* note 21, at 13 ("The 'Big Three,' as they are known—Vanguard, State Street, and BlackRock—controlled approximately 15% of the S&P 500 in 2017—a much greater share of US public companies than any three single investors have ever previously done.").

26. John Morley, *Too Big to Be Activist*, 107 S. CAL. L. REV. (forthcoming 2019) (manuscript at 2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3225555 [https://perma.cc/GRB7-U6SM].

27. *Id.*

28. Ying Duan & Yawen Jiao, *The Role of Mutual Funds in Corporate Governance: Evidence from Mutual Funds' Proxy Voting and Trading Behavior*, 51 J. FIN. & QUANTITATIVE ANALYSIS 489, 498 n.13 (2016) ("Less than 7% of our sample deviates from unanimous family voting . . . .").

29. *See, e.g.*, *BlackRock Investment Stewardship Engagement Priorities for 2019*, BLACKROCK 2 (Jan. 2019), https://www.blackrock.com/corporate/literature/publication/blk-stewardship-priorities-final.pdf [https://perma.cc/TL7W-829N] ("BlackRock, as a fiduciary investor, undertakes all investment stewardship engagements and proxy voting with the goal of protecting and enhancing the long-term value of our clients' assets."); *Investment Stewardship*, BLACKROCK, https://www.blackrock.com/institutions/en-us/solutions/sustainable-investing/investment-stewardship [https://perma.cc/7UMX-WU76] ("The BlackRock Investment Stewardship team is a centralized resource for portfolio managers. In our stewardship work we aim to: [1] Preserve and enhance the value of clients' assets through engagement with companies [2] Encourage business and management practices that support sustainable financial performance over the long-term [3] Provide specialist insight on environmental, social and governance (ESG) considerations to all investment strategies, whether indexed or actively managed."); *see also* Susanne Craig, *The Giant of Shareholders, Quietly Stirring*, N.Y. TIMES (May 18, 2013), https://www.nytimes.com/2013/05/19/business/blackrock-a-shareholding-giant-is-quietly-stirring.html [https://perma.cc/F4DB-WT24] ("Ms. Edkins [head of BlackRock's Stewardship team] oversees 20 or so people covering thousands of companies around the world, and BlackRock says they make their own decisions—regardless of the views of the firm's portfolio managers or even Mr. Fink [BlackRock's CEO].").

30. Coates, *supra* note 21, at 2 ("Index funds increasingly possess the 'median vote' in corporate contests.").

31. *See* Bebchuk & Hirst, *supra* note 20 (manuscript at 76) ("The Big Three's voting guidelines express broad support for proposals to introduce annual elections, eliminate supermajority requirements, or adopt majority voting. Consistent with these guidelines, our review indicates that BlackRock and SSGA voted in favor of a majority of the proposals in each category each year during the five-year period we consider, and Vanguard voted in favor of a majority of proposals to introduce annual elections each year during that period and a majority of proposals to adopt majority voting from 2015 through

Big Four act together, they get their way.[32] For example, when BlackRock and Vanguard supported a stockholder proposal requiring greater disclosure from Exxon on environmental risk, that proposal passed.[33] By contrast, similar proposals without the support of the Big Four did not fare as well. For example, in 2017, ninety "climate-related" proposals were put to a stockholder vote, but only three proposals received majority support.[34]

In sum, the Big Four have recently been more willing to second-guess corporate management, advocate for change, and vote their shares in a skeptical and independent way.[35] Their increasing power has its own risks,[36]

2018." (footnote omitted)); SPENCER STUART, 2018 UNITED STATES SPENCER STUART BOARD INDEX 15 (2018), https://www.spencerstuart.com/-/media/2018/october/ssbi_2018.pdf [https://perma.cc/3YX5-XXXQ] (noting that 92 percent of S&P 500 boards have declassified boards; 89 percent of boards have majority voting); *see also* BLACKROCK *Proxy Voting Guidelines*, *supra* note 15, at 5–8 (supporting annual board elections and majority voting and opposing antitakeover devices); STATE STREET *Proxy Voting Guidelines*, *supra* note 15 (supporting annual board elections and majority voting but opposing antitakeover devices); VANGUARD *Proxy Voting Guidelines*, *supra* note 15, at 16–17 (supporting annual board elections and opposing shareholder rights plans longer than one year without shareholder approval).

32. But, distinguished scholars note, the Big Four does not propose policy, it votes on the proposals of others, an arguably key gap in their stewardship role. Bebchuk & Hirst, *supra* note 20 (manuscript at 76) ("Our review of the approximately 1,500 shareholder proposals submitted during the examined five-year period did not identify a single proposal submitted by any of the Big Three.").

33. BlackRock and Vanguard only supported two proposals—at Exxon Mobile and Occidental Petroleum—and both of those proposals were among the three proposals that received majority support. *See* Rob Berridge, *Four Mutual Fund Giants Begin to Address Climate Change Risks in Proxy Votes: How About Your Funds?*, CERES (Dec. 21, 2017), https://www.ceres.org/news-center/blog/four-mutual-fund-giants-begin-address-climate-change-risks-proxy-votes-how-about [https://perma.cc/87MR-YEM8].

34. *Id.*

35. Despite the Big Four's increasing willingness to question management, reject management proposals, and support activist investors, some scholars contend that the Big Four are still largely pro-management. Professors Bebchuk and Hirst, for instance, point out that, on average, BlackRock, State Street, and Vanguard support approximately 97 percent of say-on-pay votes. Bebchuk & Hirst, *supra* note 20 (manuscript at 64). Data from the Investment Company Institute ("ICI") backs up their findings. During the 2017 Proxy Season, mutual fund managers supported 93.8 percent of management's proxy proposals. As the ICI points out though, such large support is misleading because "the vast majority of those proposals (81 percent) are routine votes on uncontested elections of directors or ratification of a company's audit firm." Morris Mitler et al., *Funds and Proxy Voting: Funds Vote Thoughtfully and Independently*, INV. COMPANY INST. (Nov. 7, 2018), https://www.ici.org/viewpoints/view_18_proxy_voting_results [https://perma.cc/SA68-CWTP]. But when it comes to the most contested and important votes, such as proxy contests, the Big Four are flexing their muscles. *See supra* note 12 (collecting sources). And on other pro-management policies—such as staggered boards and stockholder rights plans—the Big Four are decidedly skeptical of management. *See* Bebchuk & Hirst, *supra* note 20 (manuscript at 76) ("The Big Three's voting guidelines express broad support for proposals to introduce annual elections . . . or adopt majority voting.").

36. In a thought-provoking article, Professor Coates notes that control of corporate America now essentially resides in about the twelve largest institutional investors and that this poses the risk that the institutions may use their power to the detriment of society, if their power is not appropriately regulated. With this risk comes promise, as this excerpt well illustrates:

> The bottom line of this influence is very different than what the term "passive" investment implies. Rather than blindly choosing stocks in their index and then ignoring them, index fund

but also has enormous power to align corporate behavior with the interests of Worker Investors—if that power is wielded in a thoughtful way that represents Worker Investors' interests. And, as to the issue of corporate political spending, the Big Four have abdicated their representative role to Worker Investors and allowed corporate managers to act without constraint, remaining docile and deferential toward management in an old-school way.

B. The Big Four's Perplexing Total Deference to Managers on Political Spending

Is abdicate a strong word? Yes. Is it unfair? No. In the key area of corporate political spending, the Big Four have opted for a policy of total deference to management. BlackRock has a formal investment policy that defers to management on political issues. It "believe[s] that it is not the role of shareholders to suggest or approve corporate political activities; therefore [it] generally do[es] not support proposals requesting a shareholder vote on political activities or expenditures."[37] Vanguard, by contrast, will consider each proposal, but will only support those that have "a demonstrable link to long-term shareholder value."[38] State Street's policy is similar to Vanguard's,[39] and Fidelity does not have any policy on political spending.[40] In essence, the voting policies of the Big Four leave the question of political spending entirely to corporate management. In fact, the Big Four generally will not even vote to require corporations to disclose what they spend on politics, leaving the Big Four and others largely blind to what is going on. In 2018, Vanguard and Fidelity supported no political spending disclosure proposals; BlackRock supported only 4.1 percent of such proposals.[41] And

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> managers have and are increasingly using multiple channels to influence public companies of all sizes and kinds. Their views on governance issues, their opinions of CEOs, their desires for change at particular companies, their response and evaluations of restructuring or recapitalization proposals from hedge fund activists—all of these matter intensely to the way the core institutions in the U.S. economy are operating.

Coates, *supra* note 21, at 19.

37. BLACKROCK *Proxy Voting Guidelines*, *supra* note 15, at 14.

38. VANGUARD *Proxy Voting Guidelines*, *supra* note 15, at 10.

39. STATE STREET *Proxy Voting Guidelines*, *supra* note 15.

40. Though on other similar matters—like environmental and social issues—Fidelity has adopted a policy of total deference, in line with their voting behavior on political spending. *See Proxy Voting Guidelines*, FIDELITY 7 (Mar. 2019), https://www.fidelity.com/bin-public/060_www_fidelity_com/documents/Full-Proxy-Voting-Guidelines-for-Fidelity-Funds-Advised-by-FMRCo-and-SelectCo.pdf [https://perma.cc/8L8P-3323] ("Fidelity generally will vote in a manner consistent with management's recommendation on shareholder proposals concerning environmental or social issues, as it generally believes that management and the board are in the best position to determine how to address these matters.").

41. *See Mutual Fund Support for Corporate Political Disclosure Surges*, CTR. FOR POL. ACCOUNTABILITY 3 (Nov. 27, 2018), http://files.politicalaccountability.net/reports/cpa-reports/CPA_-_Mutual_Fund_Proxy_Voting_Analysis_-_2018.pdf [https://perma.cc/N85X-DY8V].

their 2018 voting patterns are not aberrational. For the last five years, BlackRock, Fidelity, and Vanguard supported almost no proposals to mandate that corporations disclose their political spending.[42] But, to be fair, State Street has done far better, supporting a majority of these proposals over the years.[43]

II. FORCED CAPITALISTS: WHY WORKER INVESTORS GIVE THEIR MONEY TO THE BIG FOUR

The Big Four's abdication of its fiduciary duty to Worker Investors when it comes to monitoring and curbing corporate political spending is especially troubling when we understand why the Big Four can be given that name. The answer is simple: the Big Four have successfully secured favored positions within the 401(k) and 529 programs that Worker Investors must use to save for retirement and college.[44] That is, the Big Four's resulting

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42. The Center for Political Accountability (CPA) has compiled data on mutual fund family voting on political spending proposals based on their model resolution for the last few years. *See CPA Reports*, CTR. FOR POL. ACCOUNTABILITY, http://politicalaccountability.net/reports/cpa-reports [https://perma.cc/M68C-7A6H].

