CORPORATE FINANCE FOR SOCIAL GOOD

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Corporations are under pressure to use their outsized power to benefit society, but this advocacy is unlikely to result in meaningful change because corporate law's incentive structure rewards fiduciaries who maximize shareholder wealth. Therefore, this Essay proposes a way forward that works within the wealth-maximization framework and yet could result in dramatic social change. The idea is simple: Use private debt markets to provide incentives for public-interested corporate action. Specifically, individuals who value prosocial corporate decisions could finance them by contributing to corporate social responsibility (CSR) bonds that would offset the corporation's implementation costs. To provide an incentive to depart from wealth maximization, the bond would stipulate that the contribution would be forgiven when the decision is implemented by the corporation—a key difference from existing pro-social financial instruments.

More broadly, the insight that the individuals with the strongest interest in seeing corporations act responsibly are not always the company's shareholders has consequences for corporate law and corporate governance. In particular, it cautions that we should recognize the limits of shareholder activism to achieve socially optimal levels of corporate responsibility. The more difficult questions are whether and how to reorient our corporate law system away from shareholders and toward other constituencies. As that project forges on, this Essay describes a tool that would enable stakeholders to influence corporate behavior without any delay.

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INTRODUCTION

As the COVID-19 pandemic waged on, financial market participants saw an opportunity. Specifically, issuers began developing bonds that would generate funds for companies and governments with the specific aim of easing the effects of the pandemic.[1] For example, the pharmaceutical company Pfizer issued a COVID-19 bond that promised investors that the assets generated would be used to support access to vaccines for people in need.[2]

These COVID-19 bonds are representative of a broader trend in the development of prosocial financial instruments that have exploded in the past five years. These instruments seek to meet the needs of investors who hope to make the world a better place in addition to securing a financial return. This Essay considers how this concept could, if expanded, promote dramatic changes in corporate decisionmaking in the service of social welfare. Specifically, it introduces the "corporate social responsibility bond," (or "CSR bond"), an instrument that has its roots in these new financial instruments, but with a twist. Unlike COVID-19 bonds, the CSR bond investor would *eschew any financial gain* if the project is successful;

1. See Karen Hube, Future Returns: COVID-19 Bonds Emerge as a Financing Tool, Barron's: Penta, https://www.barrons.com/articles/future-returns-covid-19-bonds-emerge-as-a-financing-tool-01586881044 [https://perma.cc/QLE8-C4DG] (last updated Apr. 14, 2020).

2. Id.

instead, the expected return is the social benefit.[3] As a result, CSR bonds[4] would have the potential to dramatically impact corporate behavior by providing corporations with a financial incentive to take on public-interested but profit-sacrificing projects.

And such a tool is likely necessary to induce corporations to make genuine moves in the interest of society. Indeed, decades of legal scholarship emphasizing that fiduciaries have the discretion to sacrifice profits for social good,[5] as well as urging from politicians, consumers, and even shareholders themselves, has not resulted in genuine change. As just one example of the progression of such advocacy, recall that in August 2019, the Business Roundtable announced that companies should be managed for the benefit of all stakeholders—including customers, employees, suppliers, communities, and shareholders.[6] CEOs from 181 companies signed the statement.[7] Just days after signing, Amazon CEO Jeff

3. See Antony Bugg-Levine, Bruce Kogut & Nalin Kulatilaka, A New Approach to Funding Social Enterprises, Harv. Bus. Rev. (Jan.–Feb. 2012), https://hbr.org/2012/01/a-new-approach-to-funding-social-enterprises (on file with the *Columbia Law Review*) ("[A] charitable donation [is] an investment [for which] the return . . . is not financial. The donor does not expect to get its money back; it expects its money to generate a social benefit. It considers the investment a failure only if that social benefit is not created.").

4. This Essay uses the term "bond" because the instrument has characteristics that resemble traditional bonds—in particular, green bonds and impact bonds discussed in section II.B. Debt instruments also provide lenders with governance rights that would be useful in this context. See Douglas G. Baird & Robert K. Rasmussen, Private Debt and the Missing Lever of Corporate Governance, 154 U. Pa. L. Rev. 1209, 1211 (2006) (discussing the control rights that creditors exercise through the use of loan covenants); see also infra text accompanying note 24. But the same arrangement could also be accomplished by contract.

5. See Lynn Stout, The Shareholder Value Myth 104–05 (2012) (arguing that many problems arise from the "mistaken idea" that corporations "ought to be run to maximize shareholder value"); Einer Elhauge, Sacrificing Corporate Profits in the Public Interest, 80 N.Y.U. L. Rev. 733, 763–69 (2005) (arguing that corporate managers have the discretion to sacrifice corporate profits in favor of the public interest under Delaware law); Lyman Johnson, Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose, 38 Del. J. Corp. L. 405, 432 (2013) (arguing that Delaware law is unsettled on the question of whether corporations are required to advance the long-term interests of stockholders); Lynn A. Stout, Why We Should Stop Teaching *Dodge v. Ford*, 3 Va. L. & Bus. Rev. 163, 172 (2008) ("In sum, whether gauged by corporate charters, state corporation codes, or corporate case law, the notion that corporate law as a positive matter 'requires' companies to maximize shareholder wealth turns out to be spurious.").

6. Business Roundtable Redefines the Purpose of a Corporation to Promote 'an Economy that Serves All Americans', Bus. Roundtable (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/HW5R-DP2G] [hereinafter Business Roundtable Letter] ("While each of our individual companies serves its own corporate purpose, we share a fundamental commitment to *all* of our stakeholders." (emphasis added)).

7. Id.

Bezos announced that Whole Foods, a subsidiary of Amazon, would end medical and health benefits for part-time workers.[8]

Should we be surprised? Of course not: It is naïve to expect corporations to do something other than maximize profits when corporate law's incentive structure rewards corporate fiduciaries who prioritize shareholder wealth.[9] Put somewhat differently, this wave of stakeholder advocacy does little to change the practical operation of corporate decisionmaking. Corporate fiduciaries already have incentives to engage in prosocial activities when they also maximize profit—and a large and growing literature documents the many ways that corporate social responsibility is wealth maximizing.[10] Fiduciaries, however, lack incentives

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8. See Bob Bryan, Amazon-Owned Whole Foods' Decision to Drop Health Benefits for Hundreds of Part-Time Workers Reveals How Promises to Workers like CEO Jeff Bezos' Recent Pledge Are Worthless, Bus. Insider (Sept. 13, 2019), https://www.businessinsider.com/whole-foods-healthcare-amazon-ceo-jeff-bezos-promises-business-roundtable-2019-9 [https://perma.cc/72R9-6Y2E] (noting that the changes will affect as many as 1,900 employees); see also Jesse Fried, Shareholders Always Come First and That's a Good Thing, Fin. Times (Oct. 7, 2019), https://www.ft.com/content/fff170a0-e5e0-11e9-b8e0-026e07cbe5b4 (on file with the *Columbia Law Review*) ("In reality, the Business Roundtable is merely paying lip service to broader social concerns. I predict that the pledge will not actually affect how they run their companies."); Aneesh Raghunandan & Shiva Rajgopal, Opinion, Is There Real Virtue Behind the Business Roundtable's Signaling?, Wall St. J. (Dec. 2, 2019), https://www.wsj.com/articles/is-there-real-virtue-behind-the-business-roundtables-signaling-11575330172 (on file with the *Columbia Law Review*) (collecting data showing that signatories of the Business Roundtable letter were sixteen percentage points more likely to commit at least one federal compliance violation, including labor and environmental violations, in any given year than peer nonsignatory firms and concluding that the letter's goal was to preempt regulatory criticism).

9. See D. Gordon Smith, The Shareholder Primacy Norm, 23 J. Corp. L. 277, 277 (1998) ("The structure of corporate law ensures that corporations generally operate in the interests of shareholders. Shareholders exercise control over corporations by electing directors . . . ."); 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, 1173–74, 1177 (2017) (discussing the need for a "clear-eyed" appraisal of the power dynamics that incentivize shareholder wealth maximization); Leo E. Strine, Jr., The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law, 50 Wake Forest L. Rev. 761, 768 (2015) [hereinafter Strine, Dangers of Denial] ("[A] clear-eyed look at the law of corporations in Delaware reveals that, within the limits of their discretion, directors must make stockholder welfare their sole end, and that other interests may be taken into consideration only as a means of promoting stockholder welfare.").

10. Corporate social responsibility may reduce a company's cost of capital; may have a positive impact on a company's revenue by reducing litigation, sanctions, and risk of boycott while increasing government support; and may lower a company's cost of debt. See Eugene W. Anderson & Mary W. Sullivan, The Antecedents and Consequences of Customer Satisfaction for Firms, 12 Mktg. Sci. 125, 140–41 (1993); Sudheer Chava, Environmental Externalities and Cost of Capital, 60 Mgmt. Sci. 2223, 2240–41 (2014); George Kassinis & Nikos Vafeas, Corporate Boards and Outside Stakeholders as Determinants of Environmental Litigation, 23 Strat. Mgmt. J. 399, 413–14 (2002); Paul Thompson & Christopher J. Cowton, Bringing the Environment into Bank Lending: Implications for Environmental Reporting, 36 Brit. Acct. Rev. 197, 214–16 (2004); Rob Bauer & Daniel Hann, Corporate Environmental Management and Credit Risk 15 (Dec. 23, 2010)

to make public-interested choices that are *bad* for business or that might not pay off for many years. And no amount of legal discretion will change this reality.

CSR bonds could therefore induce corporations to take profit-sacrificing actions that have large welfare benefits. Unlike COVID-19 bonds and other prosocial financial instruments, which make money available for profit-maximizing projects that align with investors' prosocial goals, CSR bonds would encourage corporations to make profit-*sacrificing* prosocial decisions.[11] Essentially, the bond would support a Coasian bargain between companies and the individuals who desire public-interested corporate action.[12] Any individual who values the decision more than its cost could contribute to the bond. To provide an incentive to depart from wealth maximization, the individuals would stipulate that their contribution would be forgiven if the decision was implemented, therefore allowing the company to internalize the Coasian bargain. If the company fails to act, however, the investor would get their money back plus penalty interest, which serves as a commitment mechanism for the issuer.[13]

Consider the following stylized example of how a CSR bond could be used, which illustrates some of the benefits (as well as the drawbacks, which will be discussed in a moment). Suppose a coal-fired power company is facing pressure from environmental advocacy groups to install scrubbers that would reduce air pollution and increase the life expectancy of employees, as well as people who live near the company's factories.[14] But

(unpublished manuscript), https://papers.ssrn.com/abstract=1660470 (on file with the *Columbia Law Review*); see also Robert G. Eccles, Ioannis Ioannou & George Serafeim, The Impact of Corporate Sustainability on Organizational Processes and Performance, 60 Mgmt. Sci. 2835, 2836 (2014) (finding that companies that voluntarily adopted sustainability policies by 1993 outperformed their counterparts over the long term); Michael E. Porter & Mark R. Kramer, The Competitive Advantage of Corporate Philanthropy, Harv. Bus. Rev. (Dec. 2002), https://hbr.org/2002/12/the-competitive-advantage-of-corporate-philanthropy [https://perma.cc/4QBX-3KDP] (arguing that "social and economic goals are not inherently conflicting but integrally connected"); Michael E. Porter, George Serafeim & Mark Kramer, Where ESG Fails, Institutional Inv. (Oct. 16, 2019), https://www.institutionalinvestor.com/article/b1hm5ghqtxj9s7/Where-ESG-Fails [https://perma.cc/YB89-VHDE] (arguing that companies that pursue social-impact goals "can outperform their peers, delivering superior returns both to society and to their shareholders").

11. This Essay explores these instruments in detail in section II.A.

12. See generally R.H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1 (1960) (arguing that, when information and transaction costs are low, the market will produce an efficient solution to the problem of nuisances regardless of where the law places liability for the nuisance).

13. See Michael Abramowicz & Ian Ayres, Commitment Bonds, 100 Geo. L.J. 605, 606–10 (2012) (exploring how bonds can be used as a commitment mechanism for issuers).

14. Although the Clean Air Act of 1977 essentially mandated that new coal-fired power plants install scrubbers, old companies were grandfathered in. See How Economics Solved Acid Rain, Env't Def. Fund, http://www.edf.org/documents/2695_cleanairact.htm [https://perma.cc/2UF7-F852] (last updated Sept. 2018). As a result, about 30% of U.S. power plants lack scrubbers. See Eric Lipton, E.P.A. Rule Change Could Let Dirtiest Coal

installing scrubbers would cause the company to incur $150 million in costs, and that amount would only be partially offset (let's say by $70 million) by increased revenue as a result of reputational benefits and employee productivity.[15] As a result, the company is unlikely to install the scrubbers without regulation, which, as a result of industry lobbying, is not expected to arise. Of course, pressure from environmental advocates, consumers, employees, or even shareholders might lead to negative repercussions for the company that fails to install scrubbers, but unless those harms exceed the costs from implementation, the choice will not be made. And this reality holds regardless of the company's legal objective and regardless of the extent of fiduciary discretion: Even if management is permitted to consider the environment or other groups, that leeway will not result in a voluntary decision to sacrifice $80 million, which will subject them to negative reputational and financial repercussions, as well as a threat of ouster.

The calculus for the company changes, however, if it has the opportunity to work with a CSR bond issuer[16] and receive funds to offset the costs from implementation. Potential contributors include individuals for whom the choice would be welfare-maximizing;[17] the most likely source

Plants Keep Running (and Stay Dirty), N.Y. Times (Aug. 24, 2018), https://www.nytimes.com/2018/08/24/climate/epa-coal-power-scrubbers.html (on file with the *Columbia Law Review*).

15. See George W. Sharp, EUCG Inc., What's That Scrubber Going to Cost?, POWER (July 15, 2007), https://www.powermag.com/whats-that-scrubber-going-to-cost/?pagenum=4 [https://perma.cc/HA3A-JJ6N].

16. A third-party issuer would help reduce coordination costs, and a nonprofit issuer would increase the likelihood that the contribution would be tax-deductible for contributors. Although a 501(c)(3) wouldn't enable the contributor to claim a charitable contribution if they get the money back, the contributor might be able to preserve charitable contribution deductibility by having the money roll over to a charity if the bond fails. In the alternative, the investor could claim a capital loss if the company takes the action in question. See, e.g., Stefan Gottschalk & Sharif Ford, IRS Addresses Timing of a Worthless Stock Deduction, RSM (Dec. 15, 2016), https://rsmus.com/what-we-do/services/tax/federal-tax/corporate-tax-services/irs-addresses-timing-of-a-worthless-stock-deduction.html [https://perma.cc/3Q89-4AN3].

