SHOOTING YOUR BRAND IN THE FOOT: WHAT *CITIZENS UNITED* INVITES

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INTRODUCTION

Citizens United v. FEC gives corporate managers a power they may not actually want to wield: the ability to spend corporate resources on politics.[1] Because politics is risky business, and politicizing business is risky,[2] managers that spend corporate resources on elections may impact their company's own brands.[3]

Politically active corporations in the United States are facing a perfect storm that makes political expenditures perilous. Ingredients of this perfect storm include the increasingly politically polarized American public and technological advances that place data about the political affiliations of brands in the palm of consumers'/shareholders' hands, which facilitates boycotts and divestment. My purpose here is not to make the normative claim that any customer or shareholder should pull their dollars from politically active firms. Rather, I am describing the volatile environment that corporate political spending must navigate post-*Citizens United*, where customers and shareholders are already reacting.

1. *See* Citizens United v. FEC, 558 U.S. 310, 365–66 (2010).
2. *See* NATE SILVER, THE SIGNAL AND THE NOISE: WHY SO MANY PREDICTIONS FAIL BUT SOME DON'T 411 (2012) ("In science, . . . the truth is more likely to prevail. In politics, a domain in which the truth enjoys no privileged status, it's anybody's guess."). Nota bene: throughout this piece I refer to corporations, companies and firms interchangeably—meaning a for-profit business corporation, unless otherwise specified.
3. *See* Michael Hadani & Douglas A. Schuler, *In Search of El Dorado: The Elusive Financial Returns on Corporate Political Investments*, 34 STRATEGIC MGMT. J. 165, 165–66 (2013) ("We find that firms' political investments are significantly and negatively related to market valuation and firms' cumulative political investments are likewise significantly and negatively related to market valuation and return on sales (ROS).").

The largest publicly traded companies are sometimes richer than nations.[4] They are big, global, and imposing, but they have two Achilles' heels related to their brands: rejection by their investors or shunning by their customers.[5] If the brand is damaged, the company is likely to suffer.[6] Corporations typically want to add value to their brands.[7] The goodwill[8] associated with a brand may well be a company's greatest asset.[9] Indeed, intellectual property litigation is often launched by firms to ensure that no one is using a copyrighted brand logo, trade dress, or trademark in a way that would tarnish or harm a brand.[10]

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4. *See* Vincent Trivett, *25 US Mega Corporations: Where They Rank If They Were Countries*, BUSINESS INSIDER (June 27, 2011, 11:27 AM), http://www.businessinsider.com/25-corporations-bigger-tan-countries-2011-6.

5. NAOMI KLEIN, NO LOGO: TAKING AIM AT BRAND BULLIES 343 (1999) ("Brand image, the source of so much corporate wealth, is also, it turns out, the corporate Achilles' heel.").

6. *See* Mario Biagioli, Anupam Chander & Madhavi Sunder, *Brand New World: Distinguishing Oneself in the Global Flow*, 47 U.C. DAVIS L. REV. 455, 465–66 (2013) ("Corporations now invest time and resources into leading the consumers to associate a certain brand with a certain image . . . ."); Deven R. Desai, *From Trademarks to Brands*, 64 FLA. L. REV. 981, 1009 (2012) ("In market terms, the brand is an information device and part of a network consisting of the product, the corporation, the consumer, and the community.").

7. *See* Tim Minahan, *Risk Management Lessons From Toyota*, FORBES (May 10, 2010, 6:00 PM), http://www.forbes.com/2010/05/10/toyota-suppliers-managing-technology-risk.html ("Your brand is a set of perceptions and images that represent a company or product. These are dramatically impacted by events such as product recalls, regardless of whether your company was at fault.").

8. *See* Newark Morning Ledger Co. v. United States, 507 U.S. 546, 555–56 (1993) ("Although the definition of goodwill has taken different forms over the years, the shorthand description of good-will as 'the expectancy of continued patronage,' *Boe v. Commissioner,* 307 F.2d 339, 343 (9th Cir. 1962), provides a useful label with which to identify the total of all the imponderable qualities that attract customers to the business." (citing Hous. Chronicle Publ'g Co. v. United States, 481 F.2d 1240, 1248 n.5 (5th Cir. 1973))).

9. *See* Jan Lindemann, *Brand Valuation, in* BRANDS AND BRANDING, AN ECONOMIST BOOK 1, 27 (Rita Simmons, John Clifton & Sameena Ahmad et. al eds., 2004) ("If this business were split up, I would give you the land and bricks and mortar, and I would take the brands and trade marks, and I would fare better than you."); Sara Stadler Nelson, *The Wages of Ubiquity in Trademark Law*, 88 IOWA L. REV. 731, 778 (2003) ("Most marketing scholars locate the shift in branding philosophy in 1988, when a series of trademark acquisitions made it obvious that brands had significant value."); Jerre B. Swann & Theodore H. Davis, Jr., *Dilution, An Idea Whose Time Has Gone; Brand Equity as Protectable Property, The New/Old Paradigm*, 1 J. INTELL. PROP. L. 219, 229 (1994) ("As is evident from the merger mania of the 1980's, brands are often more valuable [than] the physical assets of a business.").

10. *See* Lauren Behr, *Trademarks for the Cure: Why Nonprofits Need Their Own Set of Trademark Rules*, 54 B.C. L. REV. 243, 256 (2013) ("[The 1996 Federal Trademark Dilution Act ("FTDA")] established a federal cause of action against use that could tarnish or devalue a senior user's mark. The new amendment aimed primarily to protect senior

A brand's meaning is co-created with the public, which makes brands vulnerable to customers' and investors' disenchantment.[11] Conflicts over the propriety of the corporate role in politics are spilling onto the annual corporate proxies at many publicly traded firms.[12] And shareholders have the ability to impact a brand by selling and shorting a firm's stocks.

If the meaning of a brand is hijacked to connote something negative, then the whole worth of the company associated with the brand can be at risk. Consider the mobile payment system called "Isis," which decided to rebrand itself to "Softcard" in 2014 because of the possible confusion with the extremist group ISIS, which declared a caliphate in Syria and Iraq.[13] This is an extreme example to be sure, but the companies involved in the project, including AT&T, Verizon, and T-Mobile, decided that despite the price of re-branding, it would be less costly to launch the new payment service with a fresh brand, rather than keeping a tainted brand.[14] In this Article, I will focus primarily on events unlike the Isis/ISIS example, which was purely exogenous.[15] Here, I am primarily concerned with voluntary, unforced errors by a company that ostracizes its customers. But the Isis/ISIS example is instructive because it shows to what lengths even huge telecommunications companies will go to avoid a tainted brand.[16]

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trademark holders that had expended significant money and effort in developing brands . . . from the 'lessening . . . [of] the capacity of [their] famous mark' . . . ." (alterations in original)).

11. *See* Margaret Chon, *Slow Logo: Brand Citizenship in Global Value Networks*, 47 U.C. DAVIS L. REV. 935, 937 (2014) ("This global process of signification involves not just consumers and firms but also intermediaries and producers as well as others creating meaning around that brand's affiliated marks.").

12. *See* SUSTAINABLE INVS. INST., CORPORATE POLITICAL ACTIVITY SPECIAL REPORT—SHAREHOLDER PROPOSALS 2010–2014 (July 2, 2014), https://si2news.files.wordpress.com/2014/07/corporate-political-activity-shareholder-proposals-2010-2014-as-of-7-2-14.pdf (showing that there were 544 shareholder proposals on the proxies of public firms from 2010–2014).

13. *See* Press Release, Michael Abbot, CEO, ISIS Plans to Rebrand According to CEO, GREEN SHEET (July 7, 2014, 3:00 PM), http://www.greensheet.com/newswire.php?flag=display_story&id=35745.

14. Stephen T. Watson, *Isis? ISIS? Similarity Causes Change in Branding*, BUFFALO NEWS (Oct. 6, 2014, 6:26 PM), http://www.buffalonews.com/business/isis-isis-similarity-causes-change-in-branding-20141006.

15. *See* Aaron Perzanowski, *Unbranding, Confusion, and Deception*, 24 HARV. J.L. & TECH. 1, 22 (2010) ("The protection of goodwill as property is the sole rationale for trademark protection that is inconsistent with limits on unbranding. To the extent trademark law aims to help firms maximize the value of their brands, unbranding achieves that end.").

16. Watson, *supra* note 14.

As stock ownership has broadened to the point where one out of every two households invests, often a retail customer and a retail investor are one and the same person.[17] Here I will refer to such a person as a customer/shareholder.[18] This is a double-edged sword for firms. When many customers are investors in the same firm, it heightens the stakes of potential alienation.[19] The reactions to corporate political activity by customer/shareholders may vary.[20] Former Senator Russ Feingold has warned that political spending by companies may cause the public to view them through a limited partisan lens.[21] As Senator Feingold put it, "[w]e're going to have Republican and Democrat toothpaste."[22] What he meant by that is Republicans might

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17. *See* JOINT ECON. COMM., 106TH CONG., THE ROOTS OF BROADENED STOCK OWNERSHIP 1 (2000), http://www.jec.senate.gov/public/_cache/files/d3962893-20c0-49b8-b67b-a5cf8355 7335/the-roots-of-broadened-stock-ownership---april-2000.pdf; INV. CO. INST., 2009 INVESTMENT COMPANY FACT BOOK 8 (49th ed. 2009), https://www.ici.org/pdf/2009_ factbook.pdf (noting that "[h]ouseholds are the largest group of investors in [investment] funds, and registered investment companies managed 19 percent of households' financial assets at year-end 2008"); INV. CO. INST., U.S. HOUSEHOLD OWNERSHIP OF MUTUAL FUNDS IN 2005, at 2 (2005), http://www.ici.org/pdf/fm-v14n5.pdf.

18. *See* Taren Kingser & Patrick Schmidt, *Business in the Bulls-Eye? Target Corp. and the Limits of Campaign Finance Disclosure*, 11 ELECTION L.J. 21, 21 (2012) ("*Citizens United* has generated a storm of debate about the role of corporations and unions in American elections. . . . [T]he political agenda turned to whether disclosure of corporate and union involvement can serve as a check or tool of accountability.").

19. *See* Steve Denning, *The Debate on Shareholder Value Gets Political*, FORBES (July 25, 2014, 11:38 AM), http://www.forbes.com/sites/stevedenning/2014/07/25/love-people-use-things-says-aei-president/ ("[A]s Roger Martin pointed out in his book, *Fixing the Game*, if you delight customers, you also usually add value to shareholders, whereas the reverse isn't true.").

20. *See* Casey Quinlan, *Could SEC Political Spending Disclosure Affect Consumer Choices?*, MINYANVILLE (Jan. 28, 2013, 12:00 PM), http://www.minyanville.com/business-news/politics-and-regulation/articles/Could-SEC-Political-Spending-Disclosure-Affect/1/28 /2013/id/47517 ("It is unclear, however, if disclosure of political contributions would change where people shop or invest. Experts say maybe not, depending on the consumer and the product. . . . [B]ut like nutritional information, what was once ancillary could eventually make or break a purchasing decision.").

21. The UpTake, *Progressive Toothpaste to Fight Corporate Political Control*, YOUTUBE (June 16, 2011), https://www.youtube.com/watch?v=isg3sMKwZ1o.

22. THOMAS L. FRIEDMAN & MICHAEL MANDELBAUM, THAT USED TO BE US: HOW AMERICA FELL BEHIND IN THE WORLD IT INVENTED AND WE CAN COME BACK 245 (2011) (quoting Senator Feingold); *see also* Matt A. Vega, *The First Amendment Lost in Translation: Preventing Foreign Influence in U.S. Elections After* Citizens United v. FEC, 44 LOY. L.A. L. REV. 951, 988–89 n.233 (noting that customer boycotting should be recognized as playing a significant role in limiting the corrupting influence of corporate political spending); *University of Connecticut School of Law Conference on the Future of Campaign Financing in America*, CT-N CONN. NETWORK (Oct. 19, 2012), http://ct-n.com/ondemand. asp?ID=8311.

reject certain brands because of their liberal leanings, and Democrats might reject certain brands because of their conservative cache.

One reason political spending can generate negativity is because the customer base for many brands will generally be politically heterogeneous. Yet, as research from Pew has shown, America is becoming more politically polarized.[23] So, to associate a brand with one of the major American political parties is likely to turn off customers who strongly affiliate themselves with the opposite political party, provided they know of the corporate political spending. And furthermore, some customers may find any corporate political spending abhorrent no matter which political party is supported.[24] Shareholders, who are just as politically heterogeneous, may have similar worries about corporate political spending.[25] Shareholders may view it as just one more type of objectionable perquisite consumption by corporate managers.[26] And while a corporation may not care it loses a single individual as an investor, it does not want to lose big institutional investors like big public pension funds CalPERS or NYPERS, who may be alienated for similar reasons as a retail investor.

In business, being seen as partisan is not necessarily a winning strategy. As Michael Jordan once said, "Republicans buy sneakers too."[27] A customer/shareholder incensed by corporate political spending could pull her patronage and her investment dollars in response. Indeed, consumers/shareholders have a broader array of technologies to

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23. *See* Carroll Doherty, *7 Things to Know About Polarization in America*, PEW RESEARCH. CTR. (June 12, 2014), http://www.pewresearch.org/fact-tank/2014/06/12/7-things-to-know-about-polarization-in-america/ ("The share of Americans who express consistently conservative or consistently liberal opinions has doubled over the past two decades, from 10% to 21%. As a result, the amount of ideological overlap between the two parties has diminished." (emphasis omitted)).

24. *See* Peter Hamby, *Company Men: The U.S. Chamber Flexes its New Political Muscle*, CNN, http://www.cnn.com/interactive/2014/politics/hamby-midterms-chamber-tea-party/ (last visited May 16, 2016) ("But corporations don't want to be seen spending in campaigns, either by their shareholders or their customers or retail operations.").

25. Shareholder protection has inspired Congressional regulation of corporate political spending in laws like the 1907 Tillman Act. *See* ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 250 (2014) ("The concern . . . was that corporations . . . were using the money of their shareholders . . . for political purposes with which they might disagree; [Theodore] Roosevelt was explicit in saying that 'directors should not be permitted to use shareholders' money for such purposes.'").