43. According to data from the CPA, State Street supported 54 percent of Corporate Political Disclosure Resolutions based on the CPA model in 2015, 55 percent of these proposals in 2016, 74 percent of these proposals in 2017, and 39 percent of these proposals in 2018. *Mutual Fund Support for Corporate Political Disclosure Surges*, *supra* note 41, at 3; *Mutual Fund Support for Political Spending Disclosure Jumps in First Year of Trump Presidency*, CTR. FOR POL. ACCOUNTABILITY 3 (Nov. 16, 2017), https://politicalaccountability.net/hifi/files/reports/cpa-reports/mutual-fund-support-for-political-spending-disclosure-jumps-in-first-year-of-trump-presidency/Mutual_Fund_Report_2017_.pdf [https://perma.cc/GXE9-QBRV]; *Three Top Mutual Funds' Votes Support CPA Political Disclosure Resolution in Line with Their Policies: Vanguard, Fidelity, BlackRock Continue to Walk on Political Disclosure*, CTR. FOR POL. ACCOUNTABILITY 3 (Nov. 16, 2016), https://politicalaccountability.net/hifi/files/reports/cpa-reports/corporate-political-disclosure-and-the-mutual-fund-vote/CPA_-_mutual_fund_proxy_voting_-_2016_-_report_-_11-16-16.pdf [https://perma.cc/5XUV-2Y9U]; *Corporate Political Disclosure and the Mutual Fund Vote: 2015 Proxy Season Analysis Shows Steady Support*, CTR. FOR POL. ACCOUNTABILITY 3 (Dec. 2015), https://politicalaccountability.net/hifi/files/CPA_-_mutual_fund_proxy_voting_-_2015_-_12-07-15.pdf [https://perma.cc/TM8A-S8N9]. The Big Four's voting policies on proposals to require disclosure of political spending are also out of step with ISS and Glass Lewis, the two largest proxy advisory services in America. Both ISS and Glass Lewis "[g]enerally vote for proposals requesting greater disclosure of a company's political contributions." *United States: Proxy Voting Guidelines*, ISS 66 (Dec. 6, 2018), https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf [https://perma.cc/GC49-EAE7]; *see also In-Depth: Corporate Political Spending*, GLASS LEWIS 1 (Apr. 2019), http://www.glasslewis.com/wp-content/uploads/2017/03/2017-In-Depth-Report-Corporate-Political-Spending.pdf [https://perma.cc/XC3L-RE8X] ("Glass Lewis believes that a thoughtful disclosure and oversight policy regarding a company's political contributions, developed and overseen by the board, is an important component of corporate accountability.").

44. Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in* Citizens United, 61 CASE W. RES. L. REV. 497, 537 (2011) ("Stock ownership is no longer a voluntary activity . . . . The rapid rise in stock ownership has been fueled by the proliferation of defined-contribution retirement plans provided by employers."); *see also* 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, 874 (2013) ("[In 1980], institutional investors held 28.4% of U.S. equities. By 2009, institutional investors held 50.6% of all U.S. public equities, and 73% of the equity of the thousand largest U.S. corporations." (footnote omitted)).

influence does not stem from a sudden recognition on the part of American workers that they like giving a substantial part of their earnings over to others to hold for decades until they can regain access when they approach sixty. The mutual fund industry is federally subsidized because powerful tax incentives require American workers to become "forced capitalists,"[45] with little choice (and strong incentives) but to give over funds every month to institutional investors.[46] Worker Investors typically do not get to pick and choose stocks in their 401(k); they get to choose among mutual funds, often within specific fund families.[47] Once Worker Investors select one of these mutual funds, they do not control the underlying investments and do not vote at the underlying portfolio companies. That voting is left to the mutual fund manager, typically one of the Big Four.[48] And unlike the situation that exists when individuals own stock in specific companies, when it comes to mutual fund ownership, the reality is that there is no comparable stockholder litigation, proxy fights, or other activism.[49] An accountability framework of that kind just does not exist.

Investor exit is illusory; Worker Investors' capital is trapped. Because tax policy dictates Worker Investors cannot take out their money without Castro-like expropriation until age fifty-nine and a half,[50] they have to surrender this money to the institutional investor industry for generations.

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45. *See* Strine, *supra* note 2, at 4 ("As a result of these changing dynamics [the decline of defined benefit plans and the rise of 401(k)s], most ordinary Americans have little choice but to invest in the market. They are in essence 'forced capitalists,' even though they continue to depend for their economic security on their ability to sell their labor and to have access to quality jobs. These forced capitalists—in whose number I count myself—invest primarily for two purposes, both of which are long-term in focus: to send their children to college and to provide for themselves in retirement.").

46. *See* 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, 1877–78 (2017); *see also* Tucker, *supra* note 44, at 537.

47. Ian Ayres & Quinn Curtis, *Beyond Diversification: The Pervasive Problem of Excessive Fees and "Dominated Funds" in 401(k) Plans*, 124 YALE L.J. 1476, 1485 (2015) (noting that "[t]he most common type of investment options in 401(k) plans are mutual funds" and that "[a] typical 401(k) menu provides around fourteen investment options," most of which are mutual funds); Strine, *supra* note 46, at 1878 ("The workers' version of the Wall Street rule involves not being able to sell one stock in the Russell 3000 and buy another, or to move into particular bonds. Instead, it involves being able to move from one fund to another, often of the same fund family." (footnote omitted)).

48. John Morley & Quinn Curtis, *Taking Exit Rights Seriously: Why Governance and Fee Litigation Don't Work in Mutual Funds*, 120 YALE L.J. 84, 92–93 (2010) (discussing the structure of mutual fund voting).

49. *See generally* Quinn Curtis & John Morley, *The Flawed Mechanics of Mutual Fund Fee Litigation*, 32 YALE J. ON REG. 1 (2015); Morley & Curtis, *supra* note 48.

50. *See* I.R.C. § 72(t)(2)(A)(i) (2012). The same is true for IRAs. *See* I.R.C. § 408A(d)(2)(A)(i) (2012).

Likewise, savings for college by parents is now done virtually the same way.[51]

III. THE DOUBLE LEGITIMACY PROBLEM IN CORPORATE POLITICAL SPENDING

A. The First Layer: Mutual Funds Don't Have Worker Investors' Capital for Political Reasons

These realities bring us to the dual-layered, "double legitimacy" problem that infects political spending by public corporations. In a crucial sense, the reticence of the Big Four to get involved in whether corporations should engage in political spending reflects a healthy self-awareness but—and this but is important—in a "half-woke" way. The Big Four understand that they have no legitimacy in representing their clients' "political viewpoints" for an obvious reason: Worker Investors do not invest in mutual funds for political expression.[52]

Rather, Worker Investors invest for retirement and college. And because Worker Investors invest for these long-term goals, they all also share a need for durable long-term returns, which requires sound, sustainable economic growth.

Most important, because Worker Investors are by definition workers, they need public companies to create good jobs for Americans. Worker Investors derive most of their income and most of their ability to accumulate wealth from their status as laborers, not as capitalists. On average, Americans get 79 percent of their income from wages and retirement payments, and "for all but the highest income group" "[c]ompensation is the largest source of income" for Americans.[53] Thus, for most Worker Investors, their ability to put their kids through college and to have a secure retirement depends mostly on their access to a job. Their investments in equity capital are in fact just a surcharge on their incomes to fund those purposes. It is Worker Investors' access to good jobs—and the wages those

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51. Most college savings plans—529 plans—provide participants with a choice of mutual funds to invest in, and withdrawals are tax disfavored except for any education expenditure. *See* SEC Investor Bulletin, An Introduction to 529 Plans (May 29, 2018), http://www.sec.gov/investor/pubs/intro529.htm [https://perma.cc/GUG2-KD6D].

52. *See* Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923, 942 (2013) ("Shareholders do not sort themselves among companies according to their political preferences.").

53. JOSEPH ROSENBERG, MEASURING INCOME FOR DISTRIBUTIONAL ANALYSIS, TAX POL'Y CTR. 4–5 (July 25, 2013), https://www.taxpolicycenter.org/sites/default/files/alfresco/publication-pdfs/412871-Measuring-Income-for-Distributional-Analysis.PDF [https://perma.cc/Z9XN-3N2U] (showing that for all but the top 1 percent of income earners, Americans earn the majority of their income from their labor).

jobs bring—that allow them to save for retirement and their kids' college education. Absent well-paying and stable employment, Worker Investors cannot provide for their families, much less invest for retirement and college. Put simply, Worker Investors will not prosper and be economically secure unless American public companies engage in fair gain sharing with their employees and generate well-paying jobs for Worker Investors to hold.

We also know that Worker Investors do not give their money to the Big Four to invest for political purposes for another, banal reason: that is not how these institutions advertise to attract investors. Unsurprisingly, they advertise based on low fees and high returns.[54]

But that is where Worker Investors' common interests end. As to the larger range of policy choices that confront actual human beings who are citizens of a republic, there is no reason to believe that Worker Investors have similar views about issues like criminal justice, environmental regulation, or government support for the arts.[55] Rather, their views on these issues are likely as diverse as the American people themselves.

For all these reasons, there is no logical or empirical basis to contend that American Worker Investors have a shared desire to allow S&P 500 CEOs to use their invested capital as their political proxies, much less that their investment in a mutual fund in their 401(k) signals that intention. In fact, consistent poll data since *Citizens United* shows that a durable

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54. For example, an online ad for Vanguard notes that "[w]e have no outside owners, which helps us keep costs low. In fact, the average expense ratio for Vanguard mutual funds and ETFs is 83% less than the industry average." VANGUARD, https://investor.vanguard.com/what-we-offer/why-vanguard [https://perma.cc/ZK82-A6MP]; *see also* Dawn Lim, *Vanguard Ratchets Up Index-Fund Price Battle*, WALL ST. J. (Nov. 19, 2018, 9:00 AM), https://www.wsj.com/articles/vanguard-ratchets-up-index-fund-price-battle-1542636000?mod=djem10point (noting that "Vanguard Group is lowering the minimum amount customers need to invest to get cheaper prices on more than three dozen of its index funds"). Sure, there are some funds that promote their social and environmental stewardship, but the bulk of American Worker Investors' money flows into index and actively managed funds that attract investors on the promise of low fees or above average returns. And the reality is that even these social and environmental funds vote the same way as the rest of the fund family. Leo E. Strine, Jr., *Making It Easier for Directors to "Do the Right Thing"?*, 4 HARV. BUS. L. REV. 235, 250 (2014) (documenting this reality and stating that "there are socially responsible investment funds that appear to vote their shares in line with all the other funds of their mutual fund family, and to take no special efforts to vote in a way that is consistent with the fund's supposed commitment to social responsibility"). A look at the up-to-date voting data suggests that the FTSE Social Index fund continues to vote in exactly the same manner as all other Vanguard funds. *Compare* Vanguard FTSE Social Index Fund, Annual Report of Proxy Voting Record of Registered Management Investment Companies (Form N-PX) (Aug. 28, 2019), https://about.vanguard.com/investment-stewardship/supporting-files/proxyvote0213.pdf?v=1567017504181 [https://perma.cc/9B6X-WBJT], *with* Vanguard 500 Index Fund, Annual Report of Proxy Voting Record of Registered Management Investment Companies (Form N-PX) (Aug. 28, 2019), https://about.vanguard.com/investment-stewardship/supporting-files/proxyvote0040.pdf?v=1567017504180 [https://perma.cc/A3A3-W67Z]. This behavior, which illustrates a large gap in stewardship, underscores the problem that the Big Four have in claiming that they have the resolve to monitor political spending.