17. Scholars have increasingly highlighted that shareholders are individuals with values that may be inconsistent with wealth maximization. See, e.g., Ann M. Lipton, What We Talk About When We Talk About Shareholder Primacy, 69 Case W. Res. L. Rev. 863, 866–67 (2019) (discussing how shareholder primacy has been described in terms of welfare or values that shareholders privately determine). If an individual values a prosocial corporate action more highly than the alternative that would maximize profits, they might be willing to pay to encourage that prosocial action. Indeed, research suggests that ESG investors select funds based on nonfinancial considerations and may be willing to sacrifice returns in order to improve the sustainability composition of the portfolio, supporting the conclusion that individuals might also support CSR bonds under certain circumstances. See Jędrzej Białkowski & Laura T. Starks, SRI Funds: Investor Demand, Exogenous Shocks and ESG Profiles 9–13 (Mar. 2016) (unpublished manuscript), https://ir.canterbury.ac.nz/bitstream/handle/10092/12492/12660765_SRI%20Funds_March2016.pdf [https://perma.cc/7UAV-3SEU]; Maartin van Wijk, Members Are 'Willing to Sacrifice Some Returns' for ESG Investment, IPE (Apr. 4, 2019), https://www.ipe.com/members-are-willing-to-sacrifice-some-returns-for-esg-investment/10030490.article [https://perma.cc/NJ73-RLY4].

of assets, however, would be a foundation, family office, or endowment seeking an opportunity to make a tangible and measurable impact on social welfare.[18] To provide a sense of this pool of funds, consider that U.S. donors give away an amount roughly equivalent to 2% of GDP—or approximately $300 billion—each year.[19] Investors in socially responsible mutual funds might also contribute—indeed, a Socially Responsible Investing (SRI) index fund might promise that, instead of buying and selling shares of companies based on investor ideology (which is unlikely to change corporate behavior and possibly sacrifices investor returns),[20] the fund would identify worthy CSR bonds and suggest that investors contribute a portion of their returns each year.[21]

Returning to the scrubber example, let's again assume that the total cost to the company of installing scrubbers is estimated to be $80 million. If a bond was issued and funded in that amount, the company would have a difficult time resisting. And if the company installed the scrubbers, it could keep the money; if not, investors would get their money back plus interest.

In this example, the CSR bond would likely be the only way to encourage the corporation to install the scrubbers. Externality regulation that would push the company to implement scrubbers or otherwise reduce emissions is unlikely; even if regulation did arise, it would likely be the product of compromise or distorted by interest group dynamics.[22]

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18. See Unlocking Endowments: Foundations Are Stepping Up Impact Investing, Knowledge@Wharton (Nov. 28, 2018), https://knowledge.wharton.upenn.edu/article/from-backstreet-to-wall-st-ep-09 [https://perma.cc/RJR2-JU7W] ("Today, foundations across the U.S. and globally are increasingly looking to use their endowments to achieve social or environmental goals.").

19. James Andreoni & A. Abigail Payne, Charitable Giving, *in* 5 Handbook of Pub. Econ. 1, 6 (Alan J. Auerbach, Raj Chetty, Martin Feldstein & Emmanuel Saez eds., 2019). This figure excludes the $50 billion donated by U.S. charitable organizations each year. See Bugg-Levine et al., supra note 3, at 12. Note, however, that donations made to religious organizations, which "should be analyzed separately from other types of giving," account for 35% of total contributions made by individuals in the U.S. Andreoni & Payne, supra, at 10.

20. Paul Brest, Ronald J. Gilson & Mark A. Wolfson, How Investors Can (and Can't) Create Social Value, 44 J. Corp. L. 205, 210 (2018) ("It is virtually impossible for investors to affect the outputs or behavior of firms whose securities trade in public markets through buying and selling securities in the secondary market."); Christopher C. Geczy, Robert F. Stambaugh & David Levin, Investing in Socially Responsible Mutual Funds 18 (Univ. of Pa., Scholarly Commons Working Paper No. 10-2005, 2005), https://repository.upenn.edu/cgi/viewcontent.cgi?article=1444&context=fnce_papers [https://perma.cc/2GQZ-UDFK] (discussing the comparatively higher costs of SRI funds relative to non-SRI funds).

21. As of the beginning of 2018, $11.6 trillion of all professionally managed assets in the United States were in ESG investment strategies. See Adam Connaker & Saadia Madsbjerg, The State of Socially Responsible Investing, Harv. Bus. Rev. (Jan. 17, 2019), https://hbr.org/2019/01/the-state-of-socially-responsible-investing [https://perma.cc/YAJ9-C76A]. Assuming investors were willing to pay an additional fee of ten basis points each year, that would amount to over a billion dollars available to incentivize good corporate behavior.

22. See infra notes 66–69 and accompanying text.

Moreover, most consumers, many of whom live far away from the company's factories, might not mind that the coal plant is polluting if it leads to cheaper energy prices. Even socially motivated consumers might not feel compelled to boycott the company if most competing coal companies have not installed scrubbers.[23] What about shareholders? Although some prosocial shareholders may be willing to bear a hit to the stock price in service of the public good, it is unlikely that the majority will encourage profit-sacrificing decisions even when the welfare benefits are very great.

A CSR bond, therefore, would be the only way for stakeholders to bring about the desired change. Not only that, by converting corporate outsiders into creditors, the bond could alter other facets of corporate decisionmaking. Perhaps, for example, the bondholders could secure information rights or the right to monitor operations until the scrubbers are installed.[24] By giving prosocial investors (or their nonprofit representative) a voice in the room, the bond could ensure that these views are taken into consideration for many months or years.

The bond could also have beneficial secondary effects on the market. Indeed, by advertising that it has installed scrubbers, the power company's choice could cause consumers to focus on rival companies that have not followed suit, increasing the costs of noncompliance with the developing norm. The social responsibility bond could also alter industry-wide standards in another way: By forcing a company to reduce pollution, the bond removes an incentive for the company to lobby against regulation that would impose the same requirement on rivals. Indeed, the power company might now lobby in favor of regulation.[25]

In sum, the CSR bond resembles a private Pigouvian subsidy that could be used to alter corporate decisionmaking by changing the set of decisions that are wealth maximizing.[26] At its best use, a CSR bond could

23. To Boycott or Not to Boycott: The Consequences of a Protest, Knowledge@Wharton (June 9, 2010), https://knowledge.wharton.upenn.edu/article/to-boycott-or-not-the-consequences-of-a-protest [https://perma.cc/E55H-WXSU] ("[F]or a boycott to gain traction, there must be a low financial and psychological cost for consumers to get on board.").

24. See Baird & Rasmussen, supra note 4, at 1216–17 (noting that lenders wield considerable power through their "ability to insert any conditions or covenants into their loan agreements").

25. Consider Amazon's changed lobbying position on laws requiring online retailers to pay sales tax. Amazon initially opposed such laws, but once the Supreme Court ruled that state and local governments could require online merchants to levy sales tax—even when that retailer had no physical presence in the state—Amazon began lobbying in favor of laws that would require sales taxes on all internet purchases. See Kyung M. Song, Amazon Lobbies Heavily for Internet Sales Tax, Seattle Times (Sept. 7, 2013), https://www.seattletimes.com/seattle-news/amazon-lobbies-heavily-for-internet-sales-tax [https://perma.cc/LB88-JYSN].

26. Pigouvian subsidies are direct payments from the government to firms to encourage beneficial activities so that corporate decisions coincide with socially optimal allocations. See Garth Heutel, Subsidies, *in* Environmental and Natural Resources Economics: An Encyclopedia (Timothy C. Haab & John C. Whitehead eds., 2014). Note,

transform industries, ease the prospect of regulation, help prosocial individuals overcome coordination costs, and reverse harmful corporate practices. It would do this without any change in the law or corporate governance. Indeed, one of the advantages of the bond is that it works within the wealth-maximization framework and, therefore, does not risk eroding managerial accountability or incurring other inefficiencies associated with a stakeholder model.[27] In addition, by targeting problematic corporate decisions and offering incentives for corporations to improve them, CSR bonds avoid the collateral consequences that flow from consumer boycotts and employee strikes.

But the devil is in the details. Indeed, CSR bonds are fraught with complications that could render them not useful or even harmful under certain circumstances. For example, CSR bonds could be impossible to price because of information asymmetries, could lead to moral hazard for companies, and could result in harmful distributive consequences. In addition, companies might not be receptive to accepting funds when doing so will focus attention on their harmful practices.[28] Therefore, CSR bonds should not be seen as a cure for every instance of corporate irresponsibility, but as a promising tool that can offer substantial social welfare benefits under the right conditions. And the market for these bonds does not need to be large to make a substantial difference—even just one successful bond could offer huge welfare benefits, as section II.A explores. But ultimately, because of the many limitations in their use, these bonds should be viewed as a complement, rather than a substitute, to action taken on other grounds: by shareholders, consumers, employees, and regulators.

This Essay proceeds as follows: Part I explains why corporations are unlikely to make public-interested decisions, even if they have the legal discretion to do so (as many contend they do). Part II introduces the concept of CSR bonds and describes several examples of where these

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however, that CSR bonds are not calibrated to maximize public welfare, but rather private welfare. And because individuals might also fail to internalize all of the costs of corporate harm, it is likely that relying on bonds alone will not result in an optimal level of corporate social responsibility from a public welfare perspective. This is why this instrument is intended to be a complement to regulation, rather than a substitute.

27. See Lucian A. Bebchuk & Roberto Tallarita, The Illusory Promise of Stakeholder Governance, 106 Cornell L. Rev. 91, 164 (2020) (arguing that "[s]takeholderism would increase the insulation of corporate leaders from shareholders and make them less accountable to them"); Mark J. Roe, The Shareholder Wealth Maximization Norm and Industrial Organization, 149 U. Pa. L. Rev. 2063, 2065 (2001) ("[A] stakeholder measure of managerial accountability could leave managers so much discretion that managers could easily pursue their own agenda, one that might maximize neither shareholder, employee, consumer, nor national wealth, but only their own."); Strine, Dangers of Denial, supra note 9, at 768 (noting that a stakeholder model runs the risk of "shift[ing] power to the directors to couch their own actions in whatever guise they find convenient, without making them more accountable to any interest"); Jean Tirole, Corporate Governance, 69 Econometrica 1, 2 (2001) (discussing the view that shareholder primacy best solves agency problems).

28. This Essay discusses these and other possible pitfalls in Part II.

instruments could be used to alter corporate decisionmaking for the better. It also discusses analogous concepts in law and finance, including green bonds, carbon offsets, impact bonds, and tax breaks for companies that act in the public interest. Finally, it describes limitations, as well as broader implications for corporate law and corporate governance that stem from this analysis.

I. WHY COMPANIES WON'T MAKE PUBLIC-INTERESTED, PROFIT-SACRIFICING DECISIONS

There is a growing consensus that corporations could make public-interested decisions if they wanted to: Legal scholars defend a view of fiduciary obligation that would allow directors and officers to make public-interested choices, even those that sacrifice corporate profits.[29] A majority of states have adopted constituency statutes that allow management teams to consider stakeholder interests, as well as their shareholders.[30] Prominent shareholders have made public statements urging CEOs to serve the public interest;[31] prominent CEOs have voiced an increased commitment to doing so.[32]

This Part explores why this advocacy hasn't changed corporate decisionmaking for the better.[33] The reason is that advocates of corporate social responsibility either ask corporate fiduciaries to do something they already have incentives to do,[34] or they operate against a deeply ingrained incentive structure that pushes corporate fiduciaries to maximize shareholder wealth as a first priority. To make this more concrete, assume that the world of corporate decisionmaking can be divided into two categories: decisions that maximize shareholder wealth and those that do not. Quite

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29. See supra note 5 and accompanying text.

30. Elhauge, supra note 5, at 737.

31. See Larry Fink, A Sense of Purpose, Harv. L. Sch. F. on Corp. Governance (Jan. 17, 2018), https://corpgov.law.harvard.edu/2018/01/17/a-sense-of-purpose [https://perma.cc/7VEH-T9CC] ("To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society.").

32. See Business Roundtable Letter, supra note 6.

33. For many years, people have observed that regulation or taxation is necessary to induce individuals and companies to internalize externalities created by their conduct. See, e.g., William J. Baumol, On Taxation and the Control of Externalities, 62 Am. Econ. Rev. 307, 307–08 (1972) (using pollution as an example of an externality that can be internalized through Pigouvian taxation). For a more recent example, see Michael Simkovic, Limited Liability and the Known Unknown, 68 Duke L.J. 275, 329 (2018) (considering a limited liability tax as a form of public insurance that "forc[es] businesses to signal their degree of riskiness by opting either for limited liability or lower taxes, and . . . internaliz[e] costs that would otherwise be externalized").

34. Indeed, scholars have increasingly highlighted the many ways that corporate social responsibility and shareholder wealth maximization are aligned. See supra note 10 and accompanying text.

obviously, corporations already have incentives to make choices that maximize shareholder wealth.[35] The more interesting question is whether corporate fiduciaries will make public-interested, profit-sacrificing choices, or choices that would shift profits from shareholders toward employees, consumers, the environment, or the broader community. The sections that follow discuss why the typical corporation will very rarely, if ever, make these choices, even if this is what a large portion of their shareholders desire.[36] Specifically, they highlight three market forces that drive fiduciaries to prioritize shareholder wealth: (1) takeover markets, (2) shareholder activism, and (3) executive compensation.

A. *Takeover Markets*

If management routinely sacrifices profits to pursue prosocial goals, the company may become a takeover target by an acquirer who can shift the direction of the company and monetize those profits for itself. The logic is straightforward: Routine profit sacrificing will dampen the company's share price, providing an opportunity for a hostile acquirer to purchase control. By changing the direction of the company, the hostile acquirer can monetize those gains.

This is not a novel observation. Professors Andrei Shleifer and Larry Summers, Oliver Hart and Luigi Zingales, and Einer Elhauge all discuss the role of takeover markets in incentivizing management to make antisocial choices. Specifically, Shleifer and Summers show how a hostile bidder can take control of a company and profit by shifting value away from employees by renegotiating employment contracts.[37] Elhauge,[38] as

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35. This observation elides many difficulties: For example, some wealth-maximizing choices may be wealth sacrificing over a shorter time horizon, or some prosocial projects may be net present value (NPV) neutral or, more likely, uncertain. If there is a risk that an investment in corporate social responsibility will not pay off at all or that it will pay off years after the management team has departed, management may not make the choice voluntarily. If that is the hurdle, however, equity holders have tools available to push management to consider a longer time horizon. In addition, broadly diversified shareholders may be willing to use these tools to push companies to take risks on NPV uncertain decisions—so long as more than 50% pay off, these diversified shareholders will be better off.

36. Cf. Lance Moir & Richard J. Taffler, Does Corporate Philanthropy Exist?: Business Giving to the Arts in the U.K., 54 J. Bus. Ethics 149, 159 (2004) (analyzing gifts to the arts by sixty firms and finding that they were primarily driven by advertising or legitimization purposes and that none of the gifts were purely altruistic). I suspect that this is even true of benefit corporations, which generally profit from their public-interested orientation. See infra note 171.