26. Daniel J. Morrissey, *M&A Fiduciary Duties: Delaware's Murky Jurisprudence*, 58 VILL. L. REV. 121, 125–26 (2013) ("This has given management (the officers and directors) and their allies (bankers, lawyers, analysts, accountants, etc.) a great opportunity to enrich themselves at the expense of the shareholders and other stakeholders in the company (employees, consumers, communities, and society at large).").

27. KLEIN, *supra* note 5, at 186.

register their dismay with a politically active corporation. A new crop of smartphone applications has been designed specifically to enable consumers to avoid buying products that conflict with their personal ideologies.[28] Want to boycott every product produced by Koch Industries?[29] Well guess what? There's an App for that.[30] In fact, there are at least three Apps to help end-users avoid products that conflict with their core beliefs.[31]

In the years since *Citizens United*, the legal academy has focused on what this case will mean for the political process[32] and, to a lesser extent, what it will mean for shareholders.[33] Comparatively, little attention has been focused on customers.[34] And in the five years since

28. *See* Kevin D. Williamson, *Ender's Boycott*, NAT'L REV. (July 12, 2013), http://www.nationalreview.com/node/353276/print ("Buycott, the consumer-activism app that lets you scan products and match your purchases with your principles . . . ."); Victoria Bassetti, *How to Make Campaign Finance Disclosure Work*, BRENNAN CTR. BLOG (May 11, 2015), https://www.brennancenter.org/blog/how-make-campaign-finance-disclosure-work (citing BuyPartisan App).

29. *See* Patrick Lorentz, *Seller Beware: Buycott App Reveals Ideologies Behind Brands*, GREENBIZ (July 22, 2013, 6:00 AM), http://www.greenbiz.com/blog/2013/07/22/seller-beware-buycott-app-reveals-ideologies-behind-brands ("The [Buycott] app is simple but effective.").

30. *Id*.

31. *See infra* Part VI. In addition to the smartphone apps that are discussed in this piece, there are also Ethical Barcode, which allows users to learn more about the environmental, social and ethical ramifications of the products they are about to purchase; Good Guide, which allows customers to access information on a product's safety, health, environmental impact and social responsibility; and Shop Ethical, which provides information on environmental impacts of goods for the Australian market. *See* ETHICAL BARCODE, http://ethicalbarcode.com (last visited May 16, 2016); GOODGUIDE, http://www.good guide.com (last visited May 16, 2016); SHOP ETHICAL!, http://www.ethical.org.au (last visited May 16, 2016).

32. *See, e.g.*, CHEMERINSKY, *supra* note 25, at 249 ("*Citizens United v. Federal Election Commission*, in 2010, significantly changed the American political system."); Monica Youn, *First Amendment Fault Lines and the* Citizens United *Decision*, *in* MONEY, POLITICS AND THE CONSTITUTION: BEYOND *CITIZENS UNITED* 95 (Monica Youn ed., 2011); Reza Dibadj, *Expressive Rights for Shareholders After* Citizens United*?*, 46 U.S.F. L. REV. 459, 467–69 (2011); Jessica A. Levinson, *We the Corporations?: The Constitutionality of Limitations on Corporate Electoral Speech After* Citizens United, 46 U.S.F. L. REV. 307, 307–11 (2011).

33. *See, e.g.*, Lucian A. Bebchuk & Robert J. Jackson, Jr., Comment, *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 89–90 (2010); John C. Coates IV, *Corporate Politics, Governance, and Value Before and After* Citizens United, 9 J. EMPIRICAL LEGAL STUD. 657, 658–59 (2012).

34. *See, e.g.*, Deven R. Desai, *Speech, Citizenry, and the Market: A Corporate Public Figure Doctrine*, 98 MINN. L. REV. 455, 480–81 (2013) ("Today the information conveyed through a trademark often concerns the political issues of the day, especially when considering source and quality of goods and services."); Theresa J. Lee, *Democratizing the Economic Sphere: A Case for the Political Boycott*, 115 W. VA. L. REV. 531, 555–65 (2012).

Citizens United, technological advances have empowered the public to know more about the politics of the brands it buys than ever before. This technological aspect has yet to be fully explored. This piece will start to fill those gaps in the literature.

Here is how this Article will proceed. In Part I, this piece will explore why brands are valuable to the firms that own them, as well as why the meaning of a brand is easily co-opted in our wired, social media environment. In Part II, I discuss the new legal terrain that companies and their brands must navigate post-*Citizens United v. FEC*. In Part III, I chronicle the increasing partisan divide among Americans. In Part IV, I note that historically, as well as contemporaneously, customers have used boycotts to express their displeasure with the behavior of sellers of goods. In Part V, I examine how shareholders are also impacted by corporate political activity and how shareholders have been reacting to this spending. If customers' ultimate power is to boycott, investors ultimate power is to divest. In Part VI, I look at the three new smartphone applications ("Apps") that enable customers to instantly access information about firm's political affiliations and positions. These technologies enable boycotts on a small and large scale. And finally, in Part VII, I explore how customers and shareholders have caused what is known as the "ALEC Exodus"—an effort to get corporations to abandon membership in the American Legislative Exchange Council ("ALEC").

I. WHAT IS A BRAND?

Nearly from the moment the average American opens her eyes in the morning to the moment she goes to sleep, branding is everywhere from the products in her bathroom, the food in her kitchen, the vehicles in her garage, the billboards on her commute, the sign outside her workplace, the product placements on TV, or the banner ads online. Brands are so ubiquitous in our lives that they sometimes slip into genericide, or referring to the brand name instead of the actual generic object. Linguists Julie Sedivy and Greg Carlson, in their book, *Sold on Language*, provide multiple examples of how brands have become shorthand for objects in our daily lives:

> If you stroll across your *linoleum* floor over to your *formica* countertop, check on the stew in the *crock-pot*, pick up the spilled *kitty litter* in the corner with a *kleenex*, pour a bowl of *granola*, and open your freezer to take out a *popsicle* before

> proposing a game of after-dinner *ping pong*, you are contributing to the genericide of these brand names.[35]

Even as brands seep into our language, they are vulnerable to picking up negative associations and generating revulsion. As Professor Tamara Piety notes in her book, *Brandishing the First Amendment*, "[i]t is possible to create a brand out of whole cloth. However, because brand value is so dependent on imagery built by communication efforts, it is, to some extent, always susceptible to sudden shifts in public perceptions. Such shifts may include total collapse of all brand value."[36] Or as David D'Alessandro, president of John Hancock Mutual Life Insurance, once quipped, "[i]t can take 100 years to build up a good brand and 30 days to knock it down."[37]

Before I can consider whether corporate political spending could impact brand, I must first address the issues of what is a brand?[38] What constitutes a "brand" is a source great debate.[39] The answer may depend on who is asking, who is answering and the context of the conversation. A brand may mean one thing to an economist,[40] another to a cultural critic,[41] and still another to an intellectual property lawyer.[42] I will discuss each in turn.

35. JULIE SEDIVY & GREG CARLSON, SOLD ON LANGUAGE: HOW ADVERTISERS TALK TO YOU AND WHAT THIS SAYS ABOUT YOU 47 (2011).

36. TAMARA R. PIETY, BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA 33 (2013).

37. KLEIN, *supra* note 5, at 345.

38. *See Can Brand Be Measured?*, SENSE, 2002, at 14, http://www.lippincott.com/files/documents/sense-magazine/96/files/assets/downloads/sense96.pdf ("Strong brands can go off course, suffer a blow or simply fall apart. . . . [W]hen a brand weakens, the ramifications for the underlying business will be all too easy to gauge in lost market cap, profits, revenue and future sales. You never know how good you've had it until it's gone.").

39. *See* Megan Bartkowski, *Trademarks as Components of Goodwill*, 19 J. CONTEMP. LEGAL ISSUES 165, 166 (2010) ("Brand valuation illustrates the interrelationship between trademarks and goodwill."); Deven R. Desai & Spencer Waller, *Brands, Competition, and the Law*, 2010 BYU L. REV. 1425, 1431 (2010) ("For our purposes as legal academics, we will refer to brands as manufacturers' or service providers' coordinated use of design, packaging, graphics, logos, advertising, promotion, public relations, marketing, distribution, pricing, communications, and other strategies to create a durable identity and loyalty with their consumers."); Michael J. Freno, *Trademark Valuation: Preserving Brand Equity*, 97 TRADEMARK REP. 1055, 1056 (2007) ("[B]rands . . . go further, conveying information about a particular product or service, the core trademark behind the brand, . . . domain names, sub-brands, product packaging, the manufacturer and its trade name, advertising of the product, distribution of the product, celebrity endorsements, and even the shelf displays at retailers and/or displays on the Internet.").

40. *See infra* Part I.A.

41. *See infra* Part I.B.

42. *See infra* Part I.C.

A. Dollars and Sense of Brands

Branding originated as a way to distinguish otherwise generic products like piles of dry goods. As Naomi Klein explains in her book *No Logo*, in the second half of the nineteenth century:

> [T]he market was now being flooded with uniform mass-produced products that were virtually indistinguishable from one another. Competitive branding became a necessity of the machine age—within a context of manufactured sameness, image-based difference had to be manufactured along with the product . . . . The first task of branding was to bestow proper names on generic goods such as sugar, flour, soap and cereal, which had previously been scooped out of barrels by local shopkeepers. In the 1880s, corporate logos were introduced to mass-produced products like Campbell's Soup, H.J. Heinz pickles and Quaker Oats cereal.[43]

And this process continues today, as firms try to distinguish their company's cookie-cutter SUV, sedan, or pick-up truck from another company's cookie-cutter SUV, sedan, or pick-up truck merely with a hood ornament or a name on the bumper of the vehicle.

At its base, the economic meaning of a brand is that value-added quality of a product that convinces a customer to pay a premium over a similar generic product because of a positive association with the source of the product.[44] Thus, a customer will pay 50% more for a white Benetton t-shirt because it is a Benetton t-shirt, even though objectively it is no different than a no-name white t-shirt.[45] Or if there is no generic alternative, a customer may buy a novel product because she trusts the company behind it, for instance, the Apple "iPod" when it was first introduced to market. The customer buys the never-seen-before iPod

43. KLEIN, *supra* note 5, at 6.

44. *See* Mark Fenster, *Coolhunting the Law*, 12 HARV. NEGOT. L. REV. 157, 161 (2007) ("The value [of the brand] manifests itself in two senses: First, in the premium that its owner can charge above what a generic or private brand can offer for a similar product; and second, in the relative market share of the branded product in the relevant product market . . . ."); *see also The Lemon Dilemma*, THE ECONOMIST (Oct. 11, 2001), http://www.economist.com/node/813705 ("[B]rands do help to make the world easier to navigate. A Coke or a Big Mac, say, is almost the same everywhere in the world. The customer knows the quality of a product by its brand.").

45. *See* Jeremy N. Sheff, *Biasing Brands*, 32 CARDOZO L. REV. 1245, 1260 (2011) ("One way of conceptualizing brand equity, then, is as the total value of a branded product less the value of an equivalent, unbranded product.").

because she trusts the Apple brand. That trust is a fragile bond bringing the customer back to buy other clothes from Benetton or other electronics from Apple despite the availability of less expensive alternatives.[46] This is what some call "brand loyalty."[47]

Sometimes, a "brand" only refers to a line of products like Chevrolet, Buick or Cadillac, which are each the names of product lines produced by the parent company General Motors ("GM"). In other cases, a "company brand" is attached to every line of products that a company produces.[48] Nike is a clear example of a company brand, as its swoosh logo is part of the branding of nearly every product that Nike sells.[49] In either case, the "branding" may help a consumer navigate among products by providing a helpful signal of higher quality in a market rife with informational asymmetries between buyers and sellers.[50] Or as economist George A. Akerlof once explained, "[b]rand names not only indicate quality but also give the consumer a means of retaliation if the quality does not meet expectations. For the consumer will then curtail future purchases."[51]

Evidence of the importance of branding to corporations can be seen in the public relations and advertising budgets of firms.[52] Most of the

46. *See* Shahar J. Dilbary, *Famous Trademarks and the Rational Basis for Protecting "Irrational Beliefs*,*"* 14 GEO. MASON L. REV. 605, 623 (2007) ("[T]he trademark does not act to increase sales only by economizing on consumers' search costs or by minimizing consumers' error costs.").

47. *See* D. Whitaker, *The Derivation of a Measure of Brand Loyalty Using a Markov Brand Switching Model*, 29 J. OPERATIONAL RES. SOC'Y 959, 959 (1978) ("[We d]efine brand loyalty as the proportion of consumers repurchasing the brand on the next occasion without persuasion . . . .").

48. *See* Katherine E. Halmen, *The Effects of the Corporate Diversification Trend on Trademarks*, 10 MARQ. INTELL. PROP. L. REV. 459, 463 (2006) ("In particular, a company may decide to adopt a diversification strategy because it will enable the company to use a common brand name (one already known in the current business area) across a variety of new business endeavors. Such use will enhance the value of the brand name by making it more well known among consumers.").

49. See Geraldine E. Willigan, *High–Performance Marketing: An Interview with Nike's Phil Knight*, HARV. BUS. REV. (July–Aug. 1992), https://hbr.org/1992/07/high-performance-marketing-an-interview-with-nikes-phil-knight.

50. LYNN FREWER & HANS VAN TRIJP, UNDERSTANDING CONSUMERS OF FOOD PRODUCTS 167 (2007) ("[C]ompany-derived value from brand equity is largely based on the fact that brands add value for consumers in terms of ease of promotion of information processing, increased confidence in choice and increased level of satisfaction.").