55. Because Worker Investors represent a cross section of the American population, albeit a slightly wealthier cross section, their political views should be roughly similar to that of the heterogeneous American polity.

supermajority of Americans, and a majority of Americans of both major political parties, oppose the Supreme Court's decision in *Citizens United*.[56] For instance, a 2018 poll found that "[l]iberals and conservatives overwhelmingly support a constitutional amendment that would effectively overturn" *Citizens United*, with "[t]hree-fourths of survey respondents—including 66 percent of Republicans and 85 percent of Democrats—back[ing] a constitutional amendment outlawing *Citizens United*."[57] A 2010 poll found that three-fourths of Americans—again regardless of political affiliation—thought that corporations "[s]hould . . . get shareholder approval before the corporation spends money to support or oppose a candidate for elected office."[58] Therefore, if there is any political consensus among Worker Investors, it is that public corporations should not spend treasury funds to influence our nation's politics.

B. The Second Layer: Public Corporations Don't Have Equity Capital Because They Are Instruments for Stockholder Political Sentiment

When public companies use treasury funds for political purposes without stockholder approval, the "half woke" and "double legitimacy" problems come together. The Big Four are correct that they have no legitimacy to speak for their investors on matters of politics, as their investors do not invest for political reasons and do not share consistent political values. But, that reality also applies to the Big Four's portfolio companies when it comes to political spending. Just like the Big Four do not have Worker Investors' capital for political reasons, American public companies do not have the

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56. For polling data from 2010 to 2018, see the following sources: Ashley Balcerzak, *Study: Most Americans Want to Kill 'Citizens United' with Constitutional Amendment*, CTR. FOR PUB. INTEGRITY (May 10, 2018, 11:45 AM), https://www.pri.org/stories/2018-05-10/study-most-americans-want-kill-citizens-united-constitutional-amendment [https://perma.cc/29W9-96CC]; Lindsey Cook, *SCOTUS-Hating Candidates Should Look in the Mirror to See What Americans Really Hate*, U.S. NEWS & WORLD REP. (Oct. 2, 2015), https://www.usnews.com/news/blogs/data-mine/2015/10/02/supreme-court-disapproval-hits-new-high-gallup-polling-shows [https://perma.cc/FQR3-KY4Z]; Dan Eggen, *Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing*, WASH. POST (Feb. 17, 2010, 4:38 PM), http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html [https://perma.cc/2L3A-E768]; Cristian Farias, *Americans Agree on One Thing:* Citizens United *Is Terrible*, HUFFPOST (Sept. 29, 2015, 6:17 PM), https://www.huffingtonpost.com/entry/citizens-united-john-roberts_us_560acd0ce4b0af3706de129d [https://perma.cc/L3LG-9QHX]; Chris Geidner, *New Poll: Americans Think the Supreme Court Is Political, Closed Off, and Got* Citizens United *Wrong*, BUZZFEED (May 6, 2014, 11:39 PM), https://www.buzzfeednews.com/article/chrisgeidner/new-poll-americans-think-the-supreme-court-is-political-clos#2ft2vel [https://perma.cc/FX2X-WU2Q]; *Majority of Americans Support Campaign Finance Reform*, IPSOS (Aug. 24, 2017), https://www.ipsos.com/sites/default/files/ct/news/documents/2017-08/CPI%20Topline%208%2029%202017.pdf [https://perma.cc/94NU-9ZQC].

57. Balcerzak, *supra* note 56.

58. *Results of SurveyUSA News Poll #16270*, SURVEY USA 6 (Feb. 10, 2010), http://www.surveyusa.com/client/PollPrint.aspx?g=05cabb5f-599f-47a8-98fb-e3e254e425e4 [https://perma.cc/JRQ6-4Z9L].

capital of the Big Four for any reason related to politics. Thus, public corporations have as much of a legitimacy problem as the Big Four itself when it comes to political spending, and the Big Four are ignoring that reality. Not only that, they are doing so in the face of the bipartisan consensus that corporate spending unauthorized by stockholders should not be permitted.

This "double legitimacy" problem is dangerous for our Republic and for Worker Investors.[59] Because it is difficult enough for stockholders to monitor the effectiveness of corporate managers in the core area of business performance, corporate law scholars—and conservative ones in particular[60]—have urged corporate law to focus on holding corporate managers accountable to stockholders solely for producing profits within the bounds of the law.[61] These scholars argue that if corporate managers are allowed to justify their actions by reference to their desire to serve many ends, then they will be accountable for none of them.[62]

As important, these scholars contend that because stockholders themselves have no common political or philosophical shared interests, and only have a common interest in receiving a profitable return on their investments, corporate managers have no legitimate basis for using

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59. Even with increased stockholder activism and the reconcentration of voting power in fewer investors, there remains concern over the extent to which stockholders are holding corporate managers accountable for proper performance, even as to core issues of business. Bebchuk & Hirst, *supra* note 20 (manuscript at 7) ("[T]he Big Three's votes on these matters [say-on-pay and proxy contests with activist hedge funds] reveal considerable deference to corporate managers. For example, the Big Three very rarely oppose corporate managers in say-on-pay votes and do so significantly less frequently than other large investment fund managers.").

60. *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, 346–59 (2015) (documenting conservative corporate law theory positing that directors and managers should focus on maximizing stockholder returns with the bounds of law).

61. *See, e.g.*, 1 F. A. HAYEK, LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY 82 (1978) ("So long as the management has the one overriding duty of administering the resources under its control as trustees for the shareholders and for their benefit, its hands are largely tied; and it will have no arbitrary power to benefit this or that particular interest. But once the management of a big enterprise is regarded as not only entitled but even obliged to consider in its decisions whatever is regarded as the public or social interest, or to support good causes and generally to act for the public benefit, it gains indeed an uncontrollable power—a power which could not long be left in the hands of private managers but would inevitably be made the subject of increasing public control."); Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 33, 33 ("In a free-enterprise, private-property system, a corporate executive is an employe[e] of the owners of the business. He has 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 the society, both those embodied in law and those embodied in ethical custom.").

62. *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1192 (1981) ("A manager responsible to two conflicting interests is in fact answerable to neither.").

corporate funds to advance political or social causes.[63] For that reason, these scholars argue that if the firm has extra funds that it does not need to make products or deliver services for a profit, then it should return them to stockholders.[64] That is especially so if the firm has surplus for political or social spending, because the stockholders have diverse views on those subjects and if the surplus is returned to them, they can decide for themselves whether and how to spend those funds on social and political causes.[65] But because of the trapped nature of Worker Investors' savings, any surplus capital that corporations return to stockholders cannot be used by Worker Investors to engage in political expression themselves; rather the capital must be reinvested in mutual funds.[66]

C. Two Layers; Neither Solid

We therefore have a problem that Worker Investors are at the mercy of one group of agents with conflicts of interest, institutional investors, to check another group of agents with conflicts of interest, public company management, as to an issue over which neither class of agent has legitimacy.

The hierarchy of voting now chosen by the Big Four, therefore, seems almost upside down. On business strategy, an issue on which corporate management is expert, institutional investors, who are generalists at best, are more willing than ever to voice their views and to support insurgent campaigns to change course.[67] Likewise, institutions have not been shy

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63. Henry N. Butler & Fred S. McChesney, *Why They Give at the Office: Shareholder Welfare and Corporate Philanthropy in the Contractual Theory of the Corporation*, 84 CORNELL L. REV. 1195, 1224 (1999) ("[S]hareholders may have very different views on what is good for society. Even if they do not, there is no reason to channel non-profit-maximizing charity through the firm. The firm has no advantage—in greater benefits or lower costs—in making donations that profit-maximization does not justify."); Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 961 (1984) (noting that the pursuit of objectives, besides profit maximization, is "especially disturbing because profit maximization is the only goal for which we can at least theoretically posit shareholder unanimity").

64. Strine & Walter, *supra* note 60, at 363–65 (citing scholars holding this view).

65. Friedman, *supra* note 61, at 33 ("In each of these cases, the corporate executive would be spending someone else's money for a general social interest. Insofar as his actions in accord with his 'social responsibility' reduce returns to stockholders, he is spending their money. Insofar as his actions raise the price to customers, he is spending the customers' money. Insofar as his actions lower the wages of some employe[e]s, he is spending their money. The stockholders or the customers or the employe[e]s could separately spend their own money on the particular action if they wished to do so. The executive is exercising a distinct 'social responsibility,' rather than serving as an agent of the stockholders or the customers or the employe[e]s . . . ."); *see also* Butler & McChesney, *supra* note 63, at 1223–24 ("Either the money goes to the shareholders (who own the residual claim), or the firm gives it away. When managers engage in philanthropy that advances their own utility but not firm profits, they are giving away the shareholders' money.").

66. If Worker Investors want to withdraw their capital from their retirement programs to make political statements before they reach retirement age, they are subject to tax penalties on that capital. *See* I.R.C. § 72(t)(2)(A)(i) (2012).

67. *See supra* text accompaning notes 8–12.

about asserting their own views about the appropriate provisions to put in corporate charters, bylaws, pay policies, and the like.[68]

Corporate managers are not selected because they best reflect the interests of stockholders on the full range of issues that would be relevant to running a polity, but because they are equipped to successfully manage a for-profit business. But, on issues where corporate managers have far less comparative advantage than institutional investors, the institutional investors have reacted to their own lack of legitimacy by reticence, in the case of corporate social responsibility, and abdication, in the case of corporate political spending.

D. A Lack of Disclosure Means a Lack of Accountability

Now, one might say, is that really fair? Haven't some of the institutions said that they will act if a corporation's political spending appears to be out of line with industry standards, or otherwise crosses some undetermined line of unacceptability? For sure that is true,[69] but this raises another issue of blindness.

Scholars and institutions devoted to the documentation of money in our politics, such as New York University's Brennan Center, admit that they are unable to trace large amounts of the funds that influence our elections.[70]

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68. *See supra* text accompaning notes 8–12.

69. *BlackRock Investment Stewardship: Global Corporate Governance Guidelines & Engagement Principles*, BLACKROCK 7 (Jan. 2019), https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-engprinciples-global.pdf [https://perma.cc/PER6-3MDJ] (noting that BlackRock will engage with management on environmental, social, and political issues when in "[BlackRock's] assessment . . . there are potential material economic ramifications for shareholders over the long-term"); F. William McNabb III, Chairman & CEO, Vanguard, Keynote Address Before Lazard Asset Management 2015 Director Event: Getting to Know You: The Case for Significant Shareholder Engagement (June 24, 2015), https://corpgov.law.harvard.edu/2015/06/24/getting-to-know-you-the-case-for-significant-shareholder-engagement/ [https://perma.cc/SR2V-5HEE] (noting that much of Vanguard's engagement focuses on the reasons the company is an "outlier"); *see also* Catherine Dunn, *Vanguard Is No Friend to Shareholders Seeking More Details on Firms' Political Spending*, PHILA. INQUIRER (Dec. 7, 2018), http://www2.philly.com/business/vanguard-blackrock-fidelity-political-spending-donations-morningstar-votes-20181207.html [https://perma.cc/7944-P2PD] (quoting a Vanguard spokesperson as saying that "Vanguard engages on topics 'that we believe could affect our clients' investments outcomes. In addition to conducting corporate governance analysis, our investment stewardship team regularly evaluates whether and where environmental, social, or political risks could pose challenges to a company's long-term performance'").