37. See Andrei Shleifer & Lawrence H. Summers, Breach of Trust in Hostile Takeovers, *in* Corporate Takeovers: Causes and Consequences 33, 41, 46–49 (Alan J. Auerbach ed., 1988) (suggesting that "[h]ostile takeovers thus enable shareholders to redistribute wealth from stakeholders to themselves").

38. See Elhauge, supra note 5, at 740–42 (describing how hostile takeovers create a collective-action problem for public-interested shareholders: "Acting individually, shareholders may tender even if they prefer (because of their public interest views) that a

well as Hart and Zingales,[39] show how collective action problems encourage even prosocial shareholders to tender to hostile acquirers with antisocial goals. Even if a shareholder prefers not to tender to the hostile acquirer that plans to convert a public-interested company into a profit-maximizing one, that shareholder will understand that other shareholders are likely to tender. Therefore, even a prosocial shareholder will be compelled to tender for fear of losing out on the takeover premium offered by the hostile acquirer.

The risk of a hostile takeover, however, is more limited than it once was. Most states offer antitakeover statutes, which provide companies the ability to protect themselves from the risk of a hostile acquisition; in addition, companies have access to powerful takeover defenses such as poison pills.[40] Not only that, hostile takeovers are expensive, and so not every instance of profit sacrificing is likely to subject the company to takeover risk.[41] But hedge fund activism—the focus of the next section—remains a potent threat.

B. *Hedge Fund Activism*

Companies that are unlikely to become takeover targets still worry about hedge fund activism.[42] If management routinely puts shareholder interests last, a hedge fund activist that aims to move the company in a different direction may be able to recruit supporters more easily.[43] The draw for the hedge fund activist is the prospect of high returns: Agitating

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takeover not occur because they will be even worse off if the takeover occurs and they have not tendered").

39. See Oliver Hart & Luigi Zingales, Companies Should Maximize Shareholder Welfare Not Market Value, 2 J.L. Fin. & Acct. 247, 251 (2017) (identifying the role of takeovers "in pushing companies to maximize profits, even against the interest of shareholders themselves, given that shareholders may be subject to a collective action problem").

40. See generally Emiliano M. Catan & Marcel Kahan, The Law and Finance of Antitakeover Statutes, 68 Stan. L. Rev. 629 (2016) (evaluating the effect of antitakeover statutes from theoretical-legal and empirical-finance perspectives).

41. See Monika Schnitzer, Hostile Versus Friendly Takeovers, 63 Economica 37, 37 (1996) ("[T]he empirical evidence suggests that hostile tender offers are not very attractive.").

42. See Jeffrey N. Gordon, Addressing Economic Insecurity: Why Social Insurance Is Better than Corporate Governance Reform, Colum. L. Sch.: CLS Blue Sky Blog (Aug. 21, 2019), http://clsbluesky.law.columbia.edu/2019/08/21/addressing-economic-insecurity-why-social-insurance-is-better-than-corporate-governance-reform [https://perma.cc/UG8C-V49F] [hereinafter Gordon, Addressing Economic Insecurity] ("Today's reconcentration of ownership has invigorated the proxy battle, which can be pursued at much lower cost than a hostile bid and for which a shareholder activist bears only the risk of its toehold stake, not 100 percent ownership.").

43. See Jeff Schwartz, De Facto Shareholder Primacy, 79 Md. L. Rev. 652, 685–86 (2020) ("The best way to [deflect the attention of hedge fund activists] is to preemptively adopt measures activists would push, and more generally, to work to maximize current share prices.").

for changes that will result in gains to shareholders will benefit the hedge fund that has taken a large stake in the company. Although the gains are shared, the risk is also lessened because the hedge fund need not take a controlling stake to succeed. All it needs to do is convince other shareholders to support the campaign.

What about prosocial shareholders? The calculus for them is a little different in this context because they won't be coerced into supporting the hedge fund out of a fear of losing out on a takeover premium. Indeed, if enough shareholders are concerned about the activist-investor's plans, they can freely vote no at the annual meeting. It is likely, however, that many shareholders would support a plan that would result in a boost to the stock price.[44] This risk has contributed to the phenomenon of companies succumbing to pressure from activists without putting the issue to a shareholder vote.[45] In the face of an activist campaign, directors will likely find it easier to agree to make changes that would move the company in a new, profit-maximizing direction rather than to fight the activist and take the risk of an unfavorable shareholder vote.

Etsy provides an example of this dynamic at work. Etsy was founded in 2005 and, from the start, sought to benefit "buyers, sellers, staff and the planet."[46] The company prided itself on treating employees well, offering generous parental leave, as well as free organic food and yoga classes.[47] The company also prioritized the well-being of the artisans who sold goods through the site without pushing them to maximize revenue or sales.[48] As a result of these practices, the company was certified by nonprofit B Lab as a company that met particularly high social and environmental standards.[49]

But the company needed money to grow, and so it accepted millions of dollars from venture capitalists. In exchange, those venture capitalists secured board seats to ensure that they would be able to influence the

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44. See Hart & Zingales, supra note 39, at 266 ("The support that activists rely on often comes from institutional investors who may believe that they have a fiduciary duty to *their* shareholders to vote for value-maximizing actions. Thus institutions may support an activist . . . even if most shareholders are against this.").

45. See Melissa Sawyer, Lauren S. Boehmke & Nathaniel R. Ludewig, Review and Analysis of 2018 U.S. Shareholder Activism, Harv. L. Sch. F. on Corp. Governance (Apr. 5, 2019), https://corpgov.law.harvard.edu/2019/04/05/review-and-analysis-of-2018-u-s-shareholder-activism [https://perma.cc/PNF7-JGXE] (showing the frequency with which activist hedge fund campaigns are settled).

46. See David Gelles, Inside the Revolution at Etsy, N.Y. Times (Nov. 25, 2017), https://www.nytimes.com/2017/11/25/business/etsy-josh-silverman.html (on file with the *Columbia Law Review*) ("Employees believed Etsy could be equally beneficial to buyers, sellers, staff and the planet.").

47. Id.

48. Id.

49. Id. For an overview of the B Corp certification process, see generally Michael B. Dorff, Assessing the Assessment: B Lab's Effort to Measure Companies' Benevolence, 40 Seattle U. L. Rev. 515, 523 (2017) (describing and evaluating the B Lab assessment tool).

company's direction.[50] Seeking an exit, the venture capitalist investors pushed Etsy to go public. Immediately following the company's IPO, the company's failure to turn a profit became a focus for some of the company's new investors. Despite the company's B Corp status, a hedge fund activist bought a large stake in the company and began to agitate for changes.[51] Before long, private equity firms also amassed stakes in the company. As the conflict between investors and management grew, the board of directors decided to fire the company's CEO and replace him with someone who would better carry out the activist investors' goals: increased operational efficiency and profitability.[52] The new CEO allowed the company's B Corp certification to lapse, began putting pressure on sellers, and eliminated many of the generous workplace perks.[53]

In this example, the company didn't wait to take the temperature of its shareholders before changing directions. The pressure from activist investors was enough. This example also shows that having legal discretion to sacrifice profits is not dispositive. Etsy had advertised to investors that it planned to look out for its employees and the sellers that used its online marketplace. But having discretion to make profit-sacrificing choices is meaningless if vocal investors are unhappy about that course of action. In this situation, the board realized that, in order to avoid a costly proxy fight, it would need to accede to investor demands and put their interests first.[54]

This and the previous section show what is likely in store for management that routinely sacrifices corporate profits. It is not that they are likely to go out of business, as others have claimed.[55] Instead, they are likely to remain in business but under someone else's control. As such, they will not routinely sacrifice profits to benefit the public, even if this is what some—or many—shareholders desire.

C. *Executive Compensation*

Not every firm is a potential takeover target, and not every profit-sacrificing decision will attract attention from hedge fund activists. But

50. See Gelles, supra note 46 ("Venture capitalists poured some $85 million into the company, making a takeover or initial public offering all but inevitable.").

51. See id. (detailing a hedge fund investor's complaint that Etsy was "insufficiently focused on sales growth" and "operations were inefficient").

52. Id.

53. Id. Note that, as of 2017, there were no publicly traded benefit corporations. Etsy was a certified B Corp but not a benefit corporation. See Dorff, supra note 49, at 517 n.9.

54. A similar phenomenon took place at Warby Parker—when it went public, it let its B Corp certification lapse rather than comply with a requirement that it reincorporate as a benefit corporation under state law. See Sindhu Sundhar, What It Means to Be a B Corp, WWD (Aug. 14, 2019), https://wwd.com/business-news/retail/fashion-sustainability-b-corp-benefit-corporations-allbirds-patagonia-eileen-fisher-1203144787 (on file with the *Columbia Law Review*).

55. See Richard A. Posner, Economic Analysis of Law 436 (9th ed. 2014) (arguing that market forces will destroy firms that fail to maximize profit).

another market force operates to keep management focused on shareholder value—executive compensation.

Most executives have their pay tied to the company's stock price.[56] A so-called "equity-based" compensation strategy is thought to align management and shareholder incentives and usually comes in the form of stock options or stock grants.[57] But equity compensation can distort incentives, such as by motivating stock buybacks and a short-term mindset.[58] A related implication is that compensating executives primarily with stock options means that those executives will be unlikely to take action that will sacrifice profits. Therefore, whenever compensation strategies tie executives' incentives to stock price, management will have incentives to increase returns to shareholders, rather than make public-interested decisions that sacrifice shareholder returns.

Compounding this reality is the fact that a dampened stock price is also likely to negatively affect executive reputation and advancement. In theory, a CEO that makes public-interested choices could get favorable attention from the media, stakeholders, and the surrounding community.[59] That attention might help insulate the CEO from removal.[60] At the same time, the CEO who sacrifices profits for social good will have to answer to shareholders and the board of directors for the decline in stock price or slower rate of growth. This choice could cause the board of directors to suffer negative consequences too.[61] As such, the CEO is unlikely to sacrifice profits, and if they do, they are likely to be removed: Empirical evidence confirms that CEOs that invest in social responsibility initiatives that correspond with a fall in stock price are 84% more likely to

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56. See Lucian Bebchuk & Jesse Fried, Pay Without Performance 7 (2004) ("In light of the historically weak link between non-equity compensation and managerial performance, shareholders and regulators wishing to make pay more sensitive to performance have increasingly looked to, and encouraged, equity-based compensation—that is, compensation based on the value of the company's stock.").

57. Id.

58. See Lucian Bebchuk & Jesse M. Fried, How to Tie Equity Compensation to Long-Term Results, 22 J. Applied Corp. Fin. 99, 99 (2010) ("[S]tandard executive pay arrangements were leading executives to focus excessively on the short-term and to boost short-term results at the expense of long-term value.").

59. See Diego Prior, Jordi Surroca & Josep A. Tribó, Are Socially Responsible Managers Really Ethical? Exploring the Relationship Between Earnings Management and Corporate Social Responsibility, 16 Corp. Governance 160, 161 (2008) (suggesting that executives are incentivized to project a socially-responsible image since it may help create community ties and relationship capital).

60. Id. ("With this tactic, the manager will reduce the likelihood of being fired due to pressure from discontented shareholders or other stakeholders whose interests have been damaged by the implementation of earnings management practices.").

61. Cf. Eugene F. Fama & Michael C. Jensen, Separation of Ownership and Control, 26 J.L. & Econ. 301, 315 (1983) ("[O]utside directors have incentives to develop reputations as experts in decision control.").

be fired than their counterpart CEOs that do not invest in social responsibility initiatives.[62]

In sum, the CEO that makes public-interested decisions will not only make less money,[63] but will also be at a greater risk of displacement—at the hand of their investors, or even their own board.

* * *

The previous three sections demonstrated why the typical widely held public company is very unlikely to voluntarily sacrifice profits in the public interest. Doing so would subject management to takeover threats, shareholder activism, and reputational and financial consequences. As the Etsy example reveals, these threats are likely even when the company takes steps to advertise its alignment with a broader set of stakeholders.[64] Put simply, giving management the discretion to prioritize prosocial goals that sacrifice shareholder wealth will not change the practical operation of most companies so long as the incentive structure remains the same.

Of course, voluntary prosocial profit-sacrificing behavior by corporations is less important when the government adequately regulates corporate activity that harms the public. Indeed, the presence of externality regulation is at the foundation of the claim that corporations should solely maximize shareholder wealth.[65] But optimal externality regulation is unlikely for several reasons. For one, gridlock in Washington

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62. See Timothy D. Hubbard, Dane M. Christensen & Scott D. Graffin, Higher Highs and Lower Lows: The Role of Corporate Social Responsibility in CEO Dismissal, 38 Strat. Mgmt. J. 2255, 2259 (2017).

63. A small number of companies are beginning to tailor executive compensation to encourage prosocial goals, although even at these companies, ESG metrics comprise about 5% of all incentive pay on average. See More Companies Designing Exec Comp Packages with ESG Initiatives in Mind, WorldAtWork (June 20, 2019), https://www.worldatwork.org/workspan/articles/more-companies-designing-exec-comp-packages-with-esg-initiatives-in-mind [https://perma.cc/9MGR-DW5P]; see also Janice Koors, Executive Compensation and ESG, Harv. L. Sch. F. on Corp. Governance (Sept. 10, 2019), https://corpgov.law.harvard.edu/2019/09/10/executive-compensation-and-esg [https://perma.cc/W828-HBGQ] ("In an EY survey of executives at large-cap companies, 21 percent of these executives indicated *'the leadership team's compensation is driven in part by sustainability performance'* and 30 percent said the company had received shareholder inquiries about the practice.").

64. See also Dorff, supra note 49, at 517 (describing typical legal safeguards protecting B Corps as "toothless").

65. See, e.g., Milton Friedman, A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits, N.Y. Times (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html (on file with the *Columbia Law Review*) ("[T]here is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game . . . ."); see also Stephen M. Bainbridge, Corporation Law and Economics 425 (2002) ("Corporate conduct doubtless generates negative externalities. In appropriate cases, such externalities should be constrained through general welfare legislation, tort litigation, and other forms of regulation.").

continues to slow the passage of new laws and has even sidelined regulation with strong popular support.[66] And even if Congress did manage to pass externality regulation, it would likely be the product of a compromise and subject to interest group dynamics.[67] Indeed, corporations are very willing to spend millions of dollars—either on lobbyists or on direct candidate contributions—to thwart costly legislation.[68] This is one reason why advocates of corporate social responsibility have been urging a private sector response, which is the subject of the remainder of this Essay.[69]

II. CORPORATE SOCIAL RESPONSIBILITY BONDS

What possibilities remain for proponents of corporate social responsibility in a world dominated by shareholder-wealth maximization and without perfect regulation? One course of action would be to borrow from the activist investor playbook but with a different endgame. Instead of agitating for structural changes that would improve accountability to shareholders, stakeholder activists could push for structural changes that would insulate fiduciaries and therefore give them greater ability to sacrifice profits in pursuit of social goals. For example, stakeholder activists could push companies to adopt antitakeover provisions, staggered boards, anti-activist poison pills,[70] and dual class voting structures.[71] Stakeholder

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66. See Tim Wu, Opinion, The Oppression of the Supermajority, N.Y. Times (Mar. 5 2019), https://www.nytimes.com/2019/03/05/opinion/oppression-majority.html (on file with the *Columbia Law Review*) ("In our era, it is primarily Congress that prevents popular laws from being passed or getting serious consideration . . . . Entire categories of public policy options are effectively off-limits because of the combined influence of industry groups and donor interests.").