51. George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 499–500 (1970).

52. *See* STRATEGIC COMMC'N & PUB. RELATIONS CTR., UNIV. S. CAL. ANNENBERG SCH. OF COMMC'N & JOURNALISM, GAP VII: SEVENTH COMMUNICATION AND PUBLIC RELATIONS GENERALLY ACCEPTED PRACTICES STUDY (Q4 2011 DATA) 15 (2012), http://ascjweb.org/gapstudy/wp-content/uploads/2014/06/GAP-VIII-Presentation-Final-6.12.2014.pdf

corporate money for branding goes to advertising. As a report in *Fortune* indicated, "US companies spend $150 billion annually on advertising and only $5 billion on public relations."[53] *The Economist* reported that "[w]orldwide advertising expenditure grew by almost 7% in 2004 to $370 billion."[54] An article in *Forbes* by Scott Goodson concluded, "[p]roducts have life cycles. Brands outlive products. Brands convey a uniform quality, credibility and experience. Brands are valuable."[55]

The worth of a brand to a company is often millions of dollars, and a few cases, multiple billions of dollars.[56] As investment bank Credit Suisse argued in 2010: "[w]e believe brand is an equally powerful ... advantage, but one often ignored by financial markets owing to its intangible nature. Our research indicates that companies focused on brand building consistently generate outsized long-term growth,

(indicating the following spending in 2011: public companies making less than $1 billion have an average public relations budget of $1.7 million; public companies making between $1 billion and $4.99 billion have an average public relations budget of $4.8 million; public companies making between $5 billion and $9.99 billion have an average public relations budget of $3.1 million; public companies making between $10 billion and $19.99 billion have an average public relations budget of $14.6 million; public companies making between $20 billion and $40 billion have an average public relations budget of $12.6 million; public companies making more than $40 billion have an average public relations budget of $28 million).

53. Gregory Galant, *Why Public Relations Gets No Respect*, FORTUNE (Nov. 15, 2012, 8:27 PM), http://fortune.com/2012/11/15/why-public-relations-gets-no-respect/.

54. *Back on the Up*, ECONOMIST (Dec. 29, 2004), http://www.economist.com/node/3523042.

55. Scott Goodson, *Why Brand Building is Important*, FORBES (May 27, 2012, 4:47 AM), http://www.forbes.com/sites/marketshare/2012/05/27/why-brand-building-is-important/#2bab069f1e72.

56. KLEIN, *supra* note 5, at 8 ("[W]ith the Kraft purchase, a huge dollar value had been assigned to something that had previously been abstract and unquantifiable—a brand name. This was a spectacular news for the ad world, which was now able to make the claim that advertising spending was more than just a sales strategy: it was an investment in cold hard equity."); Justin Anderson, *Measuring The Financial Value of Brand Equity*, J. BUS. ADMIN. ONLINE, Spring 2011, at 1, 1 ("[B]rand equity is defined as the financial value that a firm derives from customer response to the marketing of a brand."); Desai, *supra* note 6, at 1018–19 ("[I]f people are buying a brand as a brand, then that brand has value. Indeed, well before modern assessments of brand value developed, companies asserted that brands were worth millions of dollars. . . . [F]rom the late 1980s onwards, 'intangible assets—usually in the form of brand names—represent[ed] the larger share' of a company's overall value." (third alteration in original) (footnote omitted)); Ivana Kottasova, *The Value of a Brand: Apple and Google Top $100 Billion*, CNN (Oct. 10, 2014, 2:32 AM), http://www.cnn.com/2014/10/09/business/most-valuable-brands/.

profitability, and returns."[57] Although internally generated brands are not recognized by GAAP as an asset for the corporation that develops them, nonetheless, as a practical reality for publicly held corporations,[58] a brand can be very valuable to a corporation since "[b]rand value represents future purchases and cash flow to the owners of the brands that they would not otherwise enjoy. It is now often the case that a company's intangible assets are worth far more than its tangible assets . . . ."[59] The value of the brand to its company is sometimes referred by the short hand of "brand equity" in the world of marketing.[60] This value is notoriously difficult to ascertain because consumers do not explicitly announce the values they place in company brands in ways that are readily quantifiable; instead, they announce their preferences through the purchases they make and the attitudes they have towards specific brands.[61]

However, the value of a brand is also the power to evoke more meanings than merely the source of a particular product.[62] A company's brand value, while tangible in such forms as logos, symbols, and

57. OMAR SAAD & SPENCER HILL, CREDIT SUISSE, GREAT BRANDS OF TOMORROW (2010), http://www.rankingthebrands.com/PDF/Credit%20Suisse%2027%20Great%20Brands%20of%20Tomorrow%202010.pdf.

58. ERNST & YOUNG LLP, FINANCIAL REPORTING DEVELOPMENTS: BUSINESS COMBINATIONS 46 (2015), http://www.ey.com/Publication/vwLUAssetsAL/FinancialReportingDevelopments_BB1616_BusinessCombinations_30December2015/$FILE/FinancialReport ingDevelopments_BB1616_BusinessCombinations_30December2015.pdf ("[In 2011 FASB clarified accounting rules for mergers indicating] the acquirer recognizes the acquired identifiable intangible assets, such as a brand name, . . . that the acquiree did not recognize as assets in its financial statements because it developed them internally and charged the related costs to expense."); *see also Goodwill and Other Intangible Assets—Key Differences Between U.S. GAAP and IFRSs*, DELOITTE, http://www.iasplus.com/en-us/standards/ifrs-usgaap/goodwill (last visited May 16, 2016).

59. Raymond Perrier, *Valuation Issues: The Value of a Brand as a Financial Asset*, CORP. FIN. REV., Mar.–Apr. 1998, at 1, 1.

60. Orley Ashenfelter & Daniel Hosken, *The Effect of Mergers on Consumer Prices: Evidence from Five Mergers on the Enforcement Margin*, 53 J.L. & ECON. 417, 425–26 (2010) (evaluating five mergers from the 1990s "involv[ing] products with significant brand equity" and the mergers' competitive significance).

61. Kevin Lane Keller, *Measuring Brand Equity*, *in* THE HANDBOOK OF MARKETING RESEARCH: USES, MISUSES, AND FUTURE ADVANCES 546, 546–47 (2006).

62. Heather Hamel, *Valuing the Intangible: Mission Impossible? An Analysis of the Intellectual Property Valuation Process*, 5 CYBARIS AN INTELL. PROP. L. REV. 183, 201 (2014) ("Just like patent valuation, the test of trademark valuation seems very blurry, but we see stronger correlations with respect to brand value . . . . [C]onsumer recognition, combined with a mark's exclusivity and abundance of registrations seems to drive trademark valuation."); Aaron Perzanowski, *Unbranding, Confusion, and Deception*, 24 HARV. J.L. & TECH. 1, 2 (2010) ("The value of a brand derives, in part, from its power to elicit a connection in the minds of consumers to the products or services that the brand represents.").

packaging, is somewhat intangible, as its main value lies in the minds of consumers.[63] Given that much of the value of a brand is actually the positive associations in the minds of the buying public, the company's reputation itself can be a locus of value for the firm. And yet, as *The Economist's* Intelligence Unit wrote, "[r]eputation is one of the most important corporate assets, and also [it is] one of the most difficult to protect."[64] A company with a strong, positive public image is more likely to ensure stable quarterly earnings, future growth, and a higher general market value.[65]

Despite its significant impact on corporate well-being and performance, reputational risk is difficult to quantify and control.[66] The Board of Governors of the Federal Reserve has established a regulatory definition for reputational risk, recognizing it as "the potential that negative publicity regarding an institution's business practices . . . will cause a decline in the consumer base, costly litigation, or revenue reductions."[67] Considering the negative impact that reputational risk has on a corporation, any adverse event that calls into question a corporation's public image might be seen as a threat to the company's immediate market value, and future cash flows, reducing the equity value of the firm.[68] Proper risk management implicates the fiduciary duties that directors of firms owe their shareholders.[69] Or as one author noted, "[s]ince it is the duty of [the] directors to promote the success of the company, risks to the brand (or 'reputation') must always be high on the agenda."[70] Brand risk could be thought of as a subset of reputational risk except that it is the company's brand value that is in

63. Keller, *supra* note 61, at 546–47.

64. ALASDAIR ROSS, ECONOMIST INTELLIGENCE UNIT, REPUTATION: RISK OF RISKS 2 (2005), http://www.acegroup.com/eu-en/assets/risk-reputation-report.pdf (last visited May 16, 2016).

65. Robert G. Eccles, Scott C. Newquist & Roland Schatz, *Reputation and its Risks*, HARV. BUS. REV., Feb. 2007, at 104, 104.

66. JASON PERRY & PATRICK DE FONTNOUVELLE, FED. RESERVE BANK OF BOS., MEASURING REPUTATIONAL RISK: THE MARKET REACTION TO OPERATIONAL LOSS ANNOUNCEMENTS 4 (2005), https://www.bostonfed.org/bankinfo/qau/research/papers/jppd1005.pdf.

67. Letter from Richard Spillenkothen, Dir., Div. of Banking Supervision & Regulation, Fed. Reserve Bank, to the Officer in Charge of Supervision at Each Federal Reserve Bank (Nov. 14, 1995), http://www.federalreserve.gov/BOARDDOCS/srletters/1995/sr9551. htm.

68. PERRY & FONTNOUVELLE, *supra* note 66, at 4–5.

69. *See* DAVID ABRAHAMS, BRAND RISK: ADDING RISK LITERARY TO BRAND MANAGEMENT 5–7 (2008).

70. *Id.* at 8.

play and not necessarily the whole firm.[71] "Brand risk" is simply the probability that "the brand's continued capacity to create value, commitment or influence among key stakeholders" may suffer.[72]

B. Brands as Expression

From a firm's point of view, a brand is another asset, but from the point of the consuming public, brands have taken on broader social meanings.[73] They are heuristics that stand in for other things besides the source company, like glamour, prestige, and status for high-end brands or shoddiness, weakness and powerlessness for more mundane brands.[74]

Frequently marketers will try to monetize positive secondary meanings as well. As Renzo Rosso, founder of Diesel, put it: "We don't sell products, we sell the emotions our products generate."[75] The job of advertising the brand is to inspire the customers' desire to buy more.[76] As Kevin Roberts, CEO Worldwide of Saatchi & Saatchi, argued:

> effective branding hinges on inspiring love in [the] hearts of the consumer, and stoking a loyalty that "goes beyond all reason."

71. John A. Zinno, Jr., *Enterprise Risk Management—What Educational Institutions Should Be Considering*, BLUMSHAPIRO (Aug. 13, 2013), http://blumshapiro.com/kbarticle/enterprise-risk-management-what-educational-institutions-should-be-considering ("Brand Risk—This is the kind of risk that could negatively impact an institution's reputation and/or brand, both of which are critically important to ongoing success.").

72. Sarah Veysey, *To Manage Brand Risk, Be Aware, Plan, Communicate*, BUS. INS., May 14, 2001, at 46, 46.

73. *See* Naomi Klein, *The Discarded Factory: Degraded Production in the Age of the Superbrand, in* A NATION AT WORK: THE HELDRICH GUIDE TO THE AMERICAN WORKFORCE 189, 189 (Herbert A. Schaffner & Carl E. Van Horn eds., 2003) ("'Products are made in the factory,' says Walter Landor, president of the Landor branding agency, 'but brands are made in the mind.'").

74. *See* JAMIL AMMAR, THINK CONSUMER: THE ENFORCEMENT OF THE TRADE MARK QUALITY GUARANTEE REVISITED, A LEGAL AND ECONOMIC ANALYSIS 134 (2011) ("Tibor Kalman observes . . . : 'the original notion of the brand was quality, but now brand is a stylistic badge of courage.'"); Jacob H. Rooksby, *University™: Trademark Rights Accretion in Higher Education*, 27 HARV. J. L. & TECH. 349, 358 (2014) ("No matter the protection afforded (common law, state, or federal), the primary theory behind providing trademark protection is the same. Trademarks reduce consumer search costs by allowing consumers to quickly identify those goods and services that emanate or are affiliated with a source they have come to recognize as denoting quality.").

75. SEDIVY & CARLSON, *supra* note 35, at 20.

76. *See* Tim Munoz & Shailendra Kumar, *Brand Metrics: Gauging and Linking Brands with Business Performance*, 11 J. BRAND MGMT. 381, 383 tbl.1 (2004). If more customers are acquired per unit of time as branding efforts continue, then it may indicate that the brand is stronger than it was before. *Id.*

> According to Roberts, . . . the best brands are "Lovemarks"—brands that move people to buy not because of the inherent nature of the product, but because of the irrational devotion they inspire.[77]

While brand owners try to commodify love of a brand, increasingly in our modern social media world, the public can subvert the corporate meaning of a brand to connote something new and different—on occasion something antithetical to what the firm that owns the brand would have wanted. As Professor Sheff illuminates, there can be real tension between brand owners and brand end users: "Where the consumption is performed by a brand renegade—someone who identifies with some aspects of the brand's cultivated image but who also generates social meanings inconsistent with that image—we face a conflict for control between the brand renegade and the brand owner."[78]

C. *That Brand Belongs to Me*

Despite the economic value or social and cultural meanings of a brand, from a legal standpoint, corporations keep control of their brands primarily through intellectual property law—like trademark protection.[79] As Justice Frankfurter once held: "The protection of trade-marks is the law's recognition of the psychological function of symbols."[80] In other words, the corporation will assert ownership rights like the right to exclude others from using the same brand for the same line of products.[81] This is rooted in property law. Just as I can yell at kids to get off my lawn because of my rights in real property; so too can corporate owners of a piece of intellectual property tell unwanted users

77. SEDIVY & CARLSON, *supra* note 35, at 21.

78. Jeremy N. Sheff, *Brand Renegades*, 1 N.Y.U. J. INTELL. PROP. & ENT. L. 128, 158 (2011).

79. Freno, *supra* note 39, at 1056 ("Essentially, the brand comprises all publicly identifiable knowledge associated with a particular product, service, or company. The trademark is just the legally protectable portion.").

80. Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co., 316 U.S. 203, 205 (1942).