70. *See, e.g.*, *Money in Politics 101: What You Need to Know About Campaign Finance After* Citizens United, BRENNAN CTR. FOR JUST. 4 (Sept. 28, 2012), https://www.brennancenter.org/sites/default/files/legacy/Democracy/MoneyInPolitics%20FAQ.pdf [https://perma.cc/8JGG-JYQJ] ("But the amount of corporate spending cannot be fully determined because of tax-exempt groups that do not disclose their donors. An investigation by the *New York Times* uncovered several large contributions by corporations to tax-exempt groups, including six- and seven-figure contributions from American Electric Power, Aetna, Prudential Financial, Dow Chemical, Merck, Chevron and MetLife. By donating to non-profits, corporations can avoid shareholder criticism about using revenues for political purposes as well

Since the Judiciary gutted McCain-Feingold,[71] there has been an enormous growth in "Social Welfare Organizations" under 501(c)(4) and other vehicles, which spend enormous amounts on the sly to elect or defeat specific candidates or ballot issues.[72] These organizations are the least likely to disclose their source of funding, and thus about which the least is known.[73] The best-known example may be the U.S. Chamber of Commerce, which has spent over $130 million on politics from 2010 to 2016.[74] The Chamber does not have to disclose its donors and does not, although nearly one hundred blue-chip companies are "members."[75] I do not mean to single out the Chamber. But business interests predominate in this political dark space and many spend their money in an even less open way than the Chamber.[76]

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as consumer reaction to their political stance. Consequently, it is reasonable to suspect that, because of non-profits' ability to hide donations, they are the preferred vehicle for corporate political spending." (footnote omitted)); *see* Bebchuk & Jackson, *supra* note 52, at 927 ("We present evidence indicating that public companies engage in substantial political spending through these intermediaries. Furthermore, although other types of corporate spending on politics are occasionally disclosed in public filings, collecting the information necessary to identify the amount or targets of a public company's spending would require a review of a wide range of disparate sources. As a result, it is currently impractical for a public company's investors to have a complete picture of the company's political spending."); *see also* Lucian A. Bebchuk et al., *The Untenable Case for Keeping Investors in the Dark*, 10 HARV. BUS. L. REV. (forthcoming 2019/2020) (manuscript at 8, 12), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3281791 [https://perma.cc/M99Q-T23F] [hereinafter Bebchuk et al., *Untenable*] ("Under existing rules, however, disclosure of corporate political spending is incomplete and often misleading. . . . [C]urrent law requires relatively little disclosure of corporate spending on politics. For one thing, corporations can channel significant political spending through intermediaries, and such spending largely remains under investors' radar.").

71. *See* Citizens United v. FEC, 558 U.S. 310 (2010); FEC v. Wis. Right to Life, 551 U.S. 449 (2007).

72. *See Political Nonprofits (Dark Money)*, CTR. FOR RESPONSIVE POL., https://www.opensecrets.org/outsidespending/nonprof_summ.php [https://perma.cc/6JVG-BLL9] (showing that Social Welfare Organizations are by far the largest dark money spenders).

73. *See Outside Spending: Frequently Asked Questions About 501(c)(4) Groups*, CTR. FOR RESPONSIVE POL., https://www.opensecrets.org/outsidespending/faq.php [https://perma.cc/82AQ-DGCS] (noting that 501(c)(4) organizations do not need to disclose their donors and have been growing in importance since *Citizens United*).

74. MICHAEL BECKEL, ISSUE ONE, DARK MONEY ILLUMINATED 5–6 (2018), https://www.issueone.org/wp-content/uploads/2018/09/Dark-Money-Illuminated-Report.pdf [https://perma.cc/S655-XBW8]. The U.S. Chamber of Commerce is a 501(c)(6) organization. These organizations must disclose their members if, over the course of a year, they spend more than $250 expressly advocating for the election or defeat of a particular political candidate. *See* 52 U.S.C. § 30104(c) (2012). But if these organizations give to other organizations that advocate for a particular candidate on their behalf, that disclosure is not required. The Pharmaceutical example below is a good example of organizations giving to other organizations for the purposes of hiding the true funders. *See* text accompanying *infra* note 78.

75. BECKEL, *supra* note 74, at 7.

76. Excluding 501 organizations, which themselves are usually pools of dark money, corporations represented 70 percent of dark money spending according to Issue One's database. *"Dark Money Illuminated" Issue One Database of Dark Money Donors*, ISSUE ONE, https://docs.google.com/spreadsheets/d/1vpImNT1tSNoBWpSIg7Hx_gqG85hcM70CJ_5DtPcIYBI/edit?usp=sharing (last visited Oct. 18, 2019); *see also* BECKEL, *supra* note 74, at 7 ("Companies . . . are among the donors

The spending by these groups can be targeted and hidden. For example, in the summer of 2011, a group harmlessly named "Freedom Path" started spending money to ward off a primary challenge to an incumbent U.S. Senator.[77] It worked; he won re-election. Only in November, after his re-election, did it become clear that "Freedom Path" was a bunch of pharmaceutical companies, acting through a trade association called Pharmaceutical Research and Manufacturers of America.[78] Spending by groups like this has even crept into state judicial elections, with oil and gas interests spending big in Montana's 2012 Supreme Court election, for example.[79] Unsurprisingly, these oil and gas companies are frequent litigants in Montana state courts. The extent to which corporate and other funds are involved in the huge increase in spending from dark money groups to influence elections is not fully determined, and there is no easy or reliable means to trace the spending of any specific corporation.

E. The Big Four's Failure to Press for Disclosure and How Their Vote Would Change the Tide

In response to this rise in dark money and corporate political spending, stockholders seeking to constrain the ability of corporate managers to engage in political spending without fair accountability have rationally

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identified [as donors to dark money organizations] by this research. . . . Issue One found that nearly 100 blue-chip companies have voluntarily disclosed their own dues payments to the trade association. The Dow Chemical Co. alone has contributed about $13.5 million to the U.S. Chamber of Commerce in recent years, while health insurer Aetna Inc. has contributed $5.3 million and oil giant Chevron Corp. has contributed $4.5 million. Meanwhile, Issue One found that gun manufacturer Sturm, Ruger & Co., Inc. has contributed more than $12 million in recent years to the National Rifle Association, while tobacco company Reynolds American Inc. has contributed substantial sums to three major dark money groups in recent years: $275,000 to Americans for Tax Reform, $61,000 to Americans for Prosperity and at least $50,000 to the U.S. Chamber of Commerce."); Nicholas Confessore, *Secret Money Fueling a Flood of Political Ads*, N.Y. TIMES (Oct. 10, 2014), https://www.nytimes.com/2014/10/11/us/politics/ads-paid-for-by-secret-money-flood-the-midterm-elections.html [https://perma.cc/S6WJ-U7WU] (noting that "corporations would rather mask their commercial interest in making [political] contributions" than other political contributors); Ian Vandewalker, *One Million Opinions on Transparency in Corporate Political Spending*, BRENNAN CTR. FOR JUST. (Sept. 4, 2014), http://www.brennancenter.org/blog/one-million-opinions-transparency-corporate-political-spending [https://perma.cc/8WDX-6XLX] (observing that, after *Citizens United*, "[c]orporations have taken advantage of the weakened regulations" to spend money on politics, but noting that "we have no idea how much corporations really spend, because much outside money in elections is 'dark money,' the sources of which are hidden from the public").

77. The ads supported Senator Orrin Hatch of Utah. BECKEL, *supra* note 74, at 3–4.

78. BECKEL, *supra* note 74, at 3–4.

79. ALICIA BANNON ET AL., BRENNAN CTR. FOR JUST., WHO PAYS FOR JUDICIAL RACES? 24 (2017), https://www.brennancenter.org/sites/default/files/publications/Politics_of_Judicial_Elections_Final.pdf [https://perma.cc/2AWK-HKZM].

demanded disclosure.[80] Tell us, they ask, to what extent and to what end have you spent corporate funds on politics?

Despite having policies of abdication subject only to action to prevent political spending that seems to cross some line of unacceptability in amount or form, the Big Four have generally failed to support initiatives to give them the very information that would be necessary for them to determine whether their own policies demand that they step up.[81] For instance, in 2011, when the SEC was considering mandating political spending disclosures for public companies, several asset managers signed a letter in support of the rule.[82] The Big Four did not.[83]

Stockholder proposals requesting greater political transparency will not succeed without the Big Four's votes. A recent study of twenty-five political spending disclosure proposals found that only one passed. But if each of the mutual funds owning more then 5 percent of the company's common stock had voted for these proposals, sixteen more would have passed.[84] And, over

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80. The argument for required disclosure of corporate political spending has been made well by several distinguished commentators. *See, e.g.*, Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010); John C. Coates IV, *Corporate Speech & The First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223 (2015) [hereinafter Coates, *Corporate Speech*]; John C. Coates IV & Taylor Lincoln, *Fulfilling Kennedy's Promise: Why the SEC Should Mandate Disclosure of Corporate Political Activity*, PUB. CITIZEN (Sept. 2011), https://www.citizen.org/wp-content/uploads/fulfilling-kennedys-promise.pdf [https://perma.cc/4DZ2-WSAR].

81. In fact, in *Citizens United v. FEC*, Justice Kennedy, writing for the majority, implicitly assumed that access to information about corporate political spending would be accessible and allow stockholders to correct abuses "through the procedures of corporate democracy." 558 U.S. 310, 362 (2010) (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 794 (1978)). And *Citizens United* upheld disclosure requirements as constitutional. *Id.* at 372. Therefore, our failure to mandate disclosure in a post-*Citizens United* world underscores the problem facing the country that can be uniquely solved by the Big Four.

82. Iain Richards et al., Comment Letter on Rulemaking Petition to Require Public Companies to Disclose to Shareholders the Use of Corporate Resources for Political Activities (Nov. 1, 2011), https://www.sec.gov/comments/4-637/4637-11.pdf [https://perma.cc/5MYV-EU9G].

83. *See* Comments on Rulemaking Petition to Require Public Companies to Disclose to Shareholders the Use of Corporate Resources for Political Activities, SEC, https://www.sec.gov/comments/4-637/4-637.shtml [https://perma.cc/49SN-YRZU].