67. See Henry N. Butler & Jonathan R. Macey, Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority, 14 Yale L. & Pol'y Rev. 23, 24 (1996) (noting that current economic regulations are "the result of interest group politics and dramatic political developments rather than a sober analysis of the major trade-offs involved in moving to federal domination of environmental protection").

68. See Tim Wu, The Goals of the Corporation and the Limits of the Law, Colum. L. Sch.: CLS Blue Sky Blog (Sept. 3, 2019), http://clsbluesky.law.columbia.edu/2019/09/03/the-goals-of-the-corporation-and-the-limits-of-the-law [https://perma.cc/B7HY-3Q8R] (highlighting corporate motivations to maximize profit by intervening in legislation that will bind the corporation).

69. See generally Michael P. Vandenbergh & Jonathan M. Gilligan, Beyond Politics: The Private Governance Response to Climate Change 58 (2017) (noting that, in the climate change context, "private governance can reduce the magnitude of government-driven reductions that will ultimately be required and reduce the costs and intrusiveness of more comprehensive measures in the future").

70. See generally Marcel Kahan & Edward Rock, Anti-Activist Poison Pills, 99 B.U. L. Rev. 915 (2019) (examining the role of poison pills in proxy contests).

71. Martin Lipton has pushed for such reforms for decades and continues to do so today. See, e.g., Martin Lipton, Takeover Bids in the Target's Boardroom, 35 Bus. L. 101, 130 (1979) (arguing that a company should be permitted to have a policy of remaining independent that is supported by shark-repellent charter amendments and other antitakeover provisions); Martin Lipton, Steven A. Rosenblum, Karessa L. Cain, Sabastian V. Niles, Amanda S. Blackett & Katherine C. Iannone, It's Time to Adopt the New Paradigm,

activists could also demand governance changes that would render fiduciaries sensitive to a broader set of interests, such as by benchmarking compensation to environmental hurdles.[72] They could also seek governance rights for corporate constituents other than shareholders.[73] For example, a company could issue preferred stock with super-voting shares to employees or give employees the right to elect a minority slate of directors.[74]

Given the growth of social responsibility investing, it is somewhat puzzling that investor activism about environmental and social issues has been so limited. Yes, some investors have brought nonbinding shareholder proposals to nudge companies to improve their disclosure of environmental risks or disclose corporate political spending payments, to take two examples.[75] Other investors have done more. For example, State Street has

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Harv. L. Sch. F. on Corp. Governance (Feb. 11, 2019), https://corpgov.law.harvard.edu/2019/02/11/its-time-to-adopt-the-new-paradigm [https://perma.cc/6UV9-DT8M] (providing a roadmap for an implicit corporate governance and stewardship partnership between corporations and shareholders to achieve sustainable, long-term growth).

72. See Robert Newbury, Don Delves & Ryan Resch, Willis Towers Watson, Compensation Committees and ESG, Harv. L. Sch. F. on Corp. Governance (Aug. 31, 2019), https://corpgov.law.harvard.edu/2019/08/31/compensation-committees-and-esg [https://perma.cc/U4Q8-ZAMT] (discussing one company's choice to tie executive compensation to the company's reduction of its net carbon footprint over a fifteen-year span); see also Connor Doyle, Performance Metrics: Accelerating the Stakeholder Model, Harv. L. Sch. F. on Corp. Governance (Nov. 29, 2019), https://corpgov.law.harvard.edu/2019/11/29/performance-metrics-accelerating-the-stakeholder-model [https://perma.cc/AQ7L-Q2NG] (discussing the inclusion of environmental impact metrics in executive compensation evaluations and noting that the number of Equilar 500 companies employing such metrics increased from 30 to 38 from 2015—2018).

73. See Ofer Eldar, Designing Business Forms to Pursue Social Goals, 106 Va. L. Rev. 937, 943 (2020) (proposing a new "social enterprise" legal form designed for altruistic investors). Some European countries, Germany most famously, have implemented a codetermination model that awards control rights to employees. See Grant M. Hayden & Matthew T. Bodie, Codetermination in Theory and Practice, 73 Fla. L. Rev. 321, 331–34 (2021) (describing German codetermination).

74. This is the sentiment behind Senator Elizabeth Warren's proposed legislation that would give employees the right to elect two out of five directors, Accountable Capitalism Act, S. 3348, 115th Cong. § 6(b)(1) (2018), as well as Leo Strine's proposed legislation that would implement European-style workers' councils. See Leo E. Strine, Jr., Toward Fair and Sustainable Capitalism 10 (Univ. of Pa. Inst. for L. & Econ., Working Paper No. 19-39, 2019) (on file with the *Columbia Law Review*) [hereinafter Strine, Sustainable Capitalism]. Providing employees with control rights forces fiduciaries to take their interests into consideration. See Gary Gorton & Frank Schmid, Class Struggle Inside the Firm: A Study of German Codetermination 6 (Nat'l Bureau of Econ. Rsch., Working Paper No. 7945, 2000), https://www.nber.org/papers/w7945.pdf (on file with the *Columbia Law Review*) ("We find, in fact, that codetermination does empower employees, and that they use their power in ways that contradict the desires of shareholders, that is, they change the objective function of the firm."). But these changes can also be accomplished without regulation, using dual class equity structuring.

75. See Subodh Mishra, An Early Look at 2019 U.S. Shareholder Proposals, Harv. L. Sch. F. on Corp. Governance (Mar. 5, 2019), https://corpgov.law.harvard.edu/2019/03/05/an-early-look-at-2019-us-shareholder-proposals [https://perma.cc/YL7L-6QVE].

promised to withhold votes for nominating directors that serve on all-male boards.[76] Likewise, BlackRock has promised to engage with companies until they produce a clearly defined purpose that serves society.[77] The hedge fund Jana at one point even promised to launch a fund focused on socially responsible investing (it has since delayed the launch).[78] These are all laudable efforts but are far less radical than they initially appear. For one, all justify their advocacy as maximizing long-term shareholder wealth.[79] More importantly, none move the power structure of the corporation away from shareholders and toward other groups—management or even employees—in the way that is necessary to encourage public-interested, profit-sacrificing decisions.

We should not be surprised that major investors—most of whom are investment intermediaries that are duty-bound to act in their investors' best interests[80]—aren't using activism to move companies away from a shareholder wealth-maximization viewpoint. In fact, these investors have been most influential in taking steps to increase management's focus on shareholder interests, including by demanding equity-based compensation, unified boards, and single-class equity structures.[81]

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76. See Michal Barzuza, Quinn Curtis & David H. Webber, Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance, 93 S. Cal. L. Rev. 1243, 1248 (2020) ("In 2017, for example, after State Street announced its objection to all-male boards in its portfolio firms, the index fund voted against 400 of the 476 firms . . . that did not have any female directors. By the end of 2018, more than 300 of these firms added a female director.").

77. Fink, supra note 31.

78. David Benoit, Wall Street Fighters, Do-Gooders—and Sting—Converge in New Jana Fund, Wall St. J. (Jan. 7, 2018), https://www.wsj.com/articles/wall-street-fighters-do-goodersand-stingconverge-in-new-jana-fund-1515358929 (on file with the *Columbia Law Review*). Jana has since delayed the opening of its social-impact fund and instead announced that it will raise socially responsible co-investments in three to five target companies. See Leslie P. Norton, Activist Investor that Pressured Apple Delays Launch of New Fund, Barron's (June 6, 2019), https://www.barrons.com/articles/jana-partners-activist-investor-fund-51559837142 [https://perma.cc/6TPN-CKSC]. This co-investment model indicates that the activism that the hedge fund intends to engage in is consistent with a profit-maximizing strategy.

79. See Norton, supra note 78.

80. Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies, 68 Fed. Reg. 6564, 6565 (Feb. 7, 2003) (codified at 17 C.F.R. pts. 239, 249, 270, 274); DOL, U.S. Department of Labor Proposes New Investment Duties Rule (June 23, 2020), https://www.dol.gov/newsroom/releases/ebsa/ebsa20200623-0 [https://perma.cc/U53E-VW8Q]; see also Hart & Zingales, supra note 39, at 265.

81. BlackRock, BlackRock Investment Stewardship: Proxy Voting Guidelines for U.S. Securities 4–6, 10 (2020), https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf [https://perma.cc/UPK2-K3NJ] (embracing shareholder responsiveness, unitary boards, majority voting, and equal voting rights, and opposing poison pills); State St. Glob. Advisors, Proxy Voting and Engagement Guidelines: North America 5–9 (2021), https://www.ssga.com/library-content/pdfs/ic/proxy-voting-and-engagement-guidelines-us-canada.pdf [https://perma.cc/8W6R-PEB3] (embracing shareholder rights, majority voting, annual elections, and proxy access for shareholders, and

In other words, radical change is unlikely to come from shareholders themselves. In addition, were companies to enact the changes necessary to allow fiduciaries to freely make public-interested decisions, the ensuing lack of accountability could lead to other problems—most notably, increased managerial agency costs.[82] Indeed, governance reforms of this kind cut against decades of good governance advocacy designed to empower shareholders and ensure that management teams remain accountable to them.[83] And it is possible that some management teams would use their enhanced discretion to waste money or maximize their private benefits, leading to economic harm—if not now, then at some time in the future.[84]

Is there any hope for people who hope to encourage corporations to make public-interested, profit-sacrificing decisions? This Essay proposes a way forward that works within the wealth-maximization framework and yet could result in dramatic social change. The idea is simple: Use private debt markets to provide incentives for corporations to make public-interested decisions. Specifically, donors could fund CSR bonds that would finance future prosocial decisions, thereby providing an incentive for the company to undertake them. The intuition for these instruments is as follows: If corporate social responsibility is welfare-maximizing for a group of people, then there exists a possible Coasian bargain between the individuals who desire the public-interested choice and the corporation. These individuals might include the company's shareholders but, more likely, they will be entities or individuals external to the corporation, such as charitable organizations, foundations, university endowments, and nonprofits. The amount of money available for prosocial causes is large—each year, U.S. donors give away approximately $300 billion.[85] And the existence of CSR bonds could further expand this pool of funds: Research suggests that donors are dissuaded from giving to charity when they are unsure about

opposing poison pills); Vanguard, Vanguard Fund Summary of the Proxy Voting Proxy for U.S. Portfolio Companies 16–19 (2020), https://about.vanguard.com/investment-stewardship/portfolio-company-resources/2020_proxy_voting_summary.pdf [https://perma.cc/8F5W-7ABH] (opposing limited shareholder rights, unequal voting rights, and defensive structures, embracing pay-for-performance equity compensation, unified boards, and majority voting); see also Ian R. Appel, Todd A. Gormley & Donald B. Keim, Passive Investors, Not Passive Owners, 121 J. Fin. Econ. 111, 115–16 (2016) (showing that a higher percentage of passive fund ownership is associated with a firm being less likely to have unequal voting rights, takeover defenses, and classified boards); Eli Kasargod-Staub, Climate in the Boardroom, Harv. L. Sch. F. on Corp. Governance (Oct. 7, 2019), https://corpgov.law.harvard.edu/2019/10/07/climate-in-the-boardroom [https://perma.cc/QC9N-Z7LK] (showing that BlackRock and Vanguard rarely support ESG shareholder proposals).

82. See supra note 27 and accompanying text.

83. See Dorothy S. Lund & Elizabeth Pollman, The Corporate Governance Machine, 121 Colum. L. Rev. (forthcoming Dec. 2021) (manuscript at 6–13), https://ssrn.com/abstract=3775846 (on file with the *Columbia Law Review*) (discussing the concurrent rise of corporate governance and shareholder primacy).

84. See Fried, supra note 8.

85. See Andreoni & Payne, supra note 19, at 6.

the impact of their contribution.[86] By forcing disclosure and providing a means of ensuring that funds will only be used when they are successful in redirecting corporate behavior, CSR bonds might even increase the amount of money available for prosocial causes.

How could these CSR bonds work? The issuer (likely a third-party nonprofit[87]) would first identify a corporate action that is not wealth maximizing but that would have a large positive impact on stakeholders or the broader community.[88] The issuer would then raise money to entice the company to make the decision. It would do this by issuing a bond, describing in a detailed offering document how the company could use the proceeds and certifying that the company would not make the decision without the investment. If the company agreed to participate, the nonprofit would loan the money to the company using a promissory note. If the project was implemented according to the offering document, the loan would be forgiven. If not, investors would get their money back plus penalty interest paid by the company.[89]

As this overview suggests, the CSR bond could motivate real corporate change without any government intervention. It would provide an opportunity for philanthropic individuals who dedicate 2% of GDP to charitable giving each year to use their money to direct corporate decisionmaking. And by working within the existing wealth-maximization framework, the CSR bond would avoid the risks to managerial accountability that could come from abandoning shareholder primacy altogether.

The sections that follow explore examples of the benefits CSR bonds could provide, and then set forth some of the attenuating issues and difficulties. I conclude by demonstrating how CSR bonds compare to

86. Fid. Charitable, Overcoming Barriers to Giving 1, 5 (2017), https://www.fidelitycharitable.org/content/dam/fc-public/docs/insights/overcoming-barriers-to-giving.pdf [https://perma.cc/BX6B-NK9J].

87. If the issuer was a nonprofit, the donors might be able to claim a tax deduction. See infra note 154 and accompanying text. And as the green- and impact-bond examples reveal, in all likelihood, several sophisticated third parties would be involved in the issuance. See infra notes 136–141 and accompanying text.

88. In theory, the company could also participate in the offering, although moral hazard concerns discussed in section II.C may make the issuer wary to work too closely with the company.

89. Note that, in order to preserve deductibility, the investors would need to specify that the donation would roll over if the bond fails. That is because it is unlikely that a 501(c)(3) could issue the bond and enable the purchaser to claim a charitable contribution if the investor gets the money back. If a person retains a reversionary interest, they cannot claim a charitable-contribution deduction. However, the donor might be able to preserve charitable-contribution deductibility by having the money roll over to the charity if the bond fails. See Marcus Schoenfeld, Federal Tax Aspects of Non-Profit Organizations, 10 Vill. L. Rev. 487, 501 (1965) (noting that an individual may not claim a deduction if they reserve any reversionary interest in the donation). In the alternative, the investor could claim a capital loss if the company takes the action in question. See, e.g., Gottschalk & Ford, supra note 16.

recently developed financial instruments aimed at uniting prosocial investors and profit-maximizing companies. I also explore legal analogues.