81. *See* K.J. Greene, *Abusive Trademark Litigation and the Incredible Shrinking Confusion Doctrine—Trademark Abuse in the Context of Entertainment Media and Cyberspace*, 27 HARV. J.L. & PUB. POL'Y 609, 631–32 (2004) ("Corporations using trademark law to protect their corporate image at the expense of the marketplace of ideas . . . arguably engage in abusive litigation policies, fueled by the expansion of IP law. The Mattel Corporation, for example, attacked a charity fund-raiser for critically ill children called 'Barbie Grants a Wish' weekend.").

to cease and desist. This corporate-command-and-control approach to brand management is still predominant.[82]

Clearly brands are important enough to companies that they spend a great amount of time building up brand image[83] and even litigating to defend the brand from tarnishment.[84] Yet these lawsuits to protect intellectual property can become particularly tone-deaf when they go after artistic or other playful uses of a trademark or copyright associated with a particular brand.[85] This approach of seeking protection of a brand through intellectual property litigation resulted in the peculiar case of Mattel suing a band called Aqua for composing a song about Barbie.[86] "'This is a business issue, not a freedom of speech

82. KLEIN, *supra* note 5, at 5 ("Think of the brand as the core meaning of the modern corporation, and of the advertisement as one vehicle used to convey that meaning to the world.").

83. *See* Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717, 1728–29 (1999) (discussing the increased value of trademarks).

84. Sandra L. Rierson, *The Myth and Reality of Dilution*, 11 DUKE L. & TECH. REV. 212, 246 (2012) ("[T]arnishment is more commonly associated with an alternative policy justification for trademark law, the preservation of the mark owner's goodwill. Unlike the injury suffered by a mark holder in a case of trademark infringement, the alleged injury to goodwill targeted by a cause of action for dilution by tarnishment is indirect . . . ."). *See, e.g.*, L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26, 33–34 (1st Cir. 1987) (denying an injunction against a satirical magazine parodying L.L. Bean); V Secret Catalogue, Inc. v. Moseley, 558 F. Supp. 2d 734, 750 (W.D. Ky. 2008), *aff'd*, 605 F.3d 382 (6th Cir. 2010) (granting a preliminary injunction where plaintiff showed that the marketing of adult videos and sexy toys under the moniker "Victor's Secret" and "Victor's Little Secret" would likely tarnish the Victoria's Secret brand); Eastman Kodak Co. v. Rakow, 739 F. Supp. 116, 118–20 (W.D.N.Y. 1989) (enjoining a comedian's use of "Kodak" in an act that included sexual and lewd acts because the use tarnished the company's trademark); Am. Express Co. v. Vibra Approved Labs. Corp., No. 87 CIV. 8840 (CSH), 1989 WL 39679, at *10 (S.D.N.Y. Apr. 19, 1989) (enjoining defendant's "condom card" on the grounds that it diluted American Express' trademark through tarnishment); Pillsbury Co. v. Milky Way Prods., Inc., No. C78-679A, 1981 WL 1402, at *14 (N.D. Ga. Dec. 24, 1981) (concluding that plaintiff was entitled to an injunction against defendant's sexually explicit use of the Pillsbury characters because the use could cause business damages to plaintiff, which is all that the Georgia anti-dilution statute required); Coca-Cola Co. v. Gemini Rising, Inc., 346 F. Supp. 1183, 1190–91 (E.D.N.Y. 1972) (citing dilution by tarnishment as an alternative basis for enjoining an "Enjoy Cocaine" poster that employed the trademark of Coca-Cola because it endangered Coca-Cola's good will in business); Girl Scouts of U.S. v. Personality Posters Mfg. Co., 304 F. Supp. 1228, 1235–36 (S.D.N.Y. 1969) (denying an injunction against a poster's satirical use of an image of a pregnant Girl Scout).

85. *See* Sonia K. Katyal, *Semiotic Disobedience*, 84 WASH. U. L. REV. 489, 513–14 (2006) (discussing brand parodies).

86. Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 898–899 (9th Cir. 2002).

> Mattel . . . reaped huge profits by encouraging young girls to build elaborate dream lives around their doll, but it still wants that relationship to be a monologue. The toy company, which boasts of having "as many as 100 different

issue,' a Mattel spokesperson told *Billboard*. 'This is a $2 billion company, and we don't want it messed around with, and situations like this gradually lead to brand erosion.'"[87] The court hearing the case disagreed with Mattel.[88] As the court in the case articulated: "[T]he song . . . lampoons the Barbie image and comments humorously on the cultural values Aqua claims she represents. Use of the Barbie mark in the song Barbie Girl [sic] therefore falls within the noncommercial use exemption . . . ."[89]

Back in the late 1990s, Naomi Klein worried about the litigious defense of brands as being anti-democratic.[90] She argued: "When we lack the ability to talk back to entities that are culturally and politically powerful, the very foundations of free speech and democratic society are called into question."[91] She was writing in a largely pre-social media world. The web was well established and email provided a way to gripe to personal acquaintances. But a decade and a half later, the world of push technologies bombarding customer/shareholders with ads containing brands is simply not the only way that modern wired Americans experience brands anymore.[92]

In contrast to a time when brand owners could speak in a monologue and could try to litigate away isolated attempts by end-users to start a dialog using brands in renegade ways, now, in 2016, brands are often in an environment where millions of end-users can talk back to the brand in negative and positive ways simultaneously.[93] Consider the example of Super Bowl ads that get "pre-released" online before the big game.[94] End-users can opt-in to see the ads and help create buzz by

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> [trademark] investigations going on at any time throughout the world," is almost comically aggressive . . . .

KLEIN, *supra* note 5, at 181.

87. KLEIN, *supra* note 5, at 180.

88. *Mattel, Inc.*, 296 F.3d at 902.

89. *Id.* at 907.

90. KLEIN, *supra* note 5, at 343.

91. *Id.* at 182.

92. PIETY, *supra* note 36, at 34 ("[A]dvertising efforts are directed sometimes at multiple audiences—not just to consumers, but also to investors and the general public . . . .").

93. *See, e.g.*, Jon Krawczynski & Anne M. Peterson, *NBA's Quick Action Helps Rescue Clippers' Brand*, YAHOO! SPORTS (May 4, 2014, 4:44 PM), http://sports.yahoo.com/news/nbas-quick-action-helps-rescue-175437862--nba.html (observing that Clippers' owner Donald Sterling's comments created a Twitter furor rapidly alleviated by NBA Commissioner Silver's quick action).

94. The first "viral" pre-release was Volkswagen's 2011 "The Force" ad, which was viewed eleven million times in the week before the Super Bowl. *See* Saba Hamedy & Meg James, *Why Are Super Bowl Ads Posted Online Early?*, L.A. TIMES (Feb. 1, 2015, 5:35

sharing the ads with professional and friend networks—giving the ad a wider audience than it would have had on Super Bowl Sunday alone.[95] But this is a risky approach if the ad is poorly conceived.[96] The pre-release can be a flop.[97] Customers can share the ad blanketed with criticism and loathing undermining a firm's most expensive ad buy of the year.[98] Brands today are increasingly vulnerable to subversion and cooptation on social media.

II. THIS PRESIDENTIAL CANDIDATE WAS BROUGHT TO YOU BY . . .

Brands and their corporate owners have a new legal environment to navigate thanks to the Supreme Court. In 2010, the Supreme Court decided a controversial case called *Citizens United v. FEC*.[99] As Professor Zephyr Teachout explains, "*Citizens United* changed the culture at the same time that it changed the law."[100] This decision allows corporations to spend an unlimited amount of corporate treasury funds on independent expenditures and electioneering communications (a.k.a. political ads) in federal and state elections.[101] This is a change in the law at the federal level and in over twenty states, which had all

PM), http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-super-bowl-why-ads-get-posted-online-early-20150201-story.html.

95. In 2014, pre-released ads were watched 2.5 times more than ads aired during the game. *Id.*

96. David Griner, Opinion, *Five Myths About Super Bowl Ads*, WASH. POST (Jan. 30, 2015), http://www.washingtonpost.com/opinions/five-myths-about-super-bowl-ads/2015/01/30/ce65379a-a744-11e4-a7c2-03d37af98440_story.html (describing how GoDaddy's preview generated enough feedback to cause the company to create a new ad for the Super Bowl).

97. Arin Greenwood, *GoDaddy Pulls 2015 Super Bowl Ad After Slew of Negative Feedback from Animal Advocates*, HUFFINGTON POST (Jan. 27, 2015, 7:53 PM), http://www.huffingtonpost.com/2015/01/28/godaddy-2015-super-bowl-ad_n_6557548.html (noting that over 35,000 users "signed an online petition calling for GoDaddy to" cancel the ad).

98. The hashtag #NoDaddy trended on Twitter as users shared the ad. *Id.*

99. 558 U.S. 310, 365 (2010) ("[T]he Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."); Robert Sprague & Mary Ellen Wells, *The Supreme Court as Prometheus: Breathing Life into the Corporate Supercitizen*, 49 AM. BUS. L.J. 507, 508 (2012) ("To say that *Citizens United*'s holding is controversial is an understatement.").

100. ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO *CITIZENS UNITED* 244 (2014).

101. *Citizens United*, 558 U.S. at 357 ("[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.").

previously banned corporate involvement in elections.[102] *Citizens United* builds on a preexisting right to spend in state initiatives that corporations gained in *Bellotti* in 1978.[103]

Not everyone welcomed *Citizens United*'s change in law that allowed corporations to get even more involved in politics.[104] One constituency that may not appreciate this development are ideologically diverse shareholders. Many investors may not want any corporate resources diverted for any political purpose; many would prefer a larger dividend instead.[105] And political spending may not help a firm at all.[106] One study noted that politically connected firms do not experience better business and financial results.[107] Rather, firms may have decreased market valuation and lower financial results, except for those firms that are subject to high degrees of industry-specific government regulation.[108]

The ability of officers and directors of public companies to divert corporate resources into political ads may be a new version of the old problem of managerial shirking.[109] In public companies, possibilities for shirking or other wrongdoing by corporate managers exist "because

102. *See* CIARA TORRES-SPELLISCY, BRENNAN CTR. FOR JUSTICE, TRANSPARENT ELECTIONS AFTER *CITIZENS UNITED* 3 (2011), https://www.brennancenter.org/sites/default/files/legacy/Disclosure%20in%20the%20States.pdf.

103. CHEMERINSKY, *supra* note 25, at 257 ("It was not until 1978, in *First National Bank of Boston v. Bellotti*, that the Court first found any First Amendment protection for speech by corporations."); *see also* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 790–95 (1978).

104. Sprague & Wells, *supra* note 99, at 508.

105. Adam Winkler, Commentary, McConnell v. FEC, *Corporate Political Speech, and the Legacy of the Segregated Fund Cases*, 3 ELECTION L.J. 361, 361 (2004) ("[T]reasury funds reflect the economically motivated decisions of investors or members who do not necessarily approve of the political expenditures, while segregated funds—such as a political action committee (PAC)—raise and spend money from knowing, voluntary political contributors.").

106. Hadani & Schuler, *supra* note 3, at 176–77 ("We were surprised to find that firms hiring board members with former public service did not realize better financial returns. . . . [T]he political ties . . . may degrade over time. Lastly, the value of politically tied directors may fluctuate based on political events, . . . which lie beyond firms' control.").

107. *Id.* at 165–66.

108. *Id.* at 166 ("We also find that firms' political investments and hiring of former public officials to firms' boards have no significant positive impact on firms' ROS. We find one exception to this pattern: firms from regulated sectors realize a positive association between cumulative political investments and market valuation . . . .").

109. PAUL DENICOLA ET AL., THE CONFERENCE BD., HANDBOOK ON CORPORATE POLITICAL ACTIVITY: EMERGING CORPORATE GOVERNANCE ISSUES 17 (2010) (noting that "[c]orporate political spending can introduce issues of reputational risk").

control of those enterprises is separated from their ownership" of dispersed shareholders.[110] Thus, political spending by corporate managers could present an agency problem within the firm.[111] Agency problems arise when directors or managers seek to maximize "their private utility, rather than acting as shareholders' faithful agents and maximizing shareholder value."[112]

Past experience shows that directors at public firms are already in the habit of spending their own money on politics.[113] For example, one study noted that over 83% of Fortune 500 CEOs and board members make personal campaign contributions.[114] Specifically, over 90% of directors make contributions, which is much higher than the contribution rates for other politically active professionals, such as lawyers who contribute at a rate of 45–50%.[115]

The public can see from disclosures at select firms that managers are using corporate resources (and not just their own funds) in politics.[116] According to the Center for Responsive Politics, in the 2012

110. Morrissey, *supra* note 26, at 125.

111. Pamela S. Karlan, *Me, Inc.*, BOS. REV. (July 1, 2011), http://www.bostonreview.net/pamela-karlan-corporate-personhood ("The better argument in favor of limiting partisan political spending by large, publicly traded corporations rests, ironically, on the fact that corporations are made up of people. . . . That corporate managers might spend corporate funds not to maximize the shareholders' welfare but to maximize their own is a very real danger.").

112. Kathy Fogel, Liping Ma & Randall Morck, Powerfully Independent Directors 2 (Oct. 7, 2013) (unpublished manuscript), http://www.stybelpeabody.com/newsite/pdf/powerfulindependentdirectors.pdf.

113. ADAM BONICA, AVENUES OF INFLUENCE: ON THE POLITICAL EXPENDITURES OF CORPORATIONS AND THEIR DIRECTORS AND EXECUTIVES 15 (2013), http://www.princeton.edu/csdp/events/Bonica11072013/SSRN-id2313232.pdf ("The phenomenally high rates of giving among corporate elites provides a rich data source to examine why and how they give. In fact, the high rate of giving among CEOs and board members that makes this type of analysis feasible is itself notable. Of the sample of directors and CEOs of Fortune 500 companies, at least 83 percent have made political contributions."); *see also* Hanen Khemakhem & Saidatou Dicko, *Directors' Political Connections and Compliance with Board of Directors Regulations: The Case of S&P/Tsx 300 Companies*, INT'L J. BUS. & MGMT., Nov. 18, 2013, at 117, 119 ("Political connections take the value of 1 if at least one of the firm's directors is or has been a member of parliament, works for the government, belongs to a political party or has made a financial contribution to a political party . . . .").

114. BONICA, *supra* note 113, at 15.

115. *Id.* at 32–33 ("[T]he remarkably high participation rate of over 90 percent of directors . . . sets them apart from those employed in other high paying professions. . . . [E]stimates of contribution rates . . . place medical doctors at around 15 to 20 percent and lawyers, who are known for their involvement in politics, at around 45 to 50 percent.").