84. PUB. CITIZEN, MAJORITY REPORT: IF MUTUAL FUND COMPANIES CHANGED THEIR VOTES, SHAREHOLDER SUPPORT FOR POLITICAL SPENDING DISCLOSURE WOULD SKYROCKET 7 (2017), https://corporatereformcoalition.org/wp-content/uploads/2017/05/Majority-Report-2017.pdf [https://perma.cc/6WUG-BB7W]. Allstate provides an apt recent example. The Teamsters placed a political spending disclosure proposal on Allstate's 2018 proxy. After all the votes were counted, the proposal narrowly failed, with 46.5 percent of stockholders supporting the proposal. But Vanguard, BlackRock, and State Street all voted "no." These three institutions are the three largest Allstate stockholders and if just one of them had voted "for" the proposal, it would have passed. Allstate Corp., Current Report (Form 8-K) (May 21, 2019), https://www.sec.gov/Archives/edgar/data/899051/000089905119000034/form8-k52119.htm [https://perma.cc/2HCN-TCWQ]; *see* BlackRock Funds, Annual Report of Proxy Voting Record of Registered Management Investment Company (Form N-PX) (Aug. 29, 2019), https://sec.report/Document/0001193125-19-233363/d788351dnpx.htm [https://perma.cc/8SSP-NVZD]; State Street Inst. Inv. Tr., Annual Report of Proxy Record of Registered Management Investment Company

half the proposals would have gained majority support if just the five largest investors in the corporation—typically including members of the Big Four—supported them.[85] By deferring to management, the Big Four have handcuffed their own ability to oversee political spending and denied themselves the very data they need to do so.

IV. THE BIG FOUR'S LACK OF CAPACITY TO MONITOR POLITICAL SPENDING PRACTICES

Not only do the Big Four lack the information to monitor political spending, they also lack the capacity to do so. There is a lively debate about whether the Big Four are doing enough to be active stewards, even in the core area of overseeing portfolio company business performance.[86] The Big Four must vote on stockholder proposals, directors, and pay plans at thousands of companies annually.[87] To be fair, the Big Four have recently increased their focus on stewardship and expanded their stewardship teams.[88] But the Big Four still do not have enough staff for monitoring, even when it comes to questions of core business policy. For instance, as of 2017, BlackRock had a team of thirty-three responsible for engagement at over

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(Form N-PX) (Aug. 29, 2019), https://www.sec.gov/Archives/edgar/data/1107414/000119312519234088/d784416dnpx.txt [https://perma.cc/R5U8-PK23]; Vanguard Index Funds, Annual Report of Proxy Voting Record of Registered Management Investment Companies (Form N-PX) (Aug. 28, 2019), https://www.sec.gov/Archives/edgar/data/36405/000114420419042761/tv525405-1_index0040.htm [https://perma.cc/RK6D-RKWH].

85. PUB. CITIZEN, *supra* note 84, at 7.

86. *Compare* Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493 (2018) (advocating that passive investors—like the Big Four—should be precluded from voting because they cannot be adequate stewards of capital), *with* Bebchuk & Hirst, *supra* note 20 (encouraging policy positions that would provide more incentives for passive investors—like the Big Four—to be active in corporate governance and worrying that the Big Four's current approach is too deferential to management), *and* Jill E. Fisch & Simone M. Sepe, *Shareholder Collaboration*, 98 TEX. L. REV. (forthcoming 2019), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2998&context=faculty_scholarship [https://perma.cc/6XR9-J9XB] (arguing that the Big Four collaborate already with their portfolio companies to achieve long-term returns and arguing that this type of collaboration or engagement is the best way for the Big Four to add value to both Worker Investors and their portfolio companies), *and* Marcel Kahan & Edward Rock, *Index Funds and Corporate Governance: Let Shareholders Be Shareholders* (N.Y.U. Law & Econ., Working Paper No. 18-39, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3295098 [https://perma.cc/J3KD-NN4K] (arguing that the Big 3 have enough financial incentives to be actively involved and engaged in corporate governance and key proxy contests).

87. For instance, BlackRock must vote on directors, compensation, and stockholder proposals at about 14,000 companies around the world. Vanguard and State Street are asked to monitor a similar number of corporations. *See* Lund, *supra* note 86, at 516 ("Vanguard employs fifteen people devoted to engagement and voting at about 13,000 companies based around the world, BlackRock employs about twenty people who work on governance issues at some 14,000 companies, and State Street employs fewer than ten people devoted to governance issues at around 9,000 companies.").

88. Madison Marriage, *BlackRock, Vanguard and State Street Bulk Up Governance Staff*, FIN. TIMES (Jan. 28, 2017), https://www.ft.com/content/657b243c-e492-11e6-9645-c9357a75844a.

14,000 companies—that is over 400 companies per team member.[89] At Fidelity, every year their "portfolio managers and analysts attend more than 17,000 company meetings—or one every 10 minutes on average."[90] Recent analysis by Professors Lucian Bebchuk and Scott Hirst shows that "in order to oversee each of their billion-dollar positions, BlackRock spent less than 4 person-days per year and less than $5,000 in stewardship costs per year, and each of SSGA and Vanguard spent less than 2 person-days per year and less than $2,500 in stewardship costs per year."[91] It is easy to see why staff at the Big Four themselves, in candid private moments, bemoan the proliferation of votes and the impossibility of being informed as to all of them.[92]

Given the tremendous task the Big Four face in monitoring their thousands of portfolio companies' business policies, just what incentives and capacity do they have to monitor these companies' political spending practices? In making this point, I am not blaming the Big Four. But if they in fact do not monitor in this area because they lack adequate incentives and capacity to do so, their stated policies about political spending make no logical sense, and leave corporate managers free to act without accountability in an area where they lack legitimacy.

Although the Big Four have increased their private engagement with companies,[93] the Big Four do not meet with most of their portfolio

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89. Hortense Bioy et al., *Passive Fund Providers Take an Activist Approach to Investment Stewardship*, MORNINGSTAR 19 (Dec. 2017), https://www.morningstar.com/content/dam/marketing/shared/pdfs/Research/Morningstar-Passive-Active-Stewardship.pdf [https://perma.cc/5C5A-P5C2] ("For example, BlackRock expanded its team to 33 members today from 20 in 2014, Vanguard's team went to 21 today from 10 in 2015 . . . ."); Lund, *supra* note 86, at 515–16 ("The Big Three advertise that their governance groups are active participants in firm governance, but a closer look induces some skepticism about these claims. Those governance groups do not have their pay tied to the funds' performance. They are also understaffed . . . ." (footnotes omitted)).

90. *About Us: Who We Are & What We Do*, FIDELITY INT'L, https://web.archive.org/web/20190610092215/https://www.fidelityinternational.com/global/about/default.page [https://perma.cc/9WKA-TX9Q].

91. Bebchuk & Hirst, *supra* note 20 (manuscript at 50).

92. BlackRock has criticized the overwhelming number of votes, and they all do privately. *See* Barbara Novick, Vice Chairman & Ray Cameron, Managing Director, BlackRock, Inc., Comment Letter on SEC Staff Roundtable on the Proxy Process (Nov. 16, 2018), https://www.sec.gov/comments/4-725/4725-4656351-176506.pdf [https://perma.cc/NP36-E6PW].

93. *See* Glenn H. Booraem, *Passive Investors, Not Passive Owners*, VANGUARD (June 20, 2013), https://global.vanguard.com/portal/site/institutional/ch/en/articles/research-and-commentary/topical-insights/passive-investors-passive-owners-tlor [https://perma.cc/RTZ8-BBDF] ("However, by its nature, voting reduces often complex issues to a binary choice—between FOR and AGAINST a particular proposal—making the proxy vote a rather blunt instrument. This is where the second—and perhaps more important—component of our governance program takes over; engagement with directors and management of the companies in which we invest provides for a level of nuance and precision that voting, in and of itself, lacks. So while voting is visible, it tells only part of the story. We believe that engagement is where the action is. We have found through hundreds of direct discussions every year that we are frequently able to accomplish as much—or more—through dialogue as we are through

companies annually. For about 90 percent of portfolio companies, BlackRock, Vanguard, and State Street have zero engagement—not even one single meeting.[94] And even when they do privately engage, BlackRock, Vanguard, and State Street tend to meet with a portfolio company only once a year.[95] Given these realities, it seems improbable that political spending will be a subject covered at these meetings.

V. REASONS WHY POLITICAL SPENDING DOES NOT BENEFIT DIVERSIFIED INVESTORS

Now, of course, some would argue that most corporate political spending is likely intended to help elect candidates supporting the corporation's desired regulatory policies, policies that the firm's managers believe will help the firm maintain or increase its profits. On that basis, why should institutional investors act to constrain spending as spending that increases firm profits is good for investors? Well, for many good reasons.

A. Disclosure as a First Step

For starters, institutions that have no idea how much their portfolio companies spend on politics, and how that money is being spent, are in no position to invoke this argument. It is an argument based on ignorance, not a sound empirical basis. In the S&P 500, 48 percent of companies provide no political spending disclosure, and even companies that do disclose some information have loopholes in their disclosure policies "that allow them to withhold certain information that shareholders would expect to receive."[96]

B. Worker Investors Are Hurt by Externalities and Do Not Benefit from Rent Seeking

For diversified investors, any increased profitability by particular corporations that results from externalities is suffered by them both as Worker Investors and as human citizens who pay taxes, breathe air, and have values not synonymous with lucre.

The colder economic term "externalities" can be put in these more human terms: dirtier water and air, workers suffering death or harm at an unsafe workplace, employees needing health care to be covered by the

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voting. Importantly, through engagement, we are able to put issues on the table for discussion that aren't on the proxy ballot. We believe that our active engagement on all manner of issues demonstrates that passive investors don't need to be passive owners.").

94. Bebchuk & Hirst, *supra* note 20 (manuscript at 57).

95. *Id.* (manuscript at 58).

96. Bebchuk et al., *Untenable*, *supra* note 70 (manuscript at 28).

government or a spouse's more responsible employer, or consumers who are defrauded or injured. All of these externalities are costs that Worker Investors bear as taxpayers, human victims, and as diversified investors.[97] In other words, Worker Investors are not in on the swindle that results when an industry, think big tobacco, is able to make profits by shifting its costs of harm to others.[98]

As important, because Worker Investors are dependent on real, sustainable economic growth, they are harmed when businesses use the political process to engage in rent-seeking to protect their industries against competition from other competitors with cleaner, more responsible ways of making money, or to hold off efforts by regulators to make them reduce the externalities they generate.[99] Corporate political spending that benefits particular competitors to the disadvantage of others does not benefit diversified investors; it retards sustainable growth and market competition.[100] One good example of this phenomenon is political spending designed to influence society to elect candidates who deny science and the relationship between carbon use and climate change.[101] That kind of

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97. *See* Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103, 1117 (2002) ("On this view, as with corporate charitable giving—which no one seems eager to proscribe despite the existence of the very same agency problem—there may well be a corporate profit-maximizing and therefore pro-shareholder rationale for corporate political speech. To be fair, however, it should be noted that well-diversified shareholders might not appreciate this approach to profit maximization. Well-diversified investors are equally as likely to be on the losing side as the winning side of a redistributive battle between incorporated firms, so on average they would be worse off because the transfer costs represent a deadweight loss." (footnote omitted)).