A. *Corporate Social Responsibility Bonds: The Possibilities*

This section provides examples of where CSR bonds could be used to great effect. In particular, it describes three ways that these bonds could generate large social benefits: by (1) encouraging decisions that have beneficial secondary effects, (2) overcoming coordination costs, and (3) supporting decisions in which the marginal return from corporate philanthropy is higher than individual philanthropy.

1. *Beneficial Secondary Effects.* — At its best use, a bond could not just alter practices at the targeted company, but also transform entire industries. The introduction considered the example of the power plant and scrubbers that would cost $80 million but would result in secondary societal benefits—including easing the prospect of industry-wide regulation.[90] As another example, consider how a bond could be used to transform supply chains for the better. Every year, McDonald's buys 3.4 billion pounds of potatoes—approximately 7% of U.S. production.[91] Therefore, the company has the ability to alter supply chain dynamics as a buyer. Suppose that the cheapest option for the company is sourcing potatoes grown with pesticides that harm the environment and consumers but are nonetheless legal. In addition, consumers are not sufficiently aware of or bothered by the risks to alter their consumption. Moreover, regulation that would control these environmental and consumer risks is unlikely for the reasons discussed at the end of Part II. The cost of an organic pound of potatoes would be seven cents, or 10% more than the non-organic pound—for an annual total of $240 million.[92] Of course, McDonald's will not buy the organic potatoes, even though doing so would benefit consumers and the environment.

What would happen if a CSR bond was used to push McDonald's to buy organic potatoes? Because McDonald's is such a large buyer, the increased demand could further drive up prices for organic potatoes temporarily, inducing other farmers to grow them. If this happens, prices could eventually fall—perhaps not to the level of nonorganic potatoes but below the initial price of seven cents per pound. These price effects could induce other companies to buy organic potatoes. Indeed, the company's compliance with the developing norm could encourage other companies

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90. See supra notes 16–26 and accompanying text.

91. John Miller, McDonald's Fries the Holy Grail for Potato Farmers, Spokesman-Rev. (Sept. 23, 2009), https://www.spokesman.com/stories/2009/sep/23/mcdonalds-fries-holy-grail-potato-farmers [https://perma.cc/CV6K-RLNU].

92. This figure represents approximately 4% of McDonald's annual net income. See McDonald's Co., Annual Report (Form 10-K) 10 (Feb. 26, 2020), https://www.sec.gov/Archives/edgar/data/0000063908/000006390820000022/mcd-12312019x10k.htm [https://perma.cc/FC4X-PEEQ] (noting that net income is $6.025 billion).

to follow suit in another way: McDonald's would likely advertise that it is using organic potatoes, which could put pressure on other fast-food restaurants to change course. Eventually, therefore, the bond could cause the equilibrium to shift by increasing both supply and demand for organic potatoes.

CSR bonds could also be used to benefit workers across an industry by motivating a leader to change its practices. Take the following stylized example: Nike, like many global retailers, utilizes overseas sweatshops to produce sneakers. As a result of consumer boycotts, Nike has improved conditions somewhat, but the overall state of affairs remains dismal.[93] Assume that the cost of bringing these overseas factories into compliance with OSHA standards (which the company is not required to do[94]) would be $100 million; therefore, Nike is unlikely to do so. Consumer pressure is unlikely to move the needle; indeed, consumers might not even be aware of the conditions in overseas factories. Not only that, regulation addressing overseas factory conditions is unlikely to be forthcoming,[95] and even if a country was to adopt more stringent regulation, Nike could move its factory elsewhere. In this situation, the use of a CSR bond might be the only way to incentivize the company to improve worker conditions. As in the previous examples, were Nike to advertise its compliance with the developing norm, it would focus attention on other companies that failed to enact the same changes.[96]

As a final example, a bond could be used to encourage a company to embark on a new project with large secondary benefits. Consider Bombay Dyeing, a large global textile manufacturer, which primarily uses polyester and cotton yarn.[97] These fabrics have come under scrutiny from

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93. Richard M. Locke, The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy 47–55 (2013) (using a data set of 900 working-condition audits to find a large amount of variation among Nike factories, with some at near full compliance and others suffering from "endemic problems including low wages, unsafe working conditions, excessive work hours, harassment, and so on").

94. OSHA's language limits its applicability to "employment performed in a workplace in a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Trust Territory of the Pacific Islands, Lake Island, Outer Continental Shelf lands . . . , Johnston Island, and the Canal Zone." 29 U.S.C. § 653(a) (2018).

95. See Luc Fransen, Corporate Social Responsibility and Global Labor Standards: Firms and Activists in the Making of Private Regulation 7 (2012) (noting that, since the mid-1980s, the call for improved working conditions in export industries has been redirected from governmental and intergovernmental bodies to multinational corporations).

96. Nike, however, might be concerned that the bond would have the opposite effect—shining a spotlight on the company's harmful practices, which would hurt its brand and reputation. That concern might chill Nike from accepting to work with a bond issuer in the first instance. For a discussion of this concern, see infra section II.C.

97. Bombay Dyeing, https://bombaydyeing.com [https://perma.cc/3NEZ-ED52] (last visited Jan. 24, 2021).

researchers for their harmful environmental impact.[98] A CSR bond could therefore be used to push Bombay Dyeing to launch a new banana-fiber fabric line, which would be nearly carbon neutral.[99] Assume that the cost of producing this fabric is prohibitively expensive without economies of scale and expertise in the textile industry. Assume further that it would cost $500 million dollars for Bombay Dyeing to launch a new fabric line using banana-fiber technology and that customers would be unwilling to bear the costs in the form of higher prices for banana-fiber clothing. As such, the company will not move from the status quo. Were it to do so, however, and invest in the infrastructure necessary to produce banana-fiber fabric at scale (which would include investments in suppliers and marketing), the cost would be the same for the company as producing cotton in future years. By encouraging an investment in sustainable fabric production and kickstarting a green fabric market, the CSR bond could transform the textile industry.

2. *Overcoming Coordination Costs.* — CSR bonds could also be used to overcome coordination costs for prosocial individuals. Consider Walmart, one of the biggest sellers of guns in the world.[100] Many individuals are opposed to its decision to sell guns, but they feel powerless to change it. Gun control nonprofits serve as a coordinating mechanism, but diffuse individuals might be wary to donate if they are unsure of whether the organization's efforts will be successful.[101] Indeed, contributions to these nonprofits would likely fund lobbying for more stringent regulation, which resembles an all-pay auction, in which the lobbyist with the highest expenditure is certain to win.[102] This means that, if another group spends a single dollar more, all expenditures by the nonprofit will have been in vain.[103] This provides a disincentive to participate at all, especially when success is uncertain.[104]

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98. Environmental Impacts, Green Choices, https://www.greenchoices.org/green-living/clothes/environmental-impacts [https://perma.cc/BG4S-H7FM] (last visited Jan. 24, 2021).

99. Vivian Hendriksz, Sustainable Textile Innovations: Banana Fibres, FashionUnited (Aug. 28, 2017), https://fashionunited.uk/news/fashion/sustainable-textile-innovations-banana-fibre/2017082825623 [https://perma.cc/FT45-CLST].

100. Chris Isidore, What Would Happen if Walmart Stopped Selling Guns, CNN: Bus. (Aug. 6, 2019), https://www.cnn.com/2019/08/05/business/walmart-gun-sales/index.html [https://perma.cc/5M7Y-H5W6].

101. See David Lowery & Kathleen Marchetti, You Don't Know Jack: Principals, Agents, and Lobbying, 1 Int. Grps. & Advoc. 139, 141–52 (2012) (discussing various agency issues in lobbying).

102. See Hanming Fang, Lottery Versus All-Pay Auction Models of Lobbying, 112 Pub. Choice 351, 351–53 (2002) (describing all-pay auctions, in which the lobbyist "with the highest expenditure wins with probability one").

103. Cf. Gordon Tullock, Efficient Rent Seeking, *in* Efficient Rent-Seeking 3, 3–10 (Alan Lockard & Gordon Tullock eds., 2001) (modeling the lottery and all-pay auction theories of lobbying).

104. Id.

But what if the nonprofit instead promised that it would use the donated funds to support a CSR bond that would offset Walmart's costs if it stopped selling guns?[105] The possibility of changing Walmart's practices might induce dispersed individuals to participate, especially given that the donors will get their money back if the bond is unsuccessful. Put simply, the nonprofit's decision to use a bond might overcome coordination costs of dispersed individuals who value a prosocial corporate decision. And the bond would more efficiently accomplish the intended goal than lobbying, which entails waste whenever two sides conflict over a given course of action and are induced to spend vast sums to win.[106]

3. *Higher Marginal Return from Corporate Philanthropy.* — In certain instances, corporate philanthropy will offer a higher marginal return than individual philanthropy aimed at accomplishing the same result.[107] That is because it may be very expensive for individuals to undo the harmful effects of corporate actions. For example, Harley-Davidson plans to move

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105. To get a sense of these numbers, let's suppose that Walmart does not generate much revenue from these sales, but it expects that, were it to stop selling guns, it would be subject to boycotts that would reduce revenue by 1%—for a total of $5 billion, or $300 million in lost EBITDA. Walmart Inc., Annual Report 50 (Form 10-K) (Mar. 20, 2020), https://www.sec.gov/Archives/edgar/data/104169/000010416920000011/wmtform10-kx1312020.htm [https://perma.cc/56AC-GUC3]. Assume also that there would be a boost in sales from anti-gun consumers but that this boost would only result in $150 million in additional earnings. Therefore, the bond would need to generate roughly $150 million to encourage Walmart to make the choice.

This example, however, also reveals that uncertainty plagues these calculations and how social pressures can alter the profit-maximizing course of action in ways that are unpredictable. For example, in 2018, Dick's Sporting Goods pulled guns and ammunition from ten stores in response to the Parkland shooting. See Nathaniel Meyersohn, Dick's Sporting Goods Removes Guns and Ammo from 125 Stores, CNN, https://www.cnn.com/2019/03/14/investing/dicks-sporting-goods-guns [https://perma.cc/UJ6L-YCM3] (last updated Mar. 14, 2019). The company faced boycotts but, ultimately, these boycotts were offset by a rise in sales from customers who approved of the decision, encouraging the company to remove guns from additional stores. See Dick's Sporting Goods to Stop Selling Guns at 440 Additional Stores, CBS Pittsburgh (Mar. 10, 2020), https://pittsburgh.cbslocal.com/2020/03/10/dicks-sporting-goods-440-store-gun-sales [https://perma.cc/3VY2-MNA2] (observing that "[o]verall sales increased" at the stores where the company pulled guns and that the company's stock price jumped 13% when the company announced that it would remove guns from additional stores). If the donors were worried about this prospect—that the profit-sacrificing choice could turn out to be profit maximizing—they could employ an earn-out to split the risk with the company. See infra section II.C.

106. See Tullock, supra note 103 (describing the all-pay auction theory of lobbying). Of course, people who were opposed to the Walmart bond could fund a rival bond that would urge Walmart to keep guns on the shelves. But unlike lobbying, social responsibility bonds require transparency and operate out in the open, perhaps making them a less appealing way to achieve results that lack strong popular support.

107. See Hart & Zingales, supra note 39, at 249 ("Friedman's separability assumption requires consumers to have a (scalable) project that is the reverse of the project implemented by the corporation. But is there any reason to think that the reverse of an oil digging project, say, always exists? In many cases this would seem to defy belief.").

plants overseas to avoid new tariffs imposed on U.S. manufacturers.[108] The company estimates that the new tariffs would cost the company $90 million each year, but the move overseas is predicted to cost thousands of American workers their jobs.[109] Let us also assume that many of those workers would not find new jobs and would therefore become unemployed.[110] If Harley-Davidson moves the factories, it would be extremely costly for individuals to offset the damage done. Donors would have to identify the unemployed individuals, find new jobs paying the same wage in the same area, and possibly invest in training so that the employees would be qualified for these jobs. It might not be possible for individuals to do this, and even if they could, it would likely be prohibitively expensive.

By contrast, a bond that urged Harley-Davidson to keep the jobs in the United States would offer a much higher return on investment. Consider how this might happen: A workers' rights nonprofit, such as Jobs With Justice,[111] could solicit a bond that would offset the costs of the tariffs for the company. It could negotiate with the company on the price, ultimately arriving at a sum less than $90 million, because taking the expensive course of action would result in offsetting reputational benefits[112] and cost-savings associated with moving production. Perhaps they would split the difference and the company would agree that an investment of $45 million would be enough to keep the jobs in the United States. The nonprofit would then solicit investment for the bond—from philanthropic shareholders and other individuals, foundations, and workers' rights groups. If the bond was funded, the company would be required to keep the jobs domestically or lose the money, and the optics of turning down the money would make the latter approach particularly unappealing.

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108. Carson Kessler, Why Harley-Davidson Is Moving Production Overseas, Fortune (June 26, 2018), https://fortune.com/2018/06/26/harley-davidson-moving-production-overseas (on file with the *Columbia Law Review*).

109. Id.; see also Jamie Lincoln Kitman, Opinion, Making America Unemployed Again, N.Y. Times (July 6, 2018), https://www.nytimes.com/2018/07/06/opinion/trump-tariffs-harley-davidson-auto.html (on file with the *Columbia Law Review*).

110. Cf. Jeffrey N. Gordon, Is Corporate Governance a First-Order Cause of the Current Malaise?, 6 J. Brit. Acad. 405, 421 (2018) (describing the inefficiencies of layoffs, including the search costs incurred by workers forced to find new jobs and the substantial risk they will not find new employment).

111. Jobs with Justice, https://www.jwj.org [https://perma.cc/2746-5ZUd] (last visited Jan. 24, 2021).

112. The introduction of a monetary payment for the decision could somewhat reduce the altruistic signal and corresponding reputational boost from the decision, but it is unlikely to eliminate it. See Roland Bénabou & Jean Tirole, Incentives and Prosocial Behavior, 96 Am. Econ. Rev. 1652, 1654 (2006) ("The presence of extrinsic incentives spoils the reputational value of good deeds, creating doubt about the extent to which they were performed for the incentives rather than for themselves.").

These examples show how CSR bonds could be used to alter corporate decisionmaking when the social welfare benefits are great. Importantly, the bonds do this without requiring any legal change; prosocial individuals need not wait for Congress, or even the states, to adopt corporate externality regulation or provide new legal rights to stakeholders.[113] Not only that, CSR bonds induce prosocial decisions without generating the accountability problems that economists and legal scholars predict would manifest if fiduciaries were no longer bound to maximize shareholder wealth.[114]

Another advantage of a CSR bond is that it only targets donors for whom corporate social responsibility is welfare maximizing; nobody else need pay anything at all. But this reality leads to a limitation, too. Because these bonds entail a privately provided public good, free riding is very likely. The same concern is true, however, of all charitable giving, and yet, most households give to charity.[115] Moreover, the public is increasingly interested in pushing corporations to change their behavior. Inflows to social responsibility investment vehicles have reached all-time highs;[116] institutional investors compete by advertising their prowess on environmental, social, and governance (ESG) issues.[117] The CSR bond could offer donors an even better chance to influence corporate decisionmaking for the better and could therefore appeal to many individuals.