116. *See, e.g.*, MOVING FORWARD, A COAL. OF LABOR UNIONS, SMALL BUS., PUB. SAFETY, & FIREFIGHTERS ASS'NS, RECIPIENT COMMITTEE CAMPAIGN STATEMENT COVER PAGE (2014), https://s3.amazonaws.com/s3.documentcloud.org/documents/1312372/chevron-contribs.pdf.

federal election, Chevron (ticker CVX) gave $2.5 million to the Congressional Leadership Fund Super PAC.[117] Clayton Williams Energy (ticker CWEI) gave $1 million to American Crossroads Super PAC.[118] Chesapeake Energy (ticker CHK) gave $125,000 to the Make Us Great Again Super PAC.[119] Scotts Miracle-Gro (ticker SMG) gave $200,000 to Restore our Future Super PAC.[120] CONSOL Energy (ticker CNX) gave $150,000 to Restore our Future Super PAC.[121] Hallador Energy (ticker HNRG) gave $100,000 to Restore our Future Super PAC.[122]

The story was much the same in the 2014 midterm. In 2014, Alliance Resource Partners, L.P. (ticker ARLPT on NASDAQ) gave $1,500,000 to American Crossroads and Hallador Energy (ticker HNRG) gave the group over $200,000;[123] meanwhile, KapStone Paper and Packaging Corp. (ticker KS) gave $1,250,000 and BB&T (ticker BBT) gave $156,925 to Freedom Partners Action Fund;[124] Chevron (ticker CVX) and Alliance Resource Partners, L.P. (ticker ARLPT on NASDAQ) gave $1,000,000 each to Congressional Leadership Fund, while Apollo Education Group Inc. (ticker APOL on NASDAQ) and

117. *Congressional Leadership Fund: Top Donors, 2012 Cycle*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/contrib.php?cmte=C00504530&cycle=2012 (last visited May 18, 2016).

118. *American Crossroads: Top Donors, 2012 Cycle*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/contrib.php?cmte=C00487363&cycle=2012 (last visited May 18, 2016).

119. *Make Us Great Again: Top Donors, 2012 Cycle*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/contrib.php?cmte=C00499731&cycle=2012 (last visited May 18, 2016).

120. *Restore Our Future: Donors*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/contrib_all.php?cycle=2012&type=A&cmte=C00490045&page=4 (last visited May 18, 2016).

121. *Restore Our Future: Donors*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/contrib_all.php?cycle=2012&type=A&cmte=C00490045&page=4 (last visited May 18, 2016).

122. *Restore Our Future: Donors*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/contrib_all.php?cycle=2012&type=A&cmte=C00490045&page=6 (last visited May 18, 2016).

[Renumber footnotes starting here. Not sure why they are not renumbering automatically when I deleted footnote 123]

123. *American Crossroads: Top Donors, 2014 Cycle*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/contrib.php?cmte=C00487363&cycle=2014 (last visited May 18, 2016).

124. *Freedom Partners Action Fund: Top Donors, 2014 Cycle*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/contrib.php?cmte=C00564765&cycle=2014 (last visited May 18, 2016).

Swisher (ticker SWSH on NASDAQ) gave a more modest $50,000 each.[125]

This disclosed corporate political spending likely understates the true scope of such spending because corporate money can be spent in the "dark," or in other words, hidden by using opaque intermediaries.[126] In fact between 2010 and 2014, over $600 million spent in federal elections had been from an untraceable dark source.[127] Over $67 million of this money was routed through the U.S. Chamber of Commerce, an opaque business trade association.[128] Presumably, a high percentage of that money was from corporate sources.

The corporate political spending listed above is potentially problematic because the wishes of directors may not match up with those of shareholders.[129] In particular, some directors may want to further their own political ambitions and not those of the firm.[130] Just as customers and voters are becoming more partisan, some studies have indicated that boards are themselves often affiliated with either one

125. *Congressional Leadership Fund: Top Donors, 2014 Cycle*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/contrib.php?cmte=C00504530&cycle=2014 (last visited May 18, 2016).

126. Karin Kamp, *Clip: What You Need to Know About Dark Money*, MOYERS & CO. (Mar. 21, 2014), http://billmoyers.com/2014/03/21/what-you-need-to-know-about-dark-money/.

127. Ciara Torres-Spelliscy, Opinion, *Court Ruling Drowned Politics in Dark Money: The Front Burner*, ORLANDO SENTINEL (Mar. 13, 2015, 11:26 AM), http://www.orlandosentinel.com/opinion/os-ed-citizens-united-front-burner-con-20150312-story.html.

128. *US Chamber of Commerce: Outside Spending Summary 2012*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/detail.php?cycle=2012&cmte=C90013145 (showing 2012 spending at $32,255,439) (last visited May 19, 2016); *US Chamber of Commerce: Outside Spending Summary 2014*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/detail.php?cycle=2014&cmte=C90013145 (showing 2014 spending at $35,464,243) (last visited May 19, 2016); *see also* Dave Levinthal, *Trade Groups to Top Corporations: Resist Political Disclosure*, CTR. FOR PUB. INTEGRITY (Jan. 27, 2016, 11:30 AM), https://www.publicintegrity.org/2016/01/27/19185/trade-groups-top-corporations-resist-political-disclosure.

129. Bebchuk & Jackson, Jr., *supra* note 33, at 101 ("[T]he interests of directors and executives regarding corporate political speech may often diverge from those of shareholders.").

130. SUSAN R. HOLMBERG, ROOSEVELT INST., A COST-BENEFIT ANALYSIS OF CORPORATE POLITICAL SPENDING DISCLOSURE 4 (2013), http://rooseveltinstitute.org/wp-content/uploads/2013/10/2013_10_30_Holmberg_Cost_Benefit.pdf ("The second explanation, which is gaining ground in the economics literature, is that corporate managers spend in politics for their own self-aggrandizement, at the expense of the company.").

political party or the other.[131] For example, analyzing companies on the S&P 500, data from 2000 showed that:

> 153 of the S&P 500 companies are politically connected at the time of the 2000 election. Out of these 153 companies, 78 companies have at least one board member connected to the Republicans, but no board member connected to the Democrats, while 47 companies have at least one board member connected to the Democrats, but no board member connected to the Republicans.[132]

Stanford Professor Adam Bonica has argued that one way to avoid problems with unbalanced director political activity is simply for shareholders to elect bipartisan, balanced boards.[133] However, this principle may not work everywhere because boards in some industries, such as "oil, gas, and coal," exhibit ideological bias—in this case, leaning towards the political right.[134] Furthermore, without full proxy access, the ability of shareholders to nominate their own bipartisan slate is fanciful at most firms.[135]

Citizens United has created a volatile environment for political spending by corporate actors.[136] Recent polling reveals how negatively the American public views corporate political activity: "Americans

131. *See* Eitan Goldman, Jörg Rocholl & Jongil So, *Do Politically Connected Boards Affect Firm Value?*, 22 REV. FIN. STUD. 2331, 2339 (2009).

132. *Id.*

133. Adam Bonica, Citizens United *and the Myth of a Conservative Corporate America*, IDEOLOGICAL CARTOGRAPHY (July 12, 2010), http://ideologicalcartography.com/2010/07/12/citizens-united-and-the-myth-of-a-conservative-corporate-america/ ("It just does not make sense for a board to engage in partisan conflict when they could easily compromise on not spending the money on either candidate, or better yet, spending it on the type of non-partisan issue ads that are already common. Simply put, bi-partisan boards will rarely take part in partisan politics.").

134. *Id.* ("Although board members from some sectors exhibit conservative allegiances—notably the oil, gas, and coal industries—most corporate boards are either dispersed across the ideological spectrum, or seem to have aligned with the left, as is the case of many of the growth stories of the new economy.").

135. *See* Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56668–56669 (2010) (codified at 17 C.F.R. § 240.14a-11) ("proxy access rule"). The proxy access rule was vacated by *Business Roundtable v. SEC*, 647 F.3d 1144, 1146 (D.C. Cir. 2011).

136. BRUCE F. FREED & JAMIE CARROLL, CTR. FOR POL. ACCOUNTABILITY, OPEN WINDOWS: HOW CODES OF CONDUCT REGULATE CORPORATE POLITICAL SPENDING AND A MODEL CODE TO PROTECT COMPANY INTERESTS AND SHAREHOLDER VALUE 1 (2007), http://files.cfpa.gethifi.com/reports/cpa-reports/OpenWindows03-22-07.pdf ("Companies . . . have . . . faced reputational knocks over the past few years because of political expenditures . . . .").

strongly oppose the *Citizens United* decision and a majority (55 percent) believe that corporations should not have the same constitutional rights as individuals."[137] Shortly before the influential New Hampshire Republican presidential primary in 2012, polling showed frustration with corporate political power was not just a concern of Democrats:

> Almost Two-thirds [sic] (61%) of likely New Hampshire Republican Primary voters strongly disagree with the Supreme Court decision that political spending by corporations and unions is a form of free speech protected under the First Amendment . . . . Seventy percent of likely New Hampshire Republican Primary voters would be more likely to support a candidate for President or Congress if the candidate supported a law that would require corporations, unions, and non-profits to disclose their sources of spending when they participate in elections.[138]

And three years later, loathing for *Citizens United* was still bipartisan. According to a *Bloomberg* poll in 2015, "Americans . . . are united in their view of the 2010 Supreme Court ruling that unleashed a torrent of political spending: They hate it. In a new *Bloomberg Politics* national poll, 78 percent of those responding said the *Citizens United* ruling should be overturned . . . ."[139] Customers who buy a product do not necessarily agree with a corporation's choice for President or any other candidate. Similar sentiments can be shared by investors. Thus, there is a nontrivial potential for customers/shareholders to reject politically active firms through boycotts or other means of aversion.

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137. *Two Years After* Citizens United, *Voters Fed Up With Money in Politics*, DEMOCRACY CORPS (Jan. 19, 2012) (emphasis added), http://www.democracycorps.com/National-Surveys/two-years-after-citizens-united-voters-fed-up-with-money-in-politics/; *see also* Brief for Former FEC Officials, et al. as Amici Curiae Supporting Respondents, at 26, Am. Tradition P'ship, Inc. v. Bullock, 132 S. Ct. 2490 (2012) (No. 11-1179), 2012 WL 1853625 at *26 ("In a recent national poll by the independent Opinion Research Corporation, 69% agreed that 'new rules that let corporations, unions and people give unlimited money to Super PACs will lead to corruption,' while 73% said 'there would be less corruption if there were limits on how much could be given to Super PACs.'").

138. CHAD S. NOVAK & ANDREW E. SMITH, THE SURVEY CTR. UNIV. OF N.H., GRANITE STATE POLL FOR AMERICANS FOR CAMPAIGN REFORM AND COMMITTEE FOR ECONOMIC DEVELOPMENT 1–2 (2011), https://www.ced.org/pdf/acr_october_survey_final.pdf.

139. Greg Stohr, *Bloomberg Poll: Americans Want Supreme Court to Turn Off Political Spending Spigot*, BLOOMBERG (Sept. 28, 2015, 5:00 AM), http://www.bloomberg.com/politics/articles/2015-09-28/bloomberg-poll-americans-want-supreme-court-to-turn-off-political-spending-spigot.

III. RED AMERICA v. BLUE AMERICA

The hyper-branded America of the early twenty-first century is also a hyper-partisan America.[140] The partisan rift is real and growing.[141] Indeed, roughly a third of Democrats think the Republican Party is a threat to America and a third of Republicans think the same thing about the Democratic Party.[142] This makes siding with one party or the other a fraught endeavor for corporations.

A. *The Political Parties Are Drifting Apart*

Politics is increasingly taken over by data driven ideologues who think they have mastered the world of marketing as applied to elections and who have a pecuniary interest in deepening the partisan divide.[143] For these modern-day Machiavellis with an iPad, "democracy boils down to a technical contest of influence-shaping in which the field advantage goes to whoever has the consultants with the best words, the best polling techniques, and the most cutting-edge expertise."[144]

Marketing has infected the thinking of political operatives:

> The aim of modern political marketing, consumer trends expert J. Walker Smith tells Bill Bishop in *The Big Sort*, is to "drive customer loyalty—and in marketing terms, drive the average transaction size or improve the likelihood that a registered Republican will get out and vote Republican. That's a business philosophy applied to politics that I think is really dangerous,

140. Doherty, *supra* note 23.

141. *Id.* ("Partisan antipathy has risen. The share of Republicans who have *very* unfavorable opinions of the Democratic Party has jumped from 17% to 43% in the last 20 years. Similarly, the share of Democrats with very negative opinions of the Republican Party also has more than doubled, from 16% to 38%." (emphasis omitted)); ELI PARISER, THE FILTER BUBBLE: HOW THE NEW PERSONALIZED WEB IS CHANGING WHAT WE READ AND HOW WE THINKWHAT THE INTERNET IS HIDING FROM YOU 88 (2011) ("[P]artisans of one political stripe tend not to consume the media of another.").

142. Doherty, *supra* note 23.

143. Ira S. Rubinstein, *Voter Privacy in the Age of Big Data*, 2014 WIS. L. REV. 861, 863–64 (2014) ("Recent campaigns for major federal and state offices have become data-driven operations, with major parties, presidential campaign organizations, and a new breed of politically-oriented commercial data brokers (CDBs) assembling extraordinarily detailed political dossiers on every American voter.").

144. SEDIVY & CARLSON, *supra* note 35, at 287.

> because it's not about trying to form a consensus, to get people to think about the greater good."[145]

And so voters are seen as just one more target demographic that needs to be persuaded to buy every two (or four) years.