98. *See* Jay B. Kesten, *Shareholder Political Primacy*, 10 VA. L. & BUS. REV. 161, 209 (2016) ("[M]anagers have strong incentives to engage in corporate political activity to rent-seek if doing so would maximize their own firm's value. However, rational, diversified investors should curtail that activity if the rent-seeking results in intra-portfolio wealth transfers. Because rent-seeking is not costless, the transaction costs constitute a deadweight loss. Empowering shareholders to regulate corporate political activity would allow them to prevent such losses. It may also insulate firms from losses associated with political extortion, a form of reverse rent-seeking in which politicians siphon off part of a company's surplus by threatening to enact harmful legislation.").

99. Anne Tucker, *The Citizen Shareholder: Modernizing the Agency Paradigm to Reflect How and Why a Majority of Americans Invest in the Market*, 35 SEATTLE U. L. REV. 1299, 1317 (2012) ("Because a mutual fund owner is invested in 'the market' or a representative sample of the whole, she may care more about overall growth and stability of the market rather than the performance of a specific firm." (footnote omitted)).

100. Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCT. 247, 265 (2017).

101. *See, e.g.*, Bill McKibben, *A Very Grim Forecast*, N.Y. REV. OF BOOKS, Nov. 22, 2018, at 4, https://www.nybooks.com/articles/2018/11/22/global-warming-very-grim-forecast/ [https://perma.cc/Q8EC-EYMS] ("Since the last IPCC report, a series of newspaper exposés has made it clear that the big oil companies knew all about climate change even before it became a public issue in the late 1980s, and that, instead of owning up to that knowledge, they sponsored an enormously expensive campaign to obfuscate the science. . . . After the release of the IPCC report, for instance, Exxon pledged $1 million to work toward a carbon tax. That's risible—Exxon made $280 billion in the last decade, and it has

influence peddling is designed to perpetuate large subsidies granted to traditional energy companies, and to thereby retard the growth of new businesses that generate energy in a way that uses less carbon and produces less pollution.[102] Not only does this rent-seeking privilege ossified businesses of the past over dynamic businesses with brighter prospects, it subjects our economy, and thus diversified investors, to the huge economic and social costs that will come from a failure to keep climate change within bounds.[103] Professor John Coates has summed up the corporate rent-seeking race nicely, worrying that the concerted efforts of big corporations to tilt the regulatory system in a direction that serves their selfish interests "risks economic harms—a package of risks one could call (with some but only some exaggeration) 'the risk of Russia.'" In other words, a crony capitalism that lacks fairness, integrity, and dynamism.[104]

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donated huge sums to elect a Congress that won't pass a carbon tax anytime soon; oil companies are spending many millions of dollars to defeat a carbon tax on the ballot in Washington State and to beat back bans on fracking in Colorado. Even if a carbon tax somehow made it past the GOP, the amount Exxon says it wants—$40 a ton—is tiny compared to what the IPCC's analysts say would be required to make a real dent in the problem. And in return the proposed legislation would relieve the oil companies of all liability for the havoc they've caused. A bargain that might have made sense a generation ago no longer counts for much."). Another prominent example is Chevron spending about three million dollars to elect municipal candidates in Richmond, California who would not advocate for increased safety measures at Chevron's refinery in Richmond, despite the fact that the refinery has had three major fires erupt in the last twenty-five years. Alice Kantor, *Progressives Capture City Hall and Council, Fending Off Chevron Money*, RICHMOND CONFIDENTIAL (Nov. 5, 2014), http://richmondconfidential.org/2014/11/05/progressives-capture-city-hall-and-council-fending-off-chevron-money/ [https://perma.cc/9SJU-VQQP] (reporting that another candidate won the mayoral race against the Chevron-backed candidate); Heather Smith, *In Richmond, Calif., It's Chevron's $3 Million vs. a Green Slate*, GRIST (Nov. 4, 2014), http://grist.org/politics/in-richmond-calif-its-chevrons-3-million-vs-a-green-slate [https://perma.cc/VDA9-SBCU] (discussing the exorbitant amount spent by Chevron in Richmond, California).

102. *See* McKibben, *supra* note 101.

103. John Craig & David Madland, *How Campaign Contributions and Lobbying Can Lead to Inefficient Economic Policy*, CTR. FOR AM. PROGRESS (May 2, 2014), https://cdn.americanprogress.org/wp-content/uploads/2014/05/CampaignFinance-brief.pdf [https://perma.cc/X7CL-75RC] ("As Nobel Prize-winning economist Joseph Stiglitz explains, rent-seeking not only wastes tax dollars on unnecessary or inefficient projects—redistributing money from one part of society to the rent-seekers—but it is a 'centripetal force' that hollows out the economy because 'the rewards of rent seeking become so outsize that more and more energy is directed toward it, at the expense of everything else.'" (quoting JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY (2012))).

104. Coates, *Corporate Speech*, *supra* note 80, at 224 ("Nearly half of First Amendment legal challenges now benefit business corporations and trade groups, rather than other kinds of organizations or individuals. Such cases represent examples of a particular kind of corruption, defined here as a form of rent seeking: the use of legal tools by business managers in specific cases to entrench reregulation in their personal interests at the expense of shareholders, consumers, and employees, and in aggregate to degrade the rule of law by rendering law less predictable, general and clear. This corruption not only risks the loss of a republican form of government emphasized by most critics of *Citizens United*, but also risks economic harms—a package of risks one could call (with some but only some exaggeration) 'the risk of Russia.'"). This type of corporate influence also raises questions about Worker Investors' trust in our system of government and the role played by corporations—seeking to maximize profits within the bounds of the law—and government—creating laws and regulations that protect society. *See* Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV. 639, 687–92 (2016); *see also*

C. Corporate Political Spending Is Unlikely to Even Benefit the Corporations Doing the Spending

The increasing recognition by the Big Four of the need for responsible, sustainable business practices accords with the logic of Professor Coates's work and the arguments of others who contend that political spending by corporations is not likely to be wealth creating for society or even the corporations themselves in the long run.[105] In focusing on corporate social responsibility, investors like BlackRock argue that corporations that cannot make money without taking ethical or regulatory shortcuts are unlikely to be profitable in the long run and that dubious action of that kind is a forensic indicator of a problematic business plan and culture.[106] Logically, one would infer that there is a high correlation between public corporations that engage in problematic behavior and those that engage in spending to influence the political process. Even from the narrow perspective of an investor in an actively traded mutual fund with a smaller portfolio of stocks, there is strong reason to be concerned that corporate political spending is a warning signal for investors. That, of course, should be unsurprising. If a business has to try to make money by influencing the political process, that suggests that its prospects for growth by developing improved products and services are not strong. Instead, the business apparently has to seek special favors to gain access to subsidies or government contracts, not on the basis of the merits alone, but by currying favor. And, of course, there is the reality that one business's successful political rent-seeking can be a competitor's loss, and your investment fund may also hold the loser as well as the winner. Over

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id. at 691 ("Notwithstanding the issue of political viability, this fix should be made [to the Religious Freedom Restoration Act] to preserve the equilibrium—a social compact—established in corporate law to rely on and require business corporations to comply with external regulations. This allocation of roles for different areas of law has allowed corporate law to be enabling and value creating—for corporations to serve as 'great engines for the promotion of the public convenience, and for the development of public wealth.'" (quoting Leslie v. Lorillard, 18 N.E. 363, 366 (N.Y. 1888))); Strine & Walter, *supra* note 60, at 383 ("*Citizens United* undermines conservative corporate theory's reliance upon the regulatory process as a safeguard against externality. Because *Citizens United* permits the corporation to act directly to influence who is elected to office by using the huge resources in corporate treasuries, it is likely as a general matter to make candidates of all persuasions more beholden to corporate desires. Under conservative corporate theory, the only legitimate reason for a for-profit corporation to make political expenditures will be to elect or defeat candidates based on their support for policies that the corporation believes will produce the most profits. Almost by definition, this will increase the danger of externality risk, because corporate expenditures will be made with the singular objective of stockholder profit in mind, and therefore will be likely to favor policies that leave the corporation with the profits from their operations, while shifting the costs of those operations (including of excessive risk taking or safety shortcuts) to others." (footnote omiotted)).

105. *See* John C. Coates IV, *Corporate Politics, Governance, and Value Before and After* Citizens United, 9 J. EMPIRICAL LEGAL STUD. 657, 658 (2012) ("In the majority of industries . . . political activity is common but varied, and it correlates negatively with . . . shareholder value . . . .").

106. *See supra* text accompanying notes 15–19.

time, therefore, it seems doubtful that influence-seeking is an optimal growth strategy.[107]

Empirical evidence supports this logical conclusion. A thorough study by Professor Coates demonstrates that political spending by corporations is negatively correlated with stockholder returns.[108] Other studies support his finding.[109] His study was not focused, as I am, on investors holding the entire market as index investors do, but on investors who may just buy the stock of particular firms. On strong balance, he finds that corporations that engage in more political influence-seeking tend to do worse than those that do not.[110] Professor Coates's study supports the inference that corporate political spending has an even more negative effect for Worker Investors whose portfolios are heavily indexed. For specific portfolio companies, political rent-seeking that increases externalities to create profits is unlikely to be a sound strategy for the company long-term, the horizon over which index investors hold. And those externality costs are suffered by Worker Investors as holders of the entire index, and as taxpayers and human beings. Taken in total, the result is a profoundly detrimental economic effect on Worker Investors.

D. Business Leaders' Political Spending Does Not Mirror Society's Views

The political spending that management engages in does not mirror society's political views. The idea that abdication by the Big Four is okay because corporate management can be expected to mirror society is one that is not only counterintuitive, given that corporate managers are so much wealthier than ordinary Americans,[111] but convincingly disproven by an impressive new study. In this study, the authors show that more than 57 percent of public company CEOs are Republican (compared to 19 percent who are Democrats), and the median CEO directs 75 percent of her total

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107. And companies face substantial business risks when they spend their capital on politics, as customers may boycott companies whose politics are perceived as being out-of-sync with their own. *See generally* BRUCE FREED ET AL., CTR. FOR POL. ACCOUNTABILITY, COLLISION COURSE: THE RISKS COMPANIES FACE WHEN THEIR POLITICAL SPENDING AND CORE VALUES CONFLICT AND HOW TO ADDRESS THEM 10 (2018), http://files.politicalaccountability.net/reports/cpa-reports/collision-course-the-risks-companies-face-when-their-political-spending-and-core-values-conflict-and-how-to-address-them/Final_Draft_Collision_Report.pdf [https://perma.cc/NY8E-7F8B] (documenting the backlash companies have faced from both the left and the right due to their political contributions).

108. Coates, *supra* note 105, at 658.

109. *See* Bebchuk et al., *Untenable*, *supra* note 70 (manuscript at 7 & n.22) (collecting six studies "finding that [corporate political] spending is associated with negative effects on shareholder value").