B. *Analogues*

The concept of a CSR bond, although novel, has analogues in law and finance. This Essay discusses these analogues in the sections that follow.

1. *Impact Bonds.* — Impact bonds generate investment from private investors to improve public services.[118] Repayment is contingent upon the

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113. Indeed, shareholder primacy has become entrenched in legal and extralegal sources of corporate governance, suggesting that it would take a "large shock to the system such as a major federal intervention" to generate a paradigm shift. See Lund & Pollman, supra note 83, at 3.

114. See, e.g., A. A. Berle, Jr., For Whom Corporate Managers Are Trustees: A Note, 45 Harv. L. Rev. 1365, 1367 (1932) ("When the fiduciary obligation of the corporate management and 'control' to stockholders is weakened or eliminated, the management and 'control' become for all practical purposes absolute.").

115. Andreoni & Payne, supra note 19, at 2 ("[M]ost households give something to charity each year, and in many countries average giving is a significant fraction of income—nearly 2% in the US, for instance.").

116. See Akane Otani, ESG Funds Enjoy Record Inflows, Still Back Big Oil and Gas, Wall St. J. (Nov. 11, 2019), https://www.wsj.com/articles/top-esg-funds-are-all-still-invested-in-oil-and-gas-companies-11573468200 (on file with the *Columbia Law Review*) (noting that funds with a focus on social responsibility had a record year for asset inflows).

117. See Barzuza et al., supra note 76, at 1248 ("[I]n contrast to conventional wisdom, funds compete aggressively with each other in escalating their ESG policies.").

118. See Rebecca Leventhal, Effecting Progress: Using Social Impact Bonds to Finance Social Services, 9 N.Y.U. J.L. & Bus. 511, 514–15 nn.11–12 (2013).

achievement of desired outcomes—if the objectives are not met, investors get nothing; if the project succeeds, usually far down the road, the investors make their money back.[119] In other words, the public entity only repays investors if the project provides its intended benefit.

These instruments are relatively new. Indeed, Goldman Sachs's Urban Investment Group launched the first social-impact bond in the United States in 2012—a $9.6 million loan for therapy services for juveniles incarcerated at Rikers Island.[120] The transaction was structured as follows: Goldman made funds available to the nonprofit MRDC, and the nonprofit used the funds to hire the Osborne Association, which provides therapy services to incarcerated youth.[121] MRDC was charged with overseeing the day-to-day implementation of the project.[122] In addition, the Vera Institute of Justice, another nonprofit, was tasked with evaluating whether the program reduced recidivism among those at Rikers.[123] The City of New York agreed to provide success payments to MDRC based on the projected savings from the reduced recidivism rate after five years, informed by the Vera Institute's evaluation.[124]

As this example shows, impact bonds encourage ventures that improve the efficiency of public services and are expected to generate financial benefits at some future date. Public sector organizations often lack funding and political fortitude to take on such risks;[125] impact bonds therefore unite the public sector with private suppliers of capital and, if the venture is successful, allow those suppliers of capital to share in the proceeds. Of course, a for-profit company is not limited in the same way: Management is free to pursue any strategy designed to maximize profits

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119. See id. at 518. Note that this is the opposite of how I propose the corporate social-impact bond would operate. Although making repayment contingent on achievement of the outcome provides an incentive for it to be achieved, it also creates the prospect of a lose-lose situation: one in which investors get nothing and neither does the public. There is also the prospect of distorted incentives: Imagine a hedge fund participated only to attempt to thwart the company's implementation. This prospect cautions against allowing a secondary market for these bonds.

120. John Olson & Andrea Phillips, Rikers Island: The First Social Impact Bond in the United States, 9 Cmty. Dev. Inv. Rev. 97, 97 (2013). Other social-impact bonds solicit investment from multiple investors. See Leventhal, supra note 118, at 521–23.

121. See Olson & Phillips, supra note 120, at 97–98.

122. Id.

123. Id.

124. To illustrate: A 20% reduction in recidivism would result in an estimated savings of $20.5 million for the city. If the Vera Institute and MRDC determined that the program had led to a 20% reduction in recidivism, the city would pay MRDC about half of that sum. Id.

125. See, e.g., Investing in Social Outcomes: Development Impact Bonds, Ctr. for Glob. Dev., https://www.cgdev.org/page/investing-social-outcomes-development-impact-bonds-0 [https://perma.cc/B8TA-9SXN] (last visited Jan. 24, 2021) ("The transfer of risk from public agencies to private actors is an essential feature of Development Impact Bonds. High levels of risk, among other factors, can prevent public agencies . . . from investing adequately in prevention, or in innovative approaches where there may be some uncertainty as to expected results . . . .").

and will likely be able to secure funding to support them. The key difference, therefore, between an impact bond and the instrument I envision is that the latter will be used to push companies (and not public entities) to make money-losing choices rather than profitable ones. Although the company will receive money to offset the costs, the main point of the bond is not to raise money but to encourage the company to make the public-interested choice. And the CSR bond accomplishes this inducement by providing offsetting funds when the corporation undertakes the prosocial but money-losing course of action.

2. *Green Bonds.* — Green bonds earmark funds for corporate projects that benefit the environment.[126] These bonds were invented by the World Bank in 2007;[127] investment in green bonds has escalated since then, breaking a record with $107 billion issued in the first half of 2019.[128]

Here's how green bonds work: An issuer solicits funds for a "green" project, defined as a project with a positive environmental benefit.[129] Importantly, the bond price is generally the same as an ordinary bond from that issuer, and recourse is also the same.[130] The main difference is that the funds are earmarked for qualifying green projects. Thus far, development banks have been the largest issuers,[131] but major companies, including Apple and SolarCity, have issued green bonds;[132] government

126. Romain Morel & Cécile Bordier, ClimateBrief, Financing the Transition to a Green Economy: Their Word Is Their (Green) Bond? 1–2 (2012), https://www.i4ce.org/wp-core/wp-content/uploads/2016/03/12-05-Climate-Brief-14-Financing-the-transition-to-a-green-economy-their-word-is-their-green-bond.pdf [https://perma.cc/R9AC-VZC6].

127. See 10 Years of Green Bonds: Creating the Blueprint for Sustainability Across Capital Markets, World Bank (Mar. 18, 2019), https://www.worldbank.org/en/news/immersive-story/2019/03/18/10-years-of-green-bonds-creating-the-blueprint-for-sustainability-across-capital-markets [https://perma.cc/9G5Y-2Q2Q].

128. See Nina Chestney, Green Bond Issuance Surpasses $100 Billion So Far This Year: Data, Reuters (June 25, 2019), https://www.reuters.com/article/us-bonds-environment/green-bond-issuance-surpasses-100-billion-so-far-this-year-data-idUSKCN1TQ11V [https://perma.cc/W56C-3GE2].

129. For more information about the requirements for issuing a green bond, see Int'l Cap. Mkt. Ass'n, The Green Bond Principles, 2016, at 3–6 (2016), https://cached-images.bonnier.news/swift/bilder/bbm/aktuellhallbarhet/pdfs/gbp-2016-final-16-june-2016.pdf [https://perma.cc/267F-FBFD].

130. Org. for Econ. Coop. & Dev., Mobilising Bond Markets for a Low-Carbon Transition 35 (2017), https://read.oecd-ilibrary.org/environment/mobilising-bond-markets-for-a-low-carbon-transition_9789264272323-en [https://perma.cc/46Z4-2EU7] (stating that the financial characteristics of green bonds and conventional bonds produced by the same issuer are identical at the issue date); see also Igor Shishlov, Romain Morel & Ian Cochran, Inst. for Climate Econ., Beyond Transparency: Unlocking the Full Potential of Green Bonds 19 (2016), https://www.i4ce.org/wp-core/wp-content/uploads/2016/06/I4CE_Green_Bonds-1.pdf [https://perma.cc/8BFZ-B4FH] (arguing that there is "no clear evidence" that green bonds reduce the cost of capital for their issuers).

131. Olivier David Zerbib, The Effect of Pro-Environmental Preferences on Bond Prices: Evidence from Green Bonds, 98 J. Banking & Fin. 39, 40 (2019).

132. See Apple, Annual Green Bond Impact Report (2018), https://s2.q4cdn.com/470004039/files/doc_downloads/additional_reports/Apple_GreenBond_Report_2018.pdf

bodies—including the state of Massachusetts—have also issued green municipal bonds.[133]

The main difference between a green bond and a CSR bond is that the latter is designed to push companies to make profit-sacrificing projects. By contrast, a green bond simply allows companies to secure funding for profit-maximizing green projects—projects that would be worth the cost of the debt. The fact that lenders charge the same rate for green bonds and conventional ("brown") bonds indicates that the lenders are not placing much of a constraint on decisionmaking, as borrowers are not in the habit of taking on onerous constraints for free.[134]

Take Apple's second green-bond offering as further support for this point. Shortly after the Trump Administration announced that it would withdraw from the Paris Climate Agreement,[135] Apple issued a green bond of $1 billion, following a larger green bond issuance a few years before.[136] It announced that these funds would support projects to reduce emissions in Apple's corporate facilities, stores, and supply chain.[137] The company explained that, if implemented, these projects would save the company money over time.[138] Not only that, Apple had already announced that all of the company's facilities were powered by renewable energy; these funds were being used to "maintain that achievement."[139] In sum, the green bond funding went toward supporting projects that Apple had already promised to take on or that it had plenty of incentives to do already. There

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[https://perma.cc/8Q82-HNDS]; Beate Sonerud, SolarCity Issues US$200m of Retail Bonds, Maturity Ranging From 1-7 Years, Coupon 2-4%. What A Pioneering Company! First Public Solar Bond Offering in the U.S., After Also Doing the First Solar Securitisation in 2013, Climate Bonds Initiative (Oct. 16, 2014), https://www.climatebonds.net/2014/10/solarcity-issues-us200m-retail-bonds-maturity-ranging-1-7-years-coupon-2-4-what-pioneering [https://perma.cc/3CUE-NYWK].

133. See Mass. Clean Water Tr., Annual Green Bonds Report 7 (2019), https://www.mass.gov/doc/2019-trust-annual-green-bond-report/download [https://perma.cc/P3JG-5GW7]. Denmark has issued sovereign green bonds with an interesting and unique feature: The promise to spend money on green projects is separable from the actual bond and able to be traded in the secondary market. See Matt Levine, Green Bonds Without the Bonds, Bloomberg Opinion (Dec. 6, 2019), https://www.bloomberg.com/opinion/articles/2019-12-06/green-bonds-without-the-bonds (on file with the *Columbia Law Review*). That is so, despite the fact that the green certificate is a zero-coupon bond with zero redemption at maturity. See id.

134. See K. Thomas Liaw, Survey of Green Bond Pricing and Investment Performance, 13 J. Risk & Fin. Mgmt. 193, 203 (2020) (finding "no guarantee that green bonds enjoy a lower cost").

135. Full Transcript: Trump's Paris Climate Agreement Announcement, CBS News (June 1, 2017), https://www.cbsnews.com/news/trump-paris-climate-agreement-withdrawal-announcement-full-transcript [https://perma.cc/99ZA-GW9X] ("Therefore, in order to fulfill my solemn duty to protect America and [its] citizens, the U.S. will withdraw from the Paris climate accord.").

136. See Apple, supra note 132, at 2.

137. Id. at 12.

138. See id. at 4.

139. Id. at 6.

is no evidence that the presence of green bond funding induced Apple to make profit-sacrificing decisions.[140]

By contrast, a CSR bond might be used to push Apple to better accommodate consumers who want to upgrade their electronics, rather than replace them, which would reduce carbon emissions created during the manufacturing process, as well as landfill waste.[141] This would likely have a larger environmental impact than building a LEED-certified Apple store in Japan but would sacrifice profits and, therefore, no amount of green bond funding for the same interest rate would encourage the company to do it.

3. *Carbon Offsets*. — Individuals who are concerned about the impact of activities that generate greenhouse gas emissions can purchase carbon offsets, which fund emission reduction projects elsewhere.[142] For example, if a consumer is forced to take a cross-country flight for business travel, they cannot easily avoid the expansion of their carbon footprint. A nonprofit like TerraPass allows them to purchase an offset for every one ton of carbon dioxide that the flight created.[143] Indeed, some companies give consumers the option to purchase offsets in order to directly offset the emissions created by the consumption of their products. For example, most airlines provide passengers an opportunity to offset the emissions produced by their trip.[144] Some oil and gas companies do too: Shell gives customers in the Netherlands the option to pay 0.01 euro more per liter of fuel, which the company uses to buy carbon credits that offset the carbon emissions associated with their purchase.[145] These offset funds go toward funding projects that reduce carbon dioxide emissions, including planting trees, initiating gas capture projects at landfills, and funding wind power.[146] And these campaigns have been quite successful in attracting

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140. See Caroline Flammer, Corporate Green Bonds, J. Fin. Econ. (forthcoming) (manuscript at 4, 25–29), https://ssrn.com/abstract=3125518 (on file with the *Columbia Law Review*) (showing that green bond issuance is correlated with improved financial performance, as measured by stock price reaction).

141. See David L. Veksler, Apple Is Not as Green as It Seems, FEE (Oct. 15, 2017), https://fee.org/articles/apples-environmental-claims-are-misleading [https://perma.cc/T9KK-773N].

142. Nadaa Taiyab, Exploring the Market for Voluntary Carbon Offsets 19 (2006) (unpublished manuscript), https://pubs.iied.org/sites/default/files/pdfs/migrate/G00268.pdf [https://perma.cc/CK7R-TESJ].

143. Carbon Offsets Explained, TerraPass, https://www.terrapass.com/climate-change/climate-changecarbon-offsets-explained [https://perma.cc/33M5-SEGA] (last visited Jan. 24, 2021).

144. Katie Genter, Everything You Need to Know About Carbon Offsetting for Your Flights, Points Guy (Nov. 21, 2019), https://thepointsguy.com/guide/a-guide-to-airline-carbon-offset-programs [https://perma.cc/8YQH-YQUJ].

145. Akshat Rathi, Shell Will Spend $300 Million to Offset Carbon Emissions. Here's the Catch, Quartz (Apr. 10, 2019), https://qz.com/1590325/whats-wrong-with-shells-plan-to-offset-your-carbon-emissions [https://perma.cc/7ADF-FLDU].

146. Id.

participation: Nearly $4.5 billion has been spent on offsets from 2005 to 2015.[147]

Like a carbon offset, the CSR bond is a voluntary market transaction undertaken by individuals who are concerned about externalities created by the companies with which they interact. One might enjoy shopping for cheap products at Walmart but remain concerned that their consumer surplus is taken from employees who do not earn living wages. As with a carbon offset, one can compensate for some of this harm by investing in a CSR bond directed at improving working conditions and wages for Walmart employees.