In America, there is frequently a tremendous overlap between voters and consumers. They are both bombarded with ads seeking to persuade the viewer to buy a product, even if that "product" is the next President of the United States.[146] And, the nation is awash in advertisements, whether for a car, a candidate, toothpaste or a political party. So it is no wonder the rhetoric from one sphere is leaching into the other. The language of commercialism and democratic norms are often interchanged; and commercial strategies like polling and focus groups are also deployed in political campaigns.[147] As *Sold on Language* put it, "[w]e've become increasingly comfortable marrying the language of politics with talk of commercial branding."[148] Thus, referring to the "Republican brand" or the "Democratic brand" as if they were just more things to consume has become increasingly common.[149] As Professor Daniel Kriess reported, the first Obama campaign for the presidency conceived of the campaign through the lens of branding:

> [Web] designers created a number of different "brand groups," or themes, intended to convey particular understandings of the campaign and candidate. The general "campaign brand" featured the iconic Obama blue, campaign logo, and standardized typeface—the very consistency of which designers used to suggest that the candidate was efficient and experienced. . . . Designers also created a brand group that

145. PARISER, *supra* note 141, at 157.

146. SEDIVY & CARLSON, *supra* note 35, at 279 ("Given how fully we now breathe in the air of identity marketing, it's a small step to think about political brands in the same way. . . . [V]oting can become like buying a Mac—loyalty and passion aren't ignited when people deliberate over a set of product features or a collection of policies.").

147. MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING 154 (2005) ("Clinton became President, and many people came to view his obsession with polling as deeply problematic . . . . [Clinton advisor Dick] Morris was simply bringing to the world of politics the very same notions that guide the business world.").

148. SEDIVY & CARLSON, *supra* note 35, at 257.

149. *Id.* ("'Republican brand' . . . hovers around a dozen or so uses for each decade through to the 1980s, begins to rise to 32 in the 1990s, and then explodes to 1570 between 2000 and 2009. (The phrase 'Democratic brand' shows the same pattern, but lands at a more muted 259 uses from 2000–2009.)").

> consisted of official-looking documents in order to help the public imagine Obama as president.[150]

Partisanship, not surprisingly, influences which source of news Americans trust.[151] And the news each of us watches tends to re-enforce partisan differences.[152] Americans frequently live in self-reaffirming bubbles where the news comes from sources that reconfirm the viewers' preconceived world views.[153] This presents a democratic issue since "[d]emocracy requires citizens to see things from one another's point of view, but instead we're more and more enclosed in our own bubbles. Democracy requires a reliance on shared facts; instead we're being offered parallel but separate universes."[154]

As Eli Pariser wrote in his book *The Filter Bubble*, this filtering happens each time individuals use a search engine to look for information: "[S]ince December 2009 . . . you get the result that Google's algorithm suggests is best for you in particular—and someone else may see something entirely different. In other words, there is no standard Google anymore."[155] Sedivy and Carlson argue that this information filter places consumers in isolated "tribes":

> The advent of cable TV and the Internet have pulled mass audiences apart, so that people no longer share a common source of information. All of this has made it possible for us to

150. DANIEL KREISS, TAKING OUR COUNTRY BACK: THE CRAFTING OF NETWORKED POLITICS FROM HOWARD DEAN TO BARACK OBAMA 25 (2012).

151. Ken Wheaton, *Political Partisans Agree on One Thing: They Like Amazon*, AD AGE (Oct. 30, 2014), http://adage.com/article/campaign-trail/political-partisans-agree-thing-amazon/295642/ ("YouGov interviewed 600,000 people concerning a portfolio of 1,200 brands. . . . Not surprisingly, Fox News (with a -28) came in last with Democrats and MSNBC (-31) last with Republicans.").

152. John Fetto, *What Your TV Preferences Say About Your Politics*, EXPERIAN: MARKETING FORWARD BLOG (Nov. 15, 2010), http://www.experian.com/blogs/marketing-forward/2010/11/15/what-your-tv-preferences-say-about-your-politics/ ("Can the political leaning of a TV show's audience determine the success of the program? The answer is yes. Experian Simmons examined the political party registrations of viewers of over 700 television programs measured in the Spring 2010 . . . . [R]egistered Republicans and Democrats, indeed, have different preferences in entertainment programs.").

153. Evgeny Morozov, *Your Own Facts*, N.Y. TIMES, (June 12, 2011), http://www.nytimes.com/2011/06/12/books/review/book-review-the-filter-bubble-by-eli-pariser.html ("But while [Cass] Sunstein worried that citizens would deliberately use technology to over-customize what they read, [Eli] Pariser, the board president of the political advocacy group MoveOn.org, worries that technology companies are already silently doing this for us.").

154. PARISER, *supra* note 141, at 5.

155. *Id.* at 2.

> cocoon ourselves within our own idiosyncratic tribes. And technological advances have made it easier than ever for advertisers to track and store information about which tribe we belong to, and where our tribe shops, eats, gets our hair cut, drinks coffee, exercises, and vacations.[156]

Furthermore, to the extent customers are living in their own tribal worlds, marketers will try to reach the customer in their respective bubbles.[157] This means mass marketers increasingly need to micro-target sub-demographic groups.[158] This behavior is also seen among political campaigns that narrowcast to smaller slices of the electorate.[159] Indeed, these phenomena are intertwined as political campaigns use consumer data to profile potential voters.[160]

B. Are Customers Bringing Their Partisanship to the Store?

Partisanship, which has paralyzed legislative action in Washington, D.C. in the past few years, may spill into the grocery store and the

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156. SEDIVY & CARLSON, *supra* note 35, at 209.

157. *SEE* NATHAN ABSE, INTERACTIVE ADVERT. BUREAU, BIG DATA DELIVERS ON CAMPAIGN PROMISE: MICROTARGETED POLITICAL ADVERTISING IN ELECTION 2012, at 3–5 (2012), http://www.iab.com/wp-content/uploads/2015/07/Innovations_In_Web_Marketing_and_Advertising_delivery.pdf.

158. *See id.* at 10 ("Online advertising played a role in the 2004 and 2008 election cycles. But now, in 2012, online political advertising buys have grown enormously and for the first time microtargeting has become a crucial, go-to tool for both major presidential candidates and every outside group . . . .").

159. *See* Thomas Fitzgerald, *Profiling is Key to '06 Turnout: Campaigns Are Mining Consumer Data for Votes*, PHILA. INQUIRER (Oct. 29, 2006), http://articles.philly.com/2006-10-29/news/25417727_1_campaign-manager-swing-voter-voter-vault.

160. *See* KREISS, *supra* note 150, at 134 ("[E]-mail staffers [in the Obama campaign] continually segmented their supporter lists on the basis of personal information and closely tracked the effectiveness of appeals by monitoring click throughs."); Allison Brennan, *Microtargeting: How Campaigns Know You Better Than You Know Yourself*, CNN (Nov. 5, 2012, 6:45 PM), http://www.cnn.com/2012/11/05/politics/voters-microtargeting; *MicroTargeting for Political Campaigns*, TARGETPOINT CONSULTING, (June 11, 2010), http://www. targetpointconsulting.com/microtargeting-for-political-campaigns/; LILLIE CONEY, PETER G. NEUMANN & JON PINCUS, ELEC. PRIVACY INFO. CTR., E-DECEPTIVE CAMPAIGN PRACTICES REPORT 2010: INTERNET TECHNOLOGY AND DEMOCRACY 2.0, at 9 (2010), http://epic.org/privacy/voting/E_Deceptive_Report_10_2010.pdf ("[Voter p]rofiles are used to develop expectations regarding the behavior of individuals based on their activities, preferences for a wide range of products and services, . . . religious beliefs, . . . type of work, neighborhood, . . . level of education, . . . military service membership, foreclosure status of a primary home, employment status, as well as emotional or mental state regarding the economy.").

shopping mall.[161] In 2014, *TIME* did a fascinating analysis of the location of particular retail stores and congressional districts.[162] *TIME* found that if you lived in a district with an L.L. Bean, Ben & Jerry's, or Trader Joe's, then you were likely to be represented by a Democrat in Congress.[163] By contrast, if you lived in a district with a Cracker Barrel, Hobby Lobby, or Waffle House, then your district was more likely represented by a Republican.[164] While *TIME*'s approach may be superficial, a 2012 study by Buyology found that Republican and Democratic consumers were actually attracted to different brands; Republicans desired Subway, Dunkin' Donuts, and BMW, while Democrats desired Wendy's, Starbucks, and Jeep.[165] Similarly, a study by Strategic Vision found a difference in car preferences between Republicans and Democrats.[166] Partisans may not even drink the same alcohol.[167]

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161. *See* LAWRENCE B. GLICKMAN, BUYING POWER 11 (2009) ("[C]onsumer activists have instructed shoppers to, variously, 'Buy American,' 'Buy Native American,' 'Buy Black,' 'Buy labor,' and, in the heated partisan climate of the early twenty-first century, 'Buy Blue State'—and in so doing to support one identity and often to weaken one's personal claim to, or solidarity with, other potential identities.").

162. Chris Wilson, Dave Johnson & Pratheek Rebala, *Are You a J. Crew Democrat or a Pizza Hut Republican?*, TIME (Nov. 6, 2014), http://time.com/3559482/stores-politics/ ("Methodology[:] The list of retail locations was provided by AggData. Stores were matched to Congressional district by comparing their longitude and latitude to the Census definitions of districts.").

163. *See id.*

164. *See id.*

165. *New Study Reveals that Democrats and Republicans Disagree on the Brands They Love Most,* BUYOLOGY INC. (June 13, 2012), http://www.buyologyinc.com/Buyology%20Most%20Desired%20Brands%20Report%20-%20Democrats%20vs%20Republicans%20FINAL.pdf.

166. Mary M. Chapman, *Party Affiliations in Car-Buying Choices: A Thorny Patch of Consumer Analysis*, N.Y. TIMES: WHEELS (Mar. 30, 2012, 1:50 PM), http://wheels.blogs.nytimes.com/2012/03/30/party-affiliations-in-car-buying-choices-a-thorny-patch-of-consumer-analysis/?_r=0 ("Are some vehicle models more popular with Democrats, and others with Republicans? That is the suggestion of a study conducted by Strategic Vision . . . . [In] 38,000 responses, they found trends that followed somewhat predictable patterns, with self-identified Republicans opting for bigger and pricier models, while Democrats chose smaller, more affordable ones.").

167. Matt Berman, *What Your Beer Says About Your Politics*, YAHOO! (Sept. 27, 2012, 1:10 PM), http://news.yahoo.com/beer-says-politics-150518540--politics.html ("You may think that drinking beer is one of the few truly bipartisan acts of enjoyment Americans have left, but Scarborough Research paints a different picture. The beer you buy, and presumably then drink, can say a lot about what political party you lean toward and how likely you are to vote."); Reid Wilson, *What Your Favorite Drink Says About Your Politics, in One Chart*, WASH. POST: GOVBEAT (Dec. 31, 2013), http://www.washingtonpost.com/blogs/govbeat/wp/2013/12/31/what-your-favorite-drink-says-about-your-politics-in-one-chart/ ("Consumer data suggests Democrats prefer clear spirits, while Republicans like

Most disturbingly, there seems to be a partisan take on the acceptance of science, which is reflected in the rejection of more energy-efficient products by Republican consumers. As Dena Gromet and her co-authors explained:

> More politically conservative individuals are less in favor of investing in energy efficiency than are those who are more politically liberal, a finding driven primarily by the polarized psychological valuation of carbon emissions reduction. Although one of the primary benefits of energy-efficient options is that they place less strain on the environment, not everyone values environmental protection. . . . [T]hose on the political right will avoid purchasing more expensive energy-efficient options when the choice is reflective of concern for the environment . . . .[168]

These data indicate that the consuming public may be pulling apart along partisan lines, at least on the margins. One open question: will firms actually try to cultivate a partisan image, or will they try to sell to all?

C. Boycotting the Politically Active Brand?

So if branding is infecting political campaigns, is it inevitable that politics will also infect the corporate world? Not necessarily. Scandal can hurt a corporate brand.[169] And getting in the middle of a political fight can be a scandal in and of itself for a corporation. As Professor Robert W. Emerson argues, businesses jumping into the middle of politics is about as smart as dropping a lit match while standing in a pool of gasoline—and the result is likely the same—getting burned badly.[170] As he put it:

their brown liquor. Democratic drinkers are more likely to sip Absolut and Grey Goose vodkas, while Republican tipplers are more likely to savor Jim Beam, Canadian Club and Crown Royal. That research comes from consumer data supplied by GFK MRI . . . .").

168. Dena M. Gromet et al., *Political Ideology Affects Energy-Efficiency Attitudes and Choices*, 110 PROC. NAT'L ACAD. SCI. U.S. 9314, 9317 (2013).

169. Freno, *supra* note 39, at 1056 ("Despite their interrelationship, brands and trademarks can, at least theoretically, exist apart from one another. For example, whereas scandal can increase public recognition for a trademark (theoretically strengthening the mark from a legal perspective and even making a mark 'famous'), scandal can simultaneously hurt the brand.").

170. *See* Robert W. Emerson & Jason R. Parnell, *Franchise Hostages: Fast Food, God, and Politics*, 29 J.L. & POL. 353, 357 (2014).