110. Coates, *supra* note 105, at 658.

111. *See* David Gelles, *Want to Make Money Like a C.E.O.? Work for 275 Years*, N.Y. TIMES (May 25, 2018), https://www.nytimes.com/2018/05/25/business/highest-paid-ceos-2017.html [https://perma.cc/W4VF-MQ8T] (noting, for example, that "[a] Walmart employee earning the company's median salary of $19,177 would have to work for more than a thousand years to earn the $22.2 million that" Walmart's CEO earned in a single year).

political contributions to Republicans.[112] In addition, the study finds that Republican CEOs strongly opposed transparency in corporate spending, on average.[113] The demographics found by the study sharply contrast with the American public as a whole, in which around 29 percent of Americans identify as Republicans, 31 percent as Democrats, and 38 percent as independents.[114] If the justification for this bias is that corporate management is more representative of the investor class, and can use corporate resources in a way that represents that wealthier class, this is of course an argument that the "haves" should be able to use corporate wealth to influence the political system toward their ends. If that is the basis on which institutional investors abstain, they have yet to say so, and one doubts that they will starkly surface such a belief.

E. Business Leaders Often Wish They Could "Just Say No"

There is another reality that the Big Four seems to ignore when abdicating their duty to address corporate political spending: many businesses favored the pre-*Citizens United* world because it gave them a reason to say no to political pressures to use corporate money for political spending.[115] When something is illegal, you can just do a Nancy Reagan and "just say no." After *Citizens United*, when businesses are solicited by so-called "independent" organizations seeking to support particular candidates, they can no longer truthfully say that the law forbids the corporation from doing so.[116] To think that corporations are immune from political and industry pressures is to attribute to their managers a disconnection from the reality of power relations that lacks any credible real world basis. Many business managers would like to focus on business as they once could. This reality strengthens the case for action by the Big Four to constrain corporate political spending in the absence of stockholder assent. Doing so would

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112. Alma Cohen et. al., *The Politics of CEOs*, 11 J. LEGAL ANALYSIS 1, 3 (2019).

113. *Id.* at 4 ("We find that companies led by Republican CEOs are less transparent to their investors on whether, how, and how much they spend on politics.").

114. *Party Affiliation*, GALLUP (Sept. 15, 2019), https://news.gallup.com/poll/15370/party-affiliation.aspx [https://perma.cc/CEX9-WFZ3].

115. *See* Strine & Walter, *supra* note 60, at 344 ("Thus, McCain-Feingold fit nicely with conservative corporate law theory regarding for-profit firms. . . . By providing a means for corporations to raise funds in a voluntary manner through PACs, McCain-Feingold enabled corporations to rally the expressive concerns of those stockholders who specifically desired that their funds be used in that way, while respecting the traditional conservative corporate theory view that it is illegitimate for corporate managers to use the entrusted equity of diverse stockholders for their idiosyncratic views of the common good.").

116. Section 203 of the Bipartisan Campaign Reform Act (McCain-Feingold) prohibited corporations and unions from using treasury funds to make independent expenditures for political speech. 52 U.S.C. § 30118 (2018) (original codification at 2 U.S.C. § 441b (2006)). But the Supreme Court, in *Citizens United*, found Section 203 to be unconstitutional. 558 U.S. 310, 365–66 (2010).

restore sanity and end an unhealthy incentive system that has poured tons of money into stealthy organizations seeking to influence who governs our society.

F. Human Investors Have Other Values at Stake

And let's not lose sight of something essential. Human beings have values that are at least as important as money. Much of what makes us human is not about money. The idea that the disabled should be able to live in dignity. The idea that the elderly should be secure in their old age. The importance of providing children with a quality education. The notion that the humanities writ large, including the arts, are part of being human. And those ideas, I admit, are ones I hold. But others hold equally important ones that I might not share.

The fact that an elected official will support the energy policy Exxon Mobil wants does not mean that the elected official, on the myriad issues she must vote upon as a member of Congress, deserves support from those whose capital Exxon Mobil holds. Put in the words "technology policy" and Facebook and the issue would be the same. This is not a liberal or conservative issue; it is just a fact-based problem. Corporations in which the Big Four invest are not a fitting political proxy for the human investors whose real money is being used. Quite the opposite. They do not face the moral mirror test that human beings must when they decide to support a candidate. A candidate who is an environmentalist might appeal to me, but not if she is a racist.[117] If I wish to be a responsible, moral citizen, I must judge candidates on the full range of issues they will be entrusted to address. Business corporations, being things entirely different from human beings, cannot and do not do this. And, as a result, their interests diverge starkly from that of their Worker Investors.

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117. The divergence between human-political considerations and corporate-political considerations is most recently illustrated by Google, Facebook, Wal-Mart, and other corporations funding a Senate campaign in Mississippi. When pressure mounted because the candidate made statements that seemed to make light of public hangings and was pictured wearing confederate garb, these companies were forced to backtrack and asked the Senator to return their campaign contributions. *See* Dan Mangan, *Facebook Asks Sen. Cindy Hyde-Smith for Contribution Refund, as Mississippi Republican Faces Nail Biter of an Election Runoff Against Mike Espy*, CNBC (Nov. 27, 2018, 1:27 PM), https://www.cnbc.com/2018/11/27/facebook-asks-sen-cindy-hyde-smith-for-contribution-back.html [https://perma.cc/RQG4-7SM2]. Even before this, the tension between the political views of this candidate and the public profile of some of the donating companies seems stark, but is reconciled by the obvious, which is that the companies were seeking to curry favor with an incumbent Senator on committees of jurisdiction important to their industries. Other human values were put to the side, until the incumbent engaged in behavior that put the companies themselves in bad light by their association with her. This episode just highlights the ability of corporations to focus narrowly on issues that matter to their economic interests without viewing a candidate holistically, as human-voters must.

VI. HAVE NO PITY FOR THE HAVES

Now, even though it has the least empirical or logical force of any argument, some will undoubtedly argue that stockholder constraints on corporate political spending will leave these entities helpless, voiceless, powerless victims of a political process dominated by the voice of workers, environmentalists, supporters of the arts, and consumer advocates.[118] This argument, of course, is empty of fact-based force. Before our Supreme Court invented or discovered in 2010—over 200 years after the Founding—the constitutional right of business entities to pour funds into advocating for the election or defeat of political candidates without legislative constraint, guess what the reality was? Business interests were the dominant force in spending on lobbying and politics.

Business political spending far outpaced the spending of labor unions, environmental organizations, and other interests that reflect the more flesh and blood concerns of human beings.[119] Before *Citizens United*, corporations were free to spend corporate money to organize PACs, raise funds from stockholders and managers voluntarily, and spend PAC funds on contributions.[120] And, of course, large stockholders and well-paid executives were free to use their own massive wealth for that purpose. Thus, even before *Citizens United*, business interests swamped others in spending.[121] This is, of course, to be expected. After all, if labor had the funds of capital, it would be capital.

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118. Requiring corporations to disclose their political spending would in fact level the playing field with unions, which are required to disclose their political spending under current law. *See* Bebchuk et al., *Untenable*, *supra* note 70 (manuscript at 12) ("[U]nions must report 'direct and indirect disbursements to all entities and individuals during the reporting period associated with political disbursements or contributions in money.'" (quoting Dep't of Labor, Instructions for Form LM-2: Labor Organization Annual Report, at 27 (Nov. 2010), https://www.dol.gov/olms/regs/compliance/efs/lm-2instructionsefs.pdf [https://perma.cc/NAM6-EXPD])).

119. For example, according to data from the Center for Responsive Politics, in the 2004 presidential election cycle, that is, before *Citizens United* but after McCain-Feingold, "business" outspent "labor" by a factor of twenty-four. *See Business-Labor-Ideology Split in PAC & Individual Donations to Candidates, Parties, Super PACs and Outside Spending Groups*, CTR. FOR RESPONSIVE POL., https://www.opensecrets.org/overview/blio.php [https://perma.cc/HGF4-JFYX] [hereinafter CTR. FOR RESPONSIVE POL., *Business-Labor-Ideology*]. The same trend was true in the 2008 presidential election. The same trend is true of environmental spending. In 2004, businesses associated with environmental spending—such as those in the Chemical Industry or Energy Sector—spent over $135 million on politics, over forty-one times more than Environmental groups spent. *See infra* note 122. Although Environmental groups have seen their spending increase as worry over climate change has grown, in 2016 businesses still outspent Environmental groups by a factor of 2.8. *See infra* note 122.

120. *See* 52 U.S.C. § 30118(b)(2) (2012) (permitting corporations, before *Citizens United*, to solicit contributions to "a separate segregated fund to be utilized for political purposes"). 52 U.S.C. § 30118(a) banned corporations from using treasury funds on politics, but that ban was declared unconstitutional by *Citizens United*. 558 U.S. 310, 362 (2010).

121. *See* CTR. FOR RESPONSIVE POL., *Business-Labor-Ideology*, *supra* note 119.

After *Citizens United*, this huge advantage of business over workers, business over environmentalists, and business over consumers has grown even more. For example, in 2014, after *Citizens United*, businesses likely to lobby on environmental issues—such as those in the energy, chemicals, and forestry sectors—outspent pro-environment groups by a factor of 2.5, with businesses spending about $220 million during that election cycle compared to $86 million from environmentalists.[122] Business interests also vastly outspend labor. In 2016, for instance, business spent $3.3 billion on politics compared to labor's $213 million.[123] And the known data likely understates the advantage, because so much spending flows through dark money vehicles.

Other realities undercut the idea that public corporations need the ability to engage in electioneering to be fairly heard by elected officials and regulators. In 2016, for example, the top fifty lobbying organizations, such as the National Association of Realtors or the American Hospital Association, collectively shelled out $716 million to influence legislation and lobby the federal government.[124] Of these fifty organizations, only one—the American Association of Retired Persons—was not a business or business-related entity.[125]

Not only do corporations have an advantage when it comes to getting their preferred candidates in office, but they have an advantage in steering the regulatory process as well.[126] Regulators are deferential to industry input,[127] and corporations use their huge financial advantage to dominate

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122. Spending data for businesses associated with environmental spending includes the following sectors: Crop Production & Basic Processing, Food Production & Sales, Forestry & Forest Products, Energy & Natural Resources, Chemical & Related Manufacturing, Steel Production, Textiles, Automotive, Trucking, and Railroads. *Influence & Lobbying*, CTR. FOR RESPONSIVE POL., https://www.opensecrets.org/industries/slist.php [https://perma.cc/D5TH-7HMP] (follow hyperlinks for each sector; then follow hyperlink to "Total").

123. *See* CTR. FOR RESPONSIVE POL., *Business-Labor-Ideology*, *supra* note 119.

124. Megan R. Wilson, *Lobbying's Top 50: Who's Spending Big*, HILL (Feb. 7, 2017, 6:00 AM), https://thehill.com/business-a-lobbying/business-a-lobbying/318177-lobbyings-top-50-whos-spending-big [https://perma.cc/R4Y7-TQSA].

125. *Id.*

126. Jill E. Fisch, *The Long Road Back:* Business Roundtable *and the Future of SEC Rulemaking*, 36 SEATTLE U. L. REV. 695, 722 (2013) (observing that in the regulatory process "industry groups dominate both the public and private mechanisms for provision of information and influence. They are represented disproportionately in the comment letters and private meetings, and they provide the overwhelming majority of comments that include data, statistics, or alternatives to the proposed rulemakings" (footnote omitted)).