But CSR bonds offer additional benefits. A carbon offset offers a consumer a chance to pay for the harm they generate instead of making changes in their lifestyle that would reduce emissions. The purchaser of the CSR bond, however, has no other option to generate the prosocial good—by definition, they are encouraging a choice that wouldn't otherwise be made.

However, criticism of offset markets has analogues here too. For example, some environmentalists believe that the ability to offset carbon emissions will discourage people from taking steps to reduce their carbon footprint.[148] As support for their point of view, consider why airlines and oil and gas companies offer offset opportunities to their customers. Likewise, it is possible that the prospect of receiving money as compensation for harmful activities will weaken any impetus for companies to stop them; indeed, it could even encourage companies to increase harmful activity in order to solicit payments from bond issuers.[149] Perhaps, for example, a polluting electricity company would decide to emit even more pollution in an effort to try to attract bond proceeds.

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147. Kelly Hamrick & Allie Goldstein, Forest Trends, Ahead of the Curve: State of the Voluntary Carbon Markets 2015, at 3 (Molly Peters-Stanley & Gloria Gonzalez eds., 2015).

148. See, e.g., Ascelin Gordon, Joseph W. Bull, Chris Wilcox & Martine Maron, Perverse Incentives Risk Undermining Biodiversity Offset Policies, 52 J. Applied Ecology 532, 532 (2015) (evaluating "claims that market-based approaches create a distraction from urgently needed changes in human behaviour and institutions").

149. A related critique is that monetary incentives can "crowd out" altruistic incentives. See Richard Titmuss, The Gift Relationship: From Human Blood to Social Policy 65–69 (1970) (positing that monetary compensation for donated blood would reduce the supply of donors); see also Carl Mellström & Magnus Johannesson, Crowding Out in Blood Donation: Was Titmuss Right?, 6 J. Eur. Econ. Ass'n 845, 846–47 (2008) (confirming these results). As an example, a study of Israeli daycare attendees found that lateness increased when parents were not prohibited from coming late but instead were asked to pay a fine. See Uri Gneezy & Aldo Rustichini, A Fine Is a Price, 29 J. Legal Stud. 1, 4–8 (2000).

Other studies have likewise demonstrated that economic incentives can backfire or be counterproductive. See, e.g., Bruno S. Frey & Felix Oberholzer-Gee, The Cost of Price Incentives: An Empirical Analysis of Motivation Crowding-Out, 87 Am. Econ. Rev. 746, 748–50 (1997) (providing survey data showing that individuals were less likely to accept locating a nuclear waste facility in their neighborhood if they were offered monetary compensation); see also Yochai Benkler, The Unselfish Gene, Harv. Bus. Rev. (July–Aug. 2011), https://hbr.org/2011/07/the-unselfish-gene (on file with the *Columbia Law Review*). Crowding-out

The possibility for moral hazard should weigh on the mind of anyone considering whether to use CSR bonds. But in many circumstances, corporate reputational considerations should limit moral hazard. Unlike individual polluters, corporations who do harm are subject to constant scrutiny—from the news media, consumers, employees, regulators, and shareholders.[150] This scrutiny should serve as a constraint on corporations who might otherwise feel encouraged to engage in worse behavior in order to secure funding from CSR bond donors. Relatedly, if the receipt of funds is not guaranteed, risking bad behavior is especially unlikely to pay off. Unless this tool becomes ubiquitous—which is unlikely—corporations are unlikely to engage in worse behavior than they would otherwise in order to attract bond proceeds.

Nonetheless, the prospect of moral hazard should influence CSR bond issuers and their processes, especially if bonds become common. For example, an issuer might refuse to work with a company that seeks out a bond. Or, an issuer could adopt a policy of only working with companies that have made genuine efforts at improving their ESG activities over time. Both strategies should reduce the risk of moral hazard whenever CSR bonds are used.

4. *Legal Analogues.* — The idea of paying corporations to engage in beneficial activity is unpalatable in many ways.[151] But in many instances, our government does just this: It provides incentives for private parties to benefit the public good. For example, the United States government provides billions of dollars in "climate aid" each year; these funds are used by development banks to help developing countries achieve environmental goals by encouraging green choices that would not otherwise be made without financial support.[152] Of course, there is a justice-based argument

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is less likely to occur, however, when the target of the incentive payment is a corporation, rather than an individual. Corporations do not have altruistic feelings, nor do they have intrinsic motivation. And while corporations are populated by employees, those employees do not directly benefit from the reward in question—only the entity does.

150. See John L. Campbell, Why Would Corporations Behave in Socially Responsible Ways? An Institutional Theory of Corporate Social Responsibility, 32 Acad. Mgmt. Rev. 946, 957–58 (2007) (documenting studies where corporations were induced to be more responsible because of scrutiny from nongovernmental outside parties).

151. See Daniel Hemel & Dorothy S. Lund, Sexual Harassment and Corporate Law, 118 Colum. L. Rev. 1583, 1671–73 (2018) (discussing discursive harm).

152. See Joe Thwaites, U.S. Climate Finance Improves with 2019 Budget, but There's Still a Long Way to Go, World Res. Inst. (Feb. 20, 2019), https://www.wri.org/blog/2019/02/us-climate-finance-improves-2019-budget-theres-still-long-way-go [https://perma.cc/292G-XFQL] (describing how the government funds environmental programs in the developing world).

Relatedly, "Payment for Ecosystem Services" programs link funders with people in poor countries that would be tempted to chop down trees for income. Those people are instead paid to protect their forests. These programs have been used in Costa Rica, Mexico, China, and Bolivia, and they have been found to be very successful at averting climate destruction. See Ed Yong, The Success of Paying People to Not Cut Down Trees, Atlantic (July 20, 2017), supporting this aid: Developing countries might reasonably ask why they should make developmental sacrifices to mitigate problems that developed countries created and from which they have benefitted.[153]

But in other contexts, the government offers subsidies in the form of tax deductions for prosocial behavior simply to encourage it. The deduction for charitable donations is an obvious example: Individuals who donate to eligible nonprofits are able to offset some of that cost by paying lower taxes.[154] Indeed, charitable deductions are also available for other prosocial activities, such as giving up an easement to develop your property in favor of conservation.[155] In these cases, we do not think that it is morally problematic to compensate individuals who voluntarily act to promote the public interest; indeed, we are grateful that the subsidy exists, or else such activity might not happen.

However, it is certainly more controversial when the government subsidizes *corporate* behavior with the goal of benefitting the broader community. Recall Amazon's search for a secondary corporate headquarters. The company was promised tax breaks and other inducements, which led to fierce competition among cities and states.[156] The eventual winner—New York—promised approximately $3 billion in tax incentives to attract the corporate headquarters.[157] The reason, of course, is that luring the corporate giant to New York would provide ample benefits—

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https://www.theatlantic.com/science/archive/2017/07/paying-people-to-preserve-their-trees/534351 (on file with the *Columbia Law Review*).

153. To take a recent example, former U.S. Energy Secretary Rick Perry called global efforts to shift away from fossil fuels "immoral" because they deny developing nations the resources needed to lift their populations out of poverty. See James Osborne, Energy Secretary Rick Perry Calls Shift Away from Fossil Fuels 'Immoral', Hous. Chron. (Mar. 7, 2018), https://www.houstonchronicle.com/business/article/rick-perry-energy-fossil-fuels-shift-immoral-12736682.php [https://perma.cc/3Y2C-8WLH].

154. See Ellen P. Aprill, Churches, Politics, and the Charitable Contribution Deduction, 42 B.C. L. Rev. 843, 845–46 (2001) (explaining the tax benefits of charitable donations). Corporations are also entitled to take a tax deduction for charitable donations. Publication 542 (01/2019), Corporations, IRS, https://www.irs.gov/publications/p542 [https://perma.cc/BP4F-8ZEN] (last updated Jan. 2019).

155. How We Work: Private Lands Conservation, Nature Conservancy, https://www.nature.org/en-us/about-us/who-we-are/how-we-work/private-lands-conservation/?tab_q=tab_container-tab_element_670 [https://perma.cc/MJN9-5NHD] (last visited Mar. 12, 2021) ("Because use is permanently restricted, land subject to a conservation easement may be worth less on the open market than comparable unrestricted and developable parcels. Sometimes conservation easements will enable the landowner to qualify for tax benefits in compliance with Internal Revenue Service rules.").

156. See Meagan Day, Ending the Amazon Hunger Games, Jacobin Mag. (Feb. 8, 2018), https://jacobinmag.com/2018/02/amazon-corporate-headquarters-tax-breaks [https://perma.cc/FFT4-878X] (describing the contest in which 238 cities participated).

157. See Jack Stewart & Marielle Segarra, After Political Resistance and Protests, Amazon HQ2 in New York Is No More, Marketplace (Feb. 14, 2019), https://www.marketplace.org/2019/02/14/after-political-resistance-and-protests-amazon-h2q-new-york-no-more [https://perma.cc/Z68G-NP3F].

thousands of new jobs,[158] increased revenue from sales and income tax, redevelopment plans, etc.—that likely exceeded the costs. But that did not stop fierce protests by residents and public officials. "Amazon is a billion-dollar company," Representative Alexandria Ocasio-Cortez tweeted.[159] "The idea that it will receive hundreds of millions of dollars in tax breaks at a time when our subway is crumbling and our communities need MORE investment, not less, is extremely concerning to residents here."[160] These protests eventually led Amazon to abandon its plan to build its second corporate headquarters in New York.[161]

The CSR bond concept could be plagued by a similar conceptual problem: Even if the bond would improve social welfare, the idea of paying a corporation to move in a positive direction might be unpalatable to many. However, the benefit of the bond concept is that it links *private* donors with private entities. If individuals want to subsidize corporate decisionmaking in order to generate large social benefits, why shouldn't they? Although taxpayers will support the decision to the extent that the donation is tax deductible, this limited subsidy provides less of a moral problem than the large direct subsidies that citizens ultimately pay when local and state governments attempt to incentivize corporate behavior that benefits the locality.

C. *Complications and Unintended Consequences*

This section considers additional complications and unintended consequences that complicate the use of CSR bonds. Section II.B considered whether CSR bonds could lead to moral hazard; a related concern is that a company could attempt to seek funding for actions that are wealth maximizing. This risk is especially likely for bonds that encourage companies to take on projects with uncertain net present value (NPV). Consider that, when Dick's Sporting Goods decided to stop selling firearms, it ended up boosting revenue.[162] Ex ante, outside observers might have guessed that the decision would have the opposite effect.

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158. See Day, supra note 156 ("Amazon promises to deliver a whopping fifty-thousand jobs to the victor. While the credibility of that number can be questioned, even half that number would be historic. It's clear that whichever city the campus lands in will be forever altered."). But see Austin Carr, Inside Wisconsin's Disastrous $4.5 Billion Deal with Foxconn, Bloomberg Businessweek (Feb. 6, 2019), https://www.bloomberg.com/news/features/2019-02-06/inside-wisconsin-s-disastrous-4-5-billion-deal-with-foxconn [https://perma.cc/YFU6-Z978] (describing a similar effort by the state of Wisconsin to attract electronics manufacturer Foxconn by giving the company lucrative tax breaks that ultimately failed to generate the 13,000 new jobs that the state expected).

159. Alexandria Ocasio-Cortez (@AOC), Twitter (Nov. 12, 2018), https://twitter.com/AOC/status/1062204614496403457 (on file with the *Columbia Law Review*).

160. Id.

161. Amazon Staff, Update on Plans for New York City Headquarters, Amazon (Feb. 14, 2019), https://www.aboutamazon.com/news/company-news/update-on-plans-for-new-york-city-headquarters [https://perma.cc/9GTF-THK5].

162. See supra note 105 and accompanying text.

In order to encourage investment in situations where the situation is not clearly profit sacrificing, issuers will need to study the company's financial information so that they can credibly certify to donors that the action would not be taken without the investment. Another possibility would be to allow for donor repayment if the corporate decision ends up making the company money, perhaps by using an earn-out.[163] Specifically, the third-party issuer could specify that, if the cost is less and the benefit is greater than anticipated, donors would get a portion of their money back. The donors would therefore act as insurers by sharing in the risk of implementing the prosocial decision with the company.

What about decisions that are wealth maximizing in the very long term, but profit sacrificing in the short term? In theory, a bond could be issued to encourage these choices too. Imagine, for example, that an investment in clean energy is likely to pay off for a coal company sixty years into the future, well beyond the current management team's tenure. Even though this choice could eventually be profitable, it is unlikely that management will make it now.[164] A CSR bond could be used to encourage the company to make the choice, although pricing the bond would be especially challenging. In this situation, issuers might need to provide for donor repayment in the future, again using an earn-out.

But this discussion reveals other challenges. For one, a third-party bond issuer faces an information asymmetry—it might not know enough about the company to dictate the decision, price the bond, and understand how to enforce it. This information asymmetry will be reduced if the company works with the issuer in creating the bond, but that collaboration might also reduce the issuer's leverage in negotiations. Issuing a bond would also entail high transaction costs, mostly in the form of negotiation and disclosure. It is possible that these transaction costs are too overwhelming for issuers and potential donors to navigate. However, the previous section described recently created financial instruments that have successfully linked private investors with public and private providers of public goods. Although these instruments also entail hefty transaction costs, those costs have not stopped issuers from creating them and investors from funding them.

If transaction costs and information asymmetries are not insurmountable, why then have CSR bonds not been used? One possibility is that innovation in public-interested financial products is relatively recent—as

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163. See Jonathan I. Handler & Jillian B. Hirsch, Developments in the World of Earn-Outs, 18 M&A L. 12, 12 (2014) (describing the various uses of earn-outs as a tool for bridging the valuation gap between buyers and sellers of companies).

164. Although in theory, a company's stock price could go up in anticipation of future profitability, the more salient effect on stock price will be many years of lower profits in the near future. See Charles H. Wang, Short-Term and Long-Term Market Inefficiencies and Their Implications 4 (2004), https://www.northinfo.com/documents/30.pdf [https://perma.cc/6E6H-G9AN] (describing how the increasing sophistication of short-term trading techniques leads to an "ever increasing emphasis on short-term performances").

the previous section reveals, green bonds, carbon offsets, and impact bonds were all created in the past several years. Another likely reason is that corporations are wary to call attention to their bad behavior. For example, when a customer checks out at Whole Foods, they are given the option to donate to a foundation that fights cancer. Why are they not prompted to support a higher wage for the company's own cashiers? Companies are in the business of virtue signaling—not the other way around.[165] And this hurdle would be one of the most difficult for CSR bond issuers to overcome. In fact, there will likely be a first-mover problem: The first corporation to accept bond proceeds could suffer reputational consequences. Likewise, the first nonprofit to participate might suffer as well. But corporations may also fear becoming the last mover, when others are changing their practices and letting the world know. Advertising the first-mover corporation's compliance with the developing norm could increase the costs for other companies that fail to comply; this risk could induce a company to participate in the bond ex ante.