> For business people presumably seeking to sell goods and services to one and all, to take such potentially off-putting *noncommercial* stands on matters of ideology, theology, or sheer personal philosophy appears—regardless of the politics—plainly pigheaded. They are picking a needless fight, a bad-for-business action with the reaction, intended or not, being to convert a purely commercial mark into a brand with strong, perhaps incendiary, political overtones.[171]

This behavior is really a businessperson shooting his or her brand in the foot by getting involved in politics. The old adage that business and politics don't mix is borne out by the history of corporations getting boycotted for perceived and actual political stances.[172]

Empirical evidence shows that customers are willing to boycott over corporate political spending.[173] For example, an election-eve poll conducted by Bannon Communications in October 2012 asked whether the respondents would be willing to refuse to buy a company's products or services based on their political spending.[174] A staggering 79% of Americans polled responded that, yes, they would be willing to stop buying a company's products based on corporate politicking; with 36.7% stating that they would be very willing to stop buying.[175]

IV. I'M TAKING MY BUSINESS ELSEWHERE

On one hand, if a customer/shareholder loves a corporate brand, like the Nike Swoosh, she may buy both Nike products and Nike stock. She may become a walking human billboard for the Swoosh and share this love of the brand through social media.[176] And depending on how

171. *Id.*
172. *See id.* at 359–67 (discussing the repercussions following the issuance of politically-charged statements by Chik-Fil-A and Papa John's respective directors).
173. *See* Liz Kennedy, *Citizens Actually United: The Bi-Partisan Opposition to Corporate Political Spending and Support for Common Sense Reform*, DEMOS (Oct. 25, 2012) http://www.demos.org/publication/citizens-actually-united-bi-partisan-opposition-corporate-political-spending-and-support; *see also* Alex Seitz-Wald, *Everyone Hates* Citizens United, SALON (Oct 25, 2012, 10:45 AM), http://www.salon.com/2012/10/25/people_ really_hate_citizens_united/.
174. PhonetiCall, *Corporate Reform National Survey*, Q10A (2012), http://www.citizen.org/documents/toplines.pdf.
175. *Id.*; *see also* Kennedy, *supra* note 173.
176. Paul Gorrell, *The Loyalty Economy*, HUFFINGTON POST (Feb. 2, 2016), http://www.huffingtonpost.com/paul-gorrell-phd/the-loyalty-economy_b_4008573.html ("Today we not only buy a company's product but 'like' it on Facebook and join a community of fans. Yes,

much Nike stock she buys, her financial future can be tied to the financial health of the firm. When customers/shareholders love a company's brand, it is a win-win from the company's point of view because the firm gets money coming and going, and possibly some free advertising and good will to boot.[177] But on the other hand, the downside is more severe in the world of the customer/shareholder because rejection can be doubly costly if she becomes disenchanted with the swoosh, or Nike, Nike's labor practices, its carbon footprint, or its politics.[178] She can reject Nike in multiple ways,[179] from refusing to wear the Swoosh, to refusing to buy another Swoosh, to refusing to invest another dime with Nike (ticker NYSE: NKE), to divesting from Nike, to leading others to reject Nike by making it clear through social media why she objects,[180] and encouraging others to reject the brand through boycotts and divestment.[181]

Polling shows that Americans are suspicious of corporations as a general matter:

> Just as there is little confidence in our political system, the public also has little confidence in corporations today: 14% have

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people become fans of their laundry detergents and underarm deodorants, exposing this loyalty to their friends and, on open websites like Twitter, to the larger world.").

177. Metro. Nat'l Bank v. St. Louis Dispatch Co., 149 U.S. 436, 446 (1893) ("Mr. Justice Story defined 'good will' to be 'the advantage or benefit which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position, or common celebrity, or reputation for skill or affluence or punctuality, or from other accidental circumstances or necessity, or even from ancient partialities or prejudices.'" (quoting JOSEPH STORY, COMMENTARIES ON THE LAW OF PARTNERSHIPS § 99, at 170 (6th ed. 1868)).

178. *See* PIETY, *supra* note 36, at 90 ("[A]s the Nike case demonstrated, the connection between what the corporate advertising says and what the corporation actually does may be tenuous at best.").

179. Simon Birch, *How Activism Forced Nike to Change Its Ethical Game*, GUARDIAN (July 6, 2012, 11:04 AM), http://www.theguardian.com/environment/green-living-blog/2012/jul/06/activism-nike ("It's worth remembering that in the 1990s the global boycott campaign of Nike was so successful that it has now become an object lesson in how giant corporations can be brought to account by ordinary consumers.").

180. John Greenwood, *When Sorry Is Not Enough*, WALL ST. J. (Oct. 19, 2011), http://online.wsj.com/news/articles/SB10001424052970204226204576600532996920582 ("The power of the internet and social media channels such as Facebook and Twitter mean employees, non-governmental organizations, trade unions and regulators have far more power to damage a brand if they want to.").

181. KLEIN, *supra* note 5, at 340 ("[A]lthough the media often describe campaigns like the one against Nike as 'consumer boycotts,' that tells only part of the story. It is more accurate to describe them as political campaigns that use consumer goods as readily accessible targets, as public-relations levers and as popular-education tools.").

> a great deal or quite a bit of confidence in corporations, whereas 46% have little confidence in them. Underscoring this lack of trust is that better than four in five (82%) Americans feel corporations care mostly about profits, cut corners on services, overcharge on prices, and do not treat their customers well.[182]

Moreover, organizing a boycott has never been easier.[183] And several advocates of one political stripe or another have urged shoppers to think of themselves as voting with their pocketbooks.[184] Or, as Anna Lappéonce put it, "[e]very time you spend money, you're casting a vote for the kind of world you want."[185] As citizens become more disconnected from influencing policy through small d—democratic means, increasingly activists are focusing on influencing corporations instead of members of Congress or the Executive.[186]

The brand becomes the hook for the public engagement. For example, one labor activist once explained he targets corporations "[b]ecause we have more influence on a brand name than we do with our own governments."[187] Or, as W. Lance Bennett and Taso Lagos put

182. HART RESEARCH ASSOCS., IMPRESSIONS OF THE *CITIZENS UNITED* DECISION AND A PROPOSED CONSTITUTIONAL AMENDMENT TO OVERTURN IT (2011), http://freespeechforpeople.org/sites/default/files/me10129b_public.pdf; *see also* PEOPLE FOR THE AMERICAN WAY, RESULTS OF SURVEYUSA NEWS POLL #16270 (Feb. 10, 2010), http://www.surveyusa.com/client/PollPrint.aspx?g=05cabb5f-599f-47a8-98fb-e3e254e425e4&d=0 ("Should corporations be limited in how much they can spend to influence an election? Or, should there be no limit on what a corporation can spend? . . . [Finding s]hould [b]e [l]imited[:] 78%[;] . . . . No limit[:] 16%[;] . . . . Not sure[:] 6%.").

183. M. Joy Hayes, *Buycott App Makes It Easier to Put Your Money Where Your Ideals Are*, (June 12, 2013, 5:00 AM), http://www.aol.com/article/2013/06/12/buycott-app-put-your-money-where-your-ideals-are/20617657/.

184. Melissa Schwartz, *Putting Your Money Where Your Mouth Is*, HUFFINGTON POST (Aug. 27, 2014), http://www.huffingtonpost.com/melissa-schwartz/putting-your-mouth-where-_b_5536431.html ("It's true, most of us will never have the resources to be major financial players in political campaigns. Our advocacy lies in our voice, and in our wallets.").

185. Blaine McCormick & Burton Folsom, *It's Dangerous When Corporations Give Away Your Money*, REAL CLEAR MARKETS (Feb. 14, 2014), http://www.realclearmarkets.com/articles/2014/02/14/its_dangerous_when_corporations_give_away_your_money_100902.html.

186. Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 564 (2014), http://scholar.princeton.edu/sites/default/files/mgilens/files/gilens_and_page_2014_-testing_theories_of_american_politics.doc.pdf ("Multivariate analysis indicates that economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while average citizens and mass-based interest groups have little or no independent influence.").

187. KLEIN, *supra* note 5, at 342.

it, "hard-to-sell messages about labor conditions in foreign factories become easier to deliver when simplified and paired with a brand that already travels far and wide: [like] Nike['s] sweatshop."[188] A consumer may not know what to do about inequity in global supply chains, but a consumer can choose to buy TOMS shoes (made ethically by a corporation which gives shoes away to the poor for free) instead of shoes made by a profit driven multinational—and thereby voting with her dollars.[189]

If a single customer rejects a brand, then he or she can choose to never buy another product from that firm. Most firms can live with the loss of one customer. The "brand owners" ultimate fear is that vocal criticism of the brand, or its affiliated company, will inspire large groups of customers to stop buying, or even worse, that customers will organize themselves into a large-scale long-term boycott.[190]

A. *Even Founding Fathers Boycotted*

Customer boycotts are not new. The word "boycott" was coined in 1880.[191] Today, the word "boycott" can connote everything from a freedom march to unfairly shuttered stores.[192] The history of linking shopping with political stances goes back to, at least, the early 1800s (even before the word boycott had been coined) when American

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188. W. Lance Bennett & Taso Lagos*, Logo Logic: The Ups and Downs of Branded Political Communication*, 611 ANNALS AM. ACAD. POL. & SOC. SCI. 193, 197 (2007).

189. Mary Ellen Biery, *Mixing Business Strategy, "Social Responsibility"*, FORBES (Nov. 9, 2011, 11:23 AM), http://www.forbes.com/sites/sageworks/2011/11/09/mixing-business-strategy-social-responsibility/ ("Privately owned shoe maker TOMS built its business model around social responsibility, giving a pair of shoes to a child in need for every pair purchased."). *See also Corporate Responsibility at TOMS*, TOMS, http://www.toms.com/corporate-responsibility#corporateResponsibility (last visited May 23, 2016) ("We've engaged respected third parties to review and verify our product manufacturers within our supply chain on a facility-by-facility basis to identify potential risks. Additionally, we maintain a presence in our suppliers' facilities to insure that our standards are being met, including, without limitation, our standards prohibiting human trafficking and slavery within our supply chain.").

190. KLEIN, *supra* note 5, at 336 ("The granddaddy of modern brand-based actions is the boycott against Nestle, which peaked in the late seventies. The campaign targeted the Swiss company for its aggressive marketing of costly baby formula as a 'safer' alternative to breast-feeding in the developing world.").

191. *See* GLICKMAN, *supra* note 161, at 115 ("James Redpath, in collaboration with an Irish priest, John O'Malley, coined the eponymous phrase to describe the weapon of ostracism used by Irish peasants in County Mayo, Ireland, against an exploitative British land agent named Charles Cunningham Boycott.").

192. GARY MINDA, BOYCOTT IN AMERICA: HOW IMAGINATION AND IDEOLOGY SHAPE THE LEGAL MIND 6 (1999).

abolitionists linked slavery and purchasing slave-produced goods.[193] For abolitionist boycotts of slave produced goods, "shopping was politics by other means, enabling the activist to put theoretical beliefs into practice."[194]

As Theresa J. Lee argues, political boycotts are as American as apple pie and date back to the founding.[195] She notes:

> In fact, at the time of ratification of the Constitution, founders Alexander Hamilton and John Jay were leading a boycott against New York merchants who engaged in the slave trade. Thus, the boycott is not a tool whose legitimacy must stand apart from the underlying structure of our governance and legal system; it is a part and parcel of our system. The boycott is a means of communication valued under the First Amendment, which has been used on all sides of controversies throughout American history.[196]

Just as it was for our boycotting founding fathers, shopping today can still be a political act.

Lawrence B. Glickman explored the history of American boycotts from the founding to the present in his book, *Buying Power*.[197] Like Lee, Glickman notes that there have been customer movements including boycotts on a nearly continuous basis from before America became a country to the present day.[198] He writes:

> [T]hroughout the history of the United States the omnipresent rhetoric of consumer passivity has been consistently accompanied by an equally ubiquitous consumer activism. Activists have understood, and practiced, consumption, not as the negation of citizenship, but as an instrument of solidarity, [and] a mode of ethical agency . . . .[199]

The ubiquity and identifiability of a brand becomes a potential liability and runs the risk of boycott once a negative connotation (like it

193. GLICKMAN, *supra* note 161, at 74.
194. *Id.* at 77.
195. Lee, *supra* note 34, at 538–39.
196. *Id.* (footnote omitted).
197. GLICKMAN, *supra* note 161, at xi–xii.
198. *Id.* at x.
199. *Id.*

is produced by slave labor or is injurious to human health) has attached to brand like a lamprey to a shark's belly.[200]

For example, boycotting genetically modified organisms (or GMOs) is very difficult to do in the United States since they are not labeled as they are in other nations.[201] But if consumers know that brand X contains GMOs, then that brand can be targeted with a consumer boycott.[202] As W. Lance Bennett and Taso Lagos argue:

> A brand's familiarity . . . also make[s customers] pay attention when disturbing messages are attached to it. Thus, organic consumer activists who have trouble drawing broad public attention to the bovine growth hormones in milk, or to the genetic modification of soybeans and other foods, may have more success alerting Starbucks customers to the trouble lurking within their cappuccinos or soy lattes.[203]

B. Boycotting Segregation

American boycotts have been a way for the everyday man or woman to voice his or her political objections to the practices of those either selling or producing a particular good or service.[204] Even some of the relatively powerless in America have the economic power to choose which brands to buycott or boycott.[205] Famously, the American Civil Rights Movement in the 1950s and 1960s used customer boycotts to help integrate public spaces ranging from bus routes to lunch

200. Greenwood, *supra* note 180 ("Brand risk is a key threat to a company's license to do business, as Nike, Toyota, BP and Domino's Pizza have learned to their cost in recent years. How well they have been able to protect and detoxify their brands has in large part depended on the way senior managers have fought back.").

201. Katherine Paul, *Consumers Want GMO Labels, Not Barcodes*, TRUTHOUT (Mar. 4, 2015, 11:26 AM), http://truth-out.org/opinion/item/29445-consumers-want-gmo-labels-not-barcodes.

202. *See* Bennett & Lagos, *supra* note 188, at 195–96.

203. *Id.*

204. *See, e.g.*, Martin L. King, Jr., Statement on Ending the Bus Boycott, Montgomery, Ala. (Dec. 20, 1956), http://mlk-kpp01.stanford.edu/primarydocuments/Vol3/20-Dec-1956_StatementEndingBusBoycott.pdf ("We came to see that, in the long run, it is more honorable to walk in dignity than ride in humiliation. So . . . we decided to substitute tired feet for tired souls, and walk the streets of Montgomery . . . .").

205. Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 47–48 (1994) (discussing consumer boycotts of national chains in the 1960s and its effectiveness in aiding desegregation efforts).

counters.[206] In the 1950s, African Americans found that boycotting businesses that segregated patrons by race was an effective way to change both company policies[207] as well as segregation laws.[208] While the Montgomery Bus Boycott was the most famous, other boycotts by African Americans both preceded it[209] and followed it.[210]

Civil rights consumer boycotts were recognized by the Supreme Court as free speech protected by the First Amendment in *NAACP v. Claiborne Hardware*.[211] In 1982, the Supreme Court, "unambiguously upheld the right of Americans to organize boycotts to achieve social,

206. Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1066 (1989) ("[B]y publicizing their willingness and ability to mobilize united opposition to Jim Crow practices, the protesters in Montgomery contributed a therapeutic dose of inspiration to dissidents everywhere. Later developments would attest to the influence of the boycott as a role model that encouraged other acts of rebellion.").

207. Gwenda Anthony & Jimmy Hart, *City's Buses End Segregation After Students Launch Boycott,* JACKSON SUN http://orig.jacksonsun.com/civilrights/sec2_bus_strike.shtml (last visited June 29, 2016). Local citizens in Jackson, Mississippi, inspired a short bus boycott in 1960 where local citizens, inspired by the Greensboro sit-ins and the Supreme Court decision in *Brown v. Board of Education*, organized a boycott to defeat bus segregation practices. *Id.* This resulted in a letter written by the Greyhound bus line manager, which read: "The company's policy in the future on the seating of passengers will be not to show any discrimination between the white and Negro passengers." *Id.*

208. RAYMOND ARSENAULT, FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE 77 (2006) ("The boycott itself ended triumphantly in December 1956, following the Supreme Court's unanimous ruling in *Gayle v. Browder*. Applying the same logic used in *Brown* [*v. Board of Education*], the Court struck down Montgomery's bus segregation ordinance and by implication all similar local and state laws."); A.K. Sandoval-Strausz, *Travelers, Strangers, and Jim Crow: Law, Public Accommodations, and Civil Rights in America*, 23 L. & HIST. REV. 53, 82 (2005) ("The boycott succeeded not only in desegregating public transit in the city, it also prompted the ICC [Interstate Commerce Commission] to issue a general order prohibiting racial segregation in all modes of interstate transportation.").

209. Lottie L. Joiner, *Baton Rouge Bus Boycott Paved Way for King's Montgomery Effort*, CRISIS, July–Aug. 2003, at 7 ("Two years before Rosa Parks refused to give up her seat on a bus, sparking the historic 1955 Montgomery bus boycott in Alabama, blacks in Baton Rouge, La. [sic], declined to ride public transportation in protest of the city's segregated bus system."); Dean Sinclair, *Equal in All Places: The Civil Rights Struggle in Baton Rouge, 1953—1963*, 39 J. LA. HIST. ASS'N 347, 349, 351–52 (1998) ("Baton Rouge's bus boycott of 1953 was a watershed event in the city, and it proved to be a beginning of an activist national civil rights movement that had up to that point concentrated on legal attacks on segregation rather than direct conflict.").

210. James Crawley et al., *Black Activism and the Macon Bus Boycott*, http://faculty.mercer.edu/davis_da/fys102/black_activism.html (last visited Feb. 27, 2016). The Macon "bus boycott was a campaign to end segregation on the Macon city buses and to increase the employment of blacks as bus drivers and mechanics," which achieved similar results as the Montgomery bus boycott by the desegregation of city buses. *Id.*

211. 458 U.S. 886, 911 (1982).

political, and economic change."[212] As Justice Stevens explained approvingly, "[t]he boycott was launched at a meeting of a local branch of the NAACP attended by several hundred persons. Its acknowledged purpose was to secure compliance by both civic and business leaders with a lengthy list of demands for equality and racial justice."[213]

However, not all boycotts enjoy full First Amendment protections.[214] As Gary Minda explained:

> In the same term [as *Claiborne Hardware*], however, the Court again held unanimously, in *International Longshoremen's Ass'n v. Allied International, Inc.*, that a political boycott organized by a labor union to protest the Soviet invasion of Afghanistan, was not protected by the First Amendment. More recently in *FTC v. Superior Court Trial Lawyers Ass'n*, the Court held that a boycott staged by a group of criminal defense lawyers seeking an hourly fee raise constituted a *per se* (strictly illegal) offense under the federal antitrust laws. While the lawyers alleged that their acts constituted a protected political boycott, the Court found instead that the lawyers had engaged in a price-fixing conspiracy.[215]

Thus, an unfettered right to boycott is not recognized across the board, though most customer led boycotts to make a political point are likely to be protected under *Claiborne Hardware*.

C. Targeting Target

Boycotts are not a relic of an earlier age; rather they are alive and well. In the wake of the Supreme Court's *Citizens United* decision, in 2010, Target Corp. was boycotted after the public discovered that it had given $150,000 to a group backing the then-Republican candidate for Governor of Minnesota, Tom Emmer, who had decidedly anti-gay positions.[216] Target was particularly vulnerable because it had the

212. GLICKMAN, *supra* note 161, at 300.
213. *Claiborne Hardware*, 458 U.S. at 907.
214. MINDA, *supra* note 192, at 2–3 ("Taken together, the Supreme Court's decisions in *Claiborne Hardware*, *Allied International*, and *Trial Lawyers* indicate that the Court distinguishes between political and economic boycotts, providing a higher degree of constitutional protection to boycotts perceived to be more political and less economic.").
215. *Id.* at 2 (footnotes omitted).
216. Brody Mullins & Ann Zimmerman, *Target Discovers Downside to Political Contributions*, WALL ST. J. (Aug. 7, 2010, 12:01 AM), http://www.wsj.com/articles/SB1000142405 2748703988304575413650676561696 ("Target

public as customers (instead of business-to-business customers).[217] Target isn't the only firm to get tangled in the marriage equality debate. The CEO of Chick-fil-a, Dan Cathy also caused ire when he talked disparagingly about gay marriage in 2012.[218] This caused boycotts of Chick-fil-a.[219] And by 2014, even Mr. Cathy said he regretted the impact his anti-gay marriage comments had had on the brand.[220] As reported by *Forbes*, "Cathy admitted his anti-equality stance probably wasn't a wise business decision, regretting 'making the company a symbol in the marriage debate.'"[221] Cathy agreed that his comments had the impact of "alienating market segments."[222]

The threat of boycotts has led some to argue against transparency of corporate political spending as if boycotts were somehow illegitimate forms of customer expression.[223] As Professor Rick Hasen notes:

> Part of the rhetorical divide appears to stem from conservatives' adopting a broader definition of harassment . . . . Most importantly, conservatives seem to count economic boycotts as harassment. . . . [E]conomic boycotts are themselves protected

Corp. sought to take advantage of new campaign-finance rules, but ended up putting a bull's eye on its back."); Tom Hamburger & Jennifer Martinez, *Target Stores Negotiate With Gay-lesbian Group Over Political Spending*, L.A. TIMES (Aug. 13, 2010), http://articles.latimes.com/2010/aug/13/nation/la-na-target-gays-20100813 ("[Target gave a] $150,000 donation to an organization backing a Republican candidate with a long record of opposing gay rights.").

217. Ciara Torres-Spelliscy, *Citizens Get United*, THE ADVOCATE (Mar. 24, 2011, 1:40 PM), http://www.advocate.com/news/news-features/2011/03/24/citizens-get-united.

218. Bruce Horovitz, *CEOs Express Anti-Gay Views at Their Peril*, USA TODAY (Apr. 7, 2014, 8:04 PM), http://www.usatoday.com/story/money/business/2014/04/07/chick-fil-a-dan-cathy-mozilla-barilla/7434547/.

219. *Id.* ("Chick-fil-A was the subject of pickets and boycotts in 2012 after Cathy . . . said that we are 'inviting God's judgment on our nation when we shake our fist at Him and say: "We know better than you as to what constitutes a marriage."'").

220. Maya Rhodan, *Chick–fil–A CEO Regrets Same–Sex–Marriage Debacle*, TIME (Mar. 17, 2014), http://www.time.com/27940/chick–fil–a–dan–cathy–gay–marriage/.

221. Clare O'Connor, *Chick-fil-A CEO Cathy: Gay Marriage Still Wrong, But I'll Shut Up About It and Sell Chicken*, FORBES (Mar. 19, 2014, 9:02 AM), http://www.forbes.com/sites/clareoconnor/2014/03/19/chick-fil-a-ceo-cathy-gay-marriage-still-wrong-but-ill-shut-up-about-it-and-sell-chicken/.

222. *Id.*

223. David Marston & John Yoo, *Political Privacy Should Be a Civil Right*, WALL ST. J. (Apr. 27, 2011, 12:01 AM), http://www.wsj.com/articles/SB10001424052748704132204576284630941397792; Ryan J. Reilly, *Karl Rove: They're Trying To Intimidate Us, Just Like They Did With The NAACP*, TALKING POINTS MEMO (Apr. 2, 2012, 7:05 PM), http://talkingpointsmemo.com/muckraker/karl-rove-they-re-trying-to-intimidate-us-just-like-they-did-with-the-naacp-video.

> First Amendment activity which should not be the basis for claiming a harassment exemption.[224]

Whether this harassment exemption would be expanded was litigated up to the Supreme Court while this piece was being written in the case of *ProtectMarriage v. Bowen*.[225] However, the Supreme Court declined to grant certiorari in the case;[226] thus, this issue will have to wait until a future case to be fully resolved. The lower courts in *ProtectMarriage* rejected a broadening of the harassment exemption and, rather, ruled in favor of campaign finance disclosure.[227] While Professors Bebchuk and Jackson, who have written extensively on *Citizens United*'s impact on business, have argued that customer boycotts are unlikely to stop corporate political spending,[228] only time will tell.

V. THE GADFLY SHAREHOLDERS KEEP BUZZING

Customers are not the only ones who hold the fate of a brand in the palm of their hands. Shareholders too have a role in responding to and shaping how a brand is perceived.[229] For example, a brand may lose stature if the stock of the company is traded as a valueless penny stock, if the stock is losing value relative to competitors, or being shorted by traders. At the same time, long term shareholders are often concerned with how a brand is built, perceived, or damaged, and may try to intervene to help save a brand from mismanagement.[230]

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224. Richard L. Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age*, 27 J.L. & POL. 557, 564 (2012).

225. Ciara Torres-Spelliscy, *Dark Money Could Get Even Darker*, BRENNAN CTR. BLOG (Feb. 10, 2015), https://www.brennancenter.org/blog/dark-money-could-get-even-darker (discussing the Supreme Court cert. petition in *ProtectMarriage v. Bowen*).

226. ProtectMarriage.com–Yes on 8 v. Padilla, 135 S. Ct. 1523, 1523 (2015) (mem.).

227. ProtectMarriage.com–Yes on 8 v. Bowen, 752 F.3d 827, 832–33 (9th Cir. 2014).

228. Bebchuk & Jackson, Jr., *supra* note 33, at 92–93.

229. Mark Fenster, *Coolhunting the Law*, 12 HARV. NEGOT. L. REV. 157, 166 (2007) ("[T]here is another audience for these branding efforts: investors . . . . As with the decisions that consumers make while shopping for products and services, investors and shareholders might respond positively to branding efforts in corporate deal structures; doing so, they would add value to corporate assets and securities."); Brayden G. King & Sarah A. Soule, *Social Movements as Extra-Institutional Entrepreneurs: The Effect of Protests on Stock Price Returns,* 52 ADMIN. SCI. Q. 413, 416 (2007) ("Market mechanisms . . . often do not adequately communicate stakeholders' grievances. Even if consumers, for example, decide to boycott a product due to dissatisfaction with a corporate policy, decision makers are unlikely to detect the cause of grievance unless the boycott is accompanied by some expression of voice, such as protest." (citations omitted)).

230. *See* King & Soule, *supra* note 229, at 415, 417–18.

A. Political Shareholder Resolutions Target Target

The response to the 2010 political spending at Target that inspired a customer boycott, described above, also inspired certain institutional shareholders to act.[231] Three large investors filed a joint shareholder resolution at Target asking for more internal oversight of political spending.[232] As reported by the *L.A. Times*:

> "Imprudent donations can potentially have a major negative impact on company reputations and business if they don't carefully and fully assess a candidate's positions," said Tim Smith, a senior vice president at Walden Asset Management, one of three asset management firms that this week filed a resolution asking the retail giant to overhaul its campaign donation policies. He cautioned that funding ballot initiatives, as many corporations have done, "can similarly backfire."
>
> The three management firms sponsoring the resolution—Calvert Asset Management, Trillium Asset Management and Walden—together hold $57.5 million of Target stock.[233]

Thus, at least some shareholders were concerned that Target was being too cavalier with their political spending and not considering the volatility of the environment.[234]

B. Shareholders on the Back of the Bus

The idea that shareholders could change the social and political behavior of the companies they own using the mechanisms of corporate democracy has been around for decades.[235] In the early 1950s, James

231. *See* Jennifer Martinez & Tom Hamburger, *Target Feels Backlash from Shareholders*, L.A. TIMES (Aug. 19, 2010), http://articles.latimes.com/2010/aug/19/nation/la-na-target-shareholders-20100820.
232. *Id.*
233. *Id.*
234. *See id.* ("[T]he Target case suggests that customer and shareholder pressure is emerging as an unexpected factor that could rein in at least some of that corporate spending.").
235. Leila N. Sadat-Keeling, Comment, *The 1983 Amendments to Shareholder Proposal Rule 14A-8: A Retreat From Corporate Democracy?*, 59 TUL. L. REV. 161, 168–69 (1984) ("[B]etween 1944 and 1971, not one shareholder proposal was able to muster judicial support for its inclusion. Thus, when the late 1960's and 1970's brought an increase in shareholder proposals, the law clearly disfavored their proponents.").

Peck, working with civil rights lawyer Bayard Rustin,[236] tried to get Greyhound to allow a shareholder vote on ending segregation in Greyhound buses.[237] In litigation, the court sided with Greyhound,[238] but it was on exhaustion of remedies grounds.[239] In 1952 the SEC clarified and narrowed which subjects were proper for inclusion on the proxy thereby fencing out most social and political issues.[240] And during

236. Raymond O. Arsenault, *You Don't Have to Ride Jim Crow*, 34 STETSON L. REV. 343, 364 (2005) ("[P]erhaps more than anyone else, Rustin was the intellectual godfather of the Freedom Rider movement. Peck, a radical journalist who acted as CORE's chief publicist, was the only person to participate in both the Journey of Reconciliation and the 1961 Freedom Rides."); Richard Marens, *Inventing Corporate Governance: The Mid-Century Emergence of Shareholder Activism*, 8 J. BUS. & MGMT. 365, 372 (2002) ("He [James Peck] and Bayard Rustin, both then working for the Congress of Racial Equality, each bought a share of stock in Greyhound as the price of admission to the annual shareholder's meeting in 1948 with the intention of raising the issue of integrating bus seating in the South.").

237. Eric Engle, *What You Don't Know Can Hurt You: Human Rights, Shareholder Activism and SEC Reporting Requirements*, 57 SYRACUSE