127. David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294, 304 (2006) (noting that some scholars "look to the private sector for assistance with rule generation").

the regulatory and rule-making process, and to tie up agencies in litigation if they do not get their way.[128]

As important, for generations now, businesses have used the threat of departure—even to other nations![129]—and downsizings, to get their way on legislative policy and to shift the tax base of the United States away from business entities and to human beings. The share of overall taxes in the U.S. paid by corporations now is 300% less than it was in the 1950s.[130] Businesses use their abilities to relocate their operations, shift jobs to other jurisdictions, and other coercive options to accomplish favorable tax policy, extract subsidies for initiatives to grow or sometimes even to stay in downsized form, and to demand favorable regulatory policies.[131] That is especially so of large public corporations such as the ones represented in the major indexes. Amazon's pursuit of huge public subsidies to locate its next headquarters in a major metropolitan area is just a gigantic example of quotidian corporate behavior.[132]

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128. John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 954–55 (2015) (observing that business interests are more likely to challenge regulations they disfavor in court, which may influence the regulators appetite for initiating the regulation in the first place).

129. Leo E. Strine, Jr., *Corporate Power Is Corporate Purpose II: An Encouragement for Future Consideration from Professors Johnson and Millon*, 74 WASH. & LEE L. REV. 1165, 1174–75 (2017) (documenting the wave of corporation inversions—that is, a transaction in which a U.S. Corporation restructures so that its parent corporation becomes a foreign corporation—purely for tax benefits). In the last five years, more than twenty American companies have used an "inversion" to redomicile themselves outside the U.S. *See* Zachary Mider, *Quicktake: Tax Inversion*, BLOOMBERG (Mar. 2, 2017, 3:35 PM), https://www.bloomberg.com/quicktake/tax-inversion [https://perma.cc/GAK8-9NJW] (documenting this trend).

130. Jay L. Zagorsky, Opinion, *The Share of Tax Dollars Coming from You Is Growing—and the Share from Companies Is Shrinking*, MARKETWATCH (Apr. 18, 2017, 8:50 AM), https://www.marketwatch.com/story/who-pays-a-growing-share-of-taxes-individuals-or-companies-2017-04-13 [https://perma.cc/WG9Y-37VG] ("As a result, overall businesses' funding of the federal government has fallen dramatically since 1945. Back then, corporations provided over one-third of all federal revenue. In 2015, the figure was a bit over 10%, a threefold reduction.").

131. Sanford Levinson, *Randy Barnett's Critique of Democracy (and John Marshall?)*, 32 CONST. COMMENT. 113, 135 (2017) (reviewing RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE (2016)) ("Business corporations relocate all the time, seeking the most favorable tax treatment for their profits."); *see also* KIL HUH ET AL., PEW CHARITABLE TR., HOW STATES ARE IMPROVING TAX INCENTIVES FOR JOBS AND GROWTH: A NATIONAL ASSESSMENT OF EVALUATION PRACTICES 5 (2017), https://www.pewtrusts.org/-/media/assets/2017/05/edti_how_states_are_improving_tax_incentives_for_jobs_and_growth.pdf [https://perma.cc/W668-H3VJ] (observing that tax incentives "are among the primary tools states use to try to create jobs, . . . attract businesses," and stop other businesses from relocating elsewhere); Louise Story, *As Companies Seek Tax Deals, Governments Pay High Price*, N.Y. TIMES (Dec. 1, 2012), https://www.nytimes.com/2012/12/02/us/how-local-taxpayers-bankroll-corporations.html?pagewanted=all&mcubz=3&module=inline [https://perma.cc/8JAN-P2TT] (finding that "states, counties and cities are giving up more than $80 billion each year to companies" in taxes and other incentives to stop companies from relocating).

132. Ben Casselman, *A $2 Billion Question: Did New York and Virginia Overpay for Amazon?*, N.Y. TIMES (Nov. 13, 2018), https://www.nytimes.com/2018/11/13/business/economy/amazon-hq2-va-

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For all these reasons, unconstrained corporate political spending is harmful to Worker Investors, public companies themselves, and our economy.

Unless the double legitimacy problem is addressed, the entrusted capital of Worker Investors will continue to be deployed against them, tilting our democracy even more toward moneyed interests at the expense of the flesh and blood concerns of living, breathing Americans.

CONCLUSION: THE BIG FOUR HAVE THE POWER TO IMPROVE THE INTEGRITY OF OUR DEMOCRACY AND PUBLIC CORPORATIONS BY CONSTRAINING UNDISCLOSED AND UNAUTHORIZED POLITICAL SPENDING

The power of the Big Four to change this dynamic and improve the integrity of our democracy is enormous. Although the Big Four never use their clout to affirmatively make proposals[133]—another gap in fiduciary responsibility that should be considered—their behavior is a critical consideration for other institutional investors who do make proposals.[134] If the Big Four open their eyes, recognize that they are not faithfully representing the interests of their Worker Investors, and vote to constrain political spending, they could put a system-wide break on excessive and illegitimate corporate political spending.

Precisely because the Big Four concede that they have no legitimacy to act as political proxies for their Worker Investors, they necessarily concede that the managers of the companies they put Worker Investors' capital into have no such legitimacy. For that reason, the Big Four cannot escape responsibility by disclaiming their lack of legitimacy and allowing unconstrained corporate spending by similarly illegitimate corporate proxies. They must instead put on their fiduciary boots and do the hard work of representing their Worker Investors.

After *Citizens United* there was a surge in proposals to curb political spending.[135] But, in large part because the Big Four did not support those

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long-island-city-incentives.html [https://perma.cc/Q593-XSFP]; *see also generally* Leo E. Strine, Jr., *Corporate Power Is Corporate Purpose I: Evidence from My Hometown*, 33 OXFORD REV. ECON. POL'Y 176, 184 (2017) (describing demands by other corporations for tax subsidies from communities in which they operate).

133. Bebchuk & Hirst, *supra* note 20 (manuscript at 76) ("Our review of the approximately 1,500 shareholder proposals submitted [between 2014 and 2018] did not identify a single proposal submitted by any of the Big Three.").

134. *See supra* text accompanying notes 36–40.

135. *See* Strine & Walter, *supra* note 60, at 378 n.185 (documenting this "significant uptick" in stockholder proposals in the immediate aftermath of *Citizens United*).

proposals, they failed.[136] Discouraged by this lack of success, the number of political spending proposals has dwindled in recent years.[137] A shift by the Big Four would reverse this trend and rapidly result in a major tilt in the policy of public corporations.[138]

At the very least, the Big Four cannot credibly continue to vote against proposals to make public corporations disclose their political expenditures, when there is overwhelming evidence that no one, including the Federal Elections Commission, can credibly track the corporate money flowing into our political process.[139] Their refusal to require corporations to disclose the very information that would make monitoring theoretically possible is perverse and unprincipled. But simply demanding disclosure is not enough to remedy the problem. The Big Four is poorly positioned to argue that they would monitor corporate political spending effectively if they only had the fuller disclosure they need to do so, given that they also lack the staff necessary to do so. Therefore, if the Big Four is being honest, they must admit that monitoring political spending would not be a high priority given the difficulty they currently have in fulfilling their stewardship role over core matters of business policy.

For that reason, the clearest way for the Big Four to correct their fiduciary blind spot would be for them to support proposals to bar corporate political spending without super-majority stockholder support. If the Big Four think that is radical, then they are calling a radical a legend of their own industry: the late Vanguard founder and index fund icon Jack Bogle.[140] In the wake of *Citizens United*, Jack Bogle argued that corporations should be required to gain approval from 75 percent of their shareholders before

136. *See supra* text accompanying notes 36–40.

137. *See* Reilly S. Steel, *Corporate Political Spending and the Size Effect*, 118 COLUM. L. REV. ONLINE 1, 4 (2017) (documenting the number of political spending proposals from 2012 to 2016 and showing an initial uptick in 2012–2014 followed by a decline).

138. *See supra* text accompanying notes 36–40.

139. *Dark Money Basics*, CTR. FOR RESPONSIVE POL., https://www.opensecrets.org/dark-money/basics [https://perma.cc/BFX8-3JYN] ("While some outside groups—like super PACs—are required to disclose their donors, others are not, such as 501(c)(4)s. Both types of organizations can engage in a number of activities, including buying ads that advocate for or against a candidate, running phone banks and making contributions to super PACs."); Ciara Torres-Spelliscy, Opinion, *The 2018 Elections Have $100 Million in Dark Money and Counting*, BRENNAN CTR. FOR JUST. (Oct. 22, 2018), https://www.brennancenter.org/blog/2018-elections-dark-money [https://perma.cc/E54U-QKWR] ("It's been eight years since *Citizens United v. FEC*, and America still doesn't have transparency about the sources of money in politics. To wit, over $100 million in dark money has been spent as of October 17, 2018, with key weeks left in the midterms.").

140. And, of course, Jack Bogle was no radical. He was just a caring, self-aware American who cared about our nation and who understood how important it was that the industry and company whose success he helped generate exercise its fiduciary duties. And he is not alone. At a time when there is undisputed data that our economy has been working less effectively for Worker Investors and inequality is growing, the economically powerful must be held accountable for using that power responsibly.

they spend on politics.[141] "Such a 'supermajority' requirement is necessary," Mr. Bogle argued, "because of the inevitably wide range of views that characterize any shareholder base."[142] Mr. Bogle's words are even more resonant now, with widening inequality and widespread concern that the benefits of our economy's growth are being increasingly taken by the wealthy few, to the exclusion of the many responsible for that increased output.

For most Americans, their key fiduciary is not a public company board, it is one or more of the Big Four.[143] It is not asking too much of the Big Four to make sure that Worker Investors' trapped capital is not used to tilt the playing field even more against ordinary, human Americans—subjecting them to the huge costs that come when corporations influence regulatory policies to take shortcuts that hurt workers, consumers, and the environment—and to shift the focus of corporate management away from legitimate, productive ways to generate sustainable wealth and toward rent-seeking. By abdicating their duty to police political spending, the Big Four has, in effect, enabled corporations to use Worker Investors' capital for these purposes.

With the Big Four's power comes a corresponding fiduciary duty. It must be used to end the double legitimacy problem of corporate political spending and to take a measured, but important, step to restore some basic equality to our nation's politics.

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141. Bogle, *supra* note 9 ("And yet I believe that, in the wake of the Supreme Court case, known as Citizens United, the institutional investor community has an obligation to act. Institutional investors should insist that the proxy statement of each company in which they invest contain the following: 'Resolved: That the corporation shall make no political contributions without the approval of the holders of at least 75 percent of its shares outstanding.'"). Taking a cue from Mr. Bogle, Senator Elizabeth Warren recently proposed a bill, the Accountable Capitalism Act, that would require, among other things, "[a]t least 75% of directors and shareholders . . . to approve . . . any political expenditures" for corporations with over one billion dollars in revenue annually. Elizabeth Warren, *Companies Shouldn't Be Accountable Only to Shareholders*, WALL ST. J. (Aug. 14, 2018, 7:01 PM), https://www.wsj.com/articles/companies-shouldnt-be-accountable-only-to-shareholders-1534287687; Accountable Capitalism Act, S. 3348, 115th Cong. § 8(b) (2018).

142. Bogle, *supra* note 9.

143. *See* Tucker, *supra* note 44, at 537.