The issuance of a CSR bond could have a different harmful consequence: It could direct donor attention away from other worthy causes. An individual may only donate a certain amount to charity each year. Likewise, an investor may be less willing to invest in benefit corporations or SRI mutual funds if they have donated to CSR bonds. But this consequence has some advantages: SRI mutual funds provide an opportunity for investors to invest in companies that align with their values, without offering any real opportunity to alter corporate decision-making.[166] These funds rarely advertise that fact, and often obscure it.[167] Therefore, the issuance of a CSR bond could draw attention to the fact that sacrificing returns is necessary to alter corporate decisionmaking and help alleviate investor misunderstanding about what their investment in SRI mutual funds will really accomplish.

In addition, CSR bonds could prove to be a useful compliment to other efforts that seek to improve corporate conduct, such as lobbying for externality regulation and organizing boycotts. Indeed, CSR bonds could aid nonprofits and regulators by forcing disclosure about harmful corporate practices. As discussed, a company that wants to issue a bond or work with a nonprofit issuer will have to disclose information about its business practices. It may even need to allow the third party to monitor its

165. See Jillian Jordan & David Rand, Opinion, Are You 'Virtue Signaling'?, N.Y. Times (Mar. 30, 2019), https://www.nytimes.com/2019/03/30/opinion/sunday/virtue-signaling.html (on file with the *Columbia Law Review*) (defining "virtue signaling" as "feigned righteousness intended to make the speaker appear superior").

166. Brest et al., supra note 20, at 210 ("It is virtually impossible for investors to affect the outputs or behavior of firms whose securities trade in public markets through buying and selling securities in the secondary market.").

167. Id. at 231 ("Investors should also be skeptical of claims of impact that may appear in the marketing materials for such funds.").

operations.[168] This disclosure could help nonprofits understand harmful corporate behavior; it could also aid lawmakers seeking to regulate the industry in the future.[169] And as mentioned, the CSR bond could ease the prospect of regulation in another way: It could convert the targeted company into a proponent of regulation that would bind rivals.[170] Ultimately, the hope is that CSR bonds would be used only where they would have a substantial and tangible impact—therefore supplementing action in other areas, rather than chipping away at it.

A larger concern is that the prospect of a CSR bond will decrease the incidence of voluntary corporate social responsibility by corporations. For example, what B Corp will survive when it has to compete with a company that is being paid to make the same choices? Many B Corps may not be sacrificing profits for the reasons discussed in Part I: Genuine profit sacrifices are unlikely to exist (and if they do, they are unlikely to do so for long).[171] But the point remains that, if all companies are induced to act like B Corps, B Corps may have less of a competitive advantage. Like the concern about moral hazard, however, this issue would only arise if CSR bonds become ubiquitous. It is unlikely that CSR bonds will be used often enough to threaten B Corps across all industries, and were that to occur, the social welfare benefits would likely exceed this cost.

There are reasons to be concerned, however, that CSR bonds will not only be used when the welfare benefits are great. Instead, CSR bonds could provide opportunities for wealthy individuals to alter corporate behavior for their private benefit. For example, a wealthy community could organize a CSR bond in the guise of offsetting environmental impact but with the effect of moving a planned factory into a poorer, less-populated area. But notice that the wealthy community could still obtain this result without

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168. Recall that the Rikers Island impact bond provided that the Vera Institute of Justice would monitor the program and that success payments would be based on the nonprofit's evaluation. See supra notes 120–124.

169. Note, however, that a company fearing that greater disclosure will lead to regulation and other harmful consequences will be less likely to accept the money. This reality constrains the risk of moral hazard.

170. Government bodies, however, could see the efforts of private sector financing as evidence that the area is a lower priority for legislative action. For that reason, perhaps the use of social responsibility bonds should be limited to domains where it appears unlikely that regulation would be forthcoming because of industry capture or other reasons.

171. Suntae Kim, Matthew J. Karlesky, Christopher G. Myers & Todd Schifeling, Why Companies Are Becoming B Corporations, Harv. Bus. Rev. (June 17, 2016), https://hbr.org/2016/06/why-companies-are-becoming-b-corporations (on file with the *Columbia Law Review*) (suggesting that the reason companies become B Corps is that "having a clear identity can help firms communicate their values to customers"); James Surowiecki, Companies with Benefits, New Yorker (July 28, 2014), https://www.newyorker.com/magazine/2014/08/04/companies-benefits (on file with the *Columbia Law Review*) ("[A]t the operational level, having a social mission can offer distinct advantages. It's an important way for a company to attract and retain talented employees . . . . Having a social mission can also be [a] selling point with consumers, as the success of the fair-trade movement makes clear.").

a bond—through lobbying or behind-the-scenes conversations with legislators and the company. At the very least, the CSR bond would increase the transparency of such actions—perhaps making them less likely to happen this way.

But this example reveals a deeper problem: An individual's willingness to pay might not lead us to the social-welfare-maximizing choice. For example, a wealthy individual who dislikes millennials could design a bond to induce Walmart to only hire people born before 1979—which is unlikely to further the public interest. But there are a few reasons to think that bonds will not be used for this purpose. For one, Walmart would likely experience public backlash if it accepted proceeds to support an action that most people oppose. That backlash could make the bond prohibitively expensive for the ageist donor. An antisocial bond could also increase the likelihood of regulation, especially if the course of action was widely unpopular—making the tool unappealing for both the donor and the company. Indeed, the prospect of backlash and regulatory scrutiny would likely lead to company to refuse to participate.

Ultimately, there is no guarantee that bonds that are privately welfare maximizing will be aligned with the public interest. The same is, of course, also true of a stakeholder governance model, which simply asks corporations to maximize the welfare of a larger group but does not guarantee outcomes in the public interest. For the reasons discussed above, however, CSR bonds that do not further the public interest are very unlikely to succeed.

D. *Implications*

The previous sections explored how corporate outsiders could encourage public-interested corporate decisionmaking by expanding the set of decisions that are profitable. A key implication of this analysis is that the individuals and entities with the strongest interest in seeing a corporation pursue corporate social responsibility goals are not necessarily the company's shareholders. From that observation comes several additional implications with broad consequences for corporate law and corporate governance. Most obviously, our system of corporate law, as it is currently constituted, is unlikely to lead to socially optimal levels of corporate social responsibility: Corporate stakeholders and even outsiders may place a high value on corporate social responsibility and nonetheless lack meaningful mechanisms to influence corporate behavior, especially when their preferred course of action conflicts with profit maximization. Therefore, mechanisms that elevate the voice of corporate outsiders could improve overall welfare. The CSR bond concept is just one way to do this—

other methods, such as empowering workers in governance—could help move the balance of power.[172]

A second, and related, implication is that we should recognize the limits of shareholder activism to achieve optimal levels of corporate social responsibility. Yes, shareholders may have prosocial goals, and some shareholders may even wish to prioritize those prosocial goals over wealth maximization. But the fact remains that most shareholders are only interested in corporate social responsibility that is also wealth maximizing.[173] Moreover, the most influential shareholders that could credibly threaten management with a proxy fight or other intervention are very much focused on profit maximization.[174]

What about large, broadly diversified institutional shareholders? Many scholars have focused on these "universal owners" as a possible solution to major social problems ranging from climate change[175] to financial stability risk.[176] The claim is that universal owners should have an incentive to reduce the risk of problems that would threaten their portfolio—which includes the entire market. In theory, therefore, a

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172. See Accountable Capitalism Act, S. 3348, 115th Cong. § 6 (2018); Strine, Sustainable Capitalism, supra note 74, at 10 (proposing legislation that would implement European-style workers' councils). Another possible solution would utilize voting markets to transfer votes for CSR issues to the individuals who value them most—who will not necessarily be the shareholders.

173. See Press Release, Council of Institutional Investors Responds to Business Roundtable Statement on Corporate Purpose, Council of Institutional Invs. (Aug. 19, 2019), https://www.cii.org/aug19_brt_response [https://perma.cc/VHK3-2A2W] (stating that company management should focus on "long-term shareholder value" while respecting stakeholders); see also Investment Stewardship, BlackRock, https://www.blackrock.com/corporate/about-us/investment-stewardship#our-responsibility [https://perma.cc/ZWJ7-VL93] (last visited Jan. 24, 2021) ("We engage on public policy issues and participate in market-level dialogue to contribute to the development of policies and practices that support stewardship, long-term investing and sustainable shareholder returns.").

174. See Marcel Kahan & Edward B. Rock, Hedge Funds in Corporate Governance & Corporate Control, 155 U. Pa. L. Rev. 1021, 1064 (2007) (noting that "hedge fund managers are highly incentivized to maximize the returns to fund investors").

175. See, e.g., Barzuza et al., supra note 76, at 1275 (finding it "clear that index funds' engagement on [environmental] issues has led corporate boards to more frequently and publicly discuss the issue of climate change"); Madison Condon, Externalities and the Common Owner, 95 Wash. L. Rev. 1, 5 (2020) (explaining the broad support for climate change by institutional investors to be a result of their "motivations at a *portfolio* rather than a *firm* level"); Strine, Sustainable Capitalism, supra note 74, at 6 (noting that institutional investors now focus on environmental factors).

176. See, e.g., Yesha Yadav, Too-Big-To-Fail Shareholders, 103 Minn. L. Rev. 587, 636 (2018) (theorizing that broadly diversified asset managers can help manage bank default risk); Jeffrey Gordon, Systematic Stewardship, ECGI Working Paper (Eur. Corp. Governance Inst., Working Paper No. 566/2021, 2021) https://ssrn.com/abstract=3782814 (on file with the *Columbia Law Review*) (proposing that "asset managers should seek to mitigate systematic risk, which most notably would include climate change risk, financial stability risk, and social stability risk"); Gordon, Addressing Economic Insecurity, supra note 42 (suggesting that universal investors should have an incentive to reduce systematic risk "across their portfolio as a whole—that is, the entire economy").

universal owner should push a polluting company to raise emissions standards, even if doing so would sacrifice profits, if reduced emissions would safeguard the health of the portfolio.[177]

I am skeptical that universal owner engagement is the solution, however. Even if universal owners did take an institutional portfolio-level view of their responsibilities—and the largest universal owners generally deny that this is the case[178]—how would these investors successfully implement such a strategy? The paradigmatic universal owner is an index fund, which offers investors the opportunity to secure market returns for a low cost. But in order to keep costs low, the index fund needs to minimize overall expenditures—including investments in company-specific information and market research.[179] For this reason, index funds primarily focus on governance reforms that can be implemented at scale.[180] They are not well positioned to solve problems that have generated substantial debate among informed researchers, such as how companies can minimize risks from climate change. They might not even be able to identify the worst offenders.[181]

And even if index funds had sufficient knowledge to identify problematic companies and push them to sacrifice profits in order to minimize portfolio-level risk, how would they implement that strategy? Their principal tools are governance rights, and shareholder voting is a crude tool to bring about specific operational changes. In addition, universal owners have tended to follow rather than lead. For example, the largest universal owners never bring shareholder proposals themselves, and they fail to consistently vote in favor of the prosocial shareholder proposals that are brought by others.[182] Perhaps behind-the-scenes engagement would be

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177. See Condon, supra note 175, at 5.

178. Cf. Michelle Edkins, Gerald Garvey, Ananth Madhaven, Sarah Matthews, Barbara Novick & Jasmin Sethi, BlackRock, Index Investing and Common Ownership Theories 11 (2017), https://www.blackrock.com/corporate/literature/whitepaper/viewpoint-index-investing-and-common-ownership-theories-eng-march.pdf [https://perma.cc/F4ZB-SXEZ] ("Asset managers often offer a variety of investment products, using both index and active strategies, and . . . each portfolio is managed according to a separate investment mandate.").

179. Dorothy S. Lund, The Case Against Passive Shareholder Voting, 43 J. Corp. L. 493, 510 (2018) ("Because a passive fund seeks only to match the performance of a market index—not outperform it—the fund lacks a financial incentive to ensure that the companies in their portfolio are well run.").

180. See id.; Marcel Kahan & Edward Rock, Index Funds and Corporate Governance: Let Shareholders Be Shareholders 34 (N.Y.U. Sch. of L., Working Paper No. 18-39, 2019), https://ssrn.com/abstract=3295098 (on file with the *Columbia Law Review*) [hereinafter Kahan & Rock, Index Funds] (noting that institutional investors are incentivized to obtain issue-specific information that affects multiple holdings rather than company-specific information that affects just one holding).

181. See Kahan & Rock, Index Funds, supra note 180, at 34.

182. Lucian Bebchuk & Scott Hirst, Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy, 119 Colum. L. Rev. 2029, 2050–66 (2019) (discussing the many incentives for institutional investors to underinvest in stewardship and

more effective than voting, but meaningful engagement is even more time consuming and expensive.[183] In addition, index fund engagement may be ineffective without a credible exit threat.[184]

In sum, even universal owners are unlikely to solve the problem of corporate irresponsibility. Of course, shareholders—as well as other stakeholders—can shift the objective function of a firm by influencing the type of conduct that is profit maximizing. Indeed, consumer boycotts, employee strikes, and investor divestment campaigns all attempt to alter company conduct by identifying companies with harmful business practices and affecting their bottom line. As discussed, the CSR bond is not intended to be a substitute for these practices, but a complement. Indeed, even when these campaigns are not successful, they may narrow the distance between profit sacrificing and profit maximizing enough to allow bond donors to close the gap.

CONCLUSION

This Essay offers a novel take on an old question: What is the optimal objective function for a corporation? According to Hart and Zingales, corporations should maximize shareholder welfare and not wealth.[185] But if welfare is the right lens, why limit welfare to that of shareholders? The classic answer is that administering a standard that encompasses multiple points of view is complex and prone to error or bias.[186] The CSR bond solves that problem. Indeed, whenever stakeholders value the effects of a corporate decision more than its cost, there exists a possible Coasian bargain between the corporation and the stakeholders that would maximize overall welfare. The bond simply serves as a coordinating device for stakeholders and a way for them to clearly express preferences. Although CSR bonds should not be seen as the cure for every instance of corporate irresponsibility, they represent a promising tool that would allow corporate stakeholders to dramatically influence corporate behavior without delay.

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to be excessively deferential to corporate managers); Tim McLaughlin & Ross Kerber, Index Funds Invest Trillions but Rarely Challenge Management, Reuters (Oct. 8, 2019), https://www.reuters.com/article/us-usa-funds-index-specialreports/special-report-index-funds-invest-trillions-but-rarely-challenge-management-idUSKBN1WN107 (on file with the *Columbia Law Review*).

183. See Lund, supra note 179, at 515–20.

184. See, e.g., Marco Becht, Julian Franks & Hannes F. Wagner, Corporate Governance Through Voice and Exit 24 (Eur. Corp. Governance Inst., Working Paper No. 633/2019, 2019) https://ssrn.com/abstract=3456626 (on file with the *Columbia Law Review*).

185. See Hart & Zingales, supra note 39, at 271 ("[W]e believe that shareholder welfare maximization should replace market value maximization as the proper objective of companies.").

186. See Bebchuk & Tallarita, supra note 27, at 26–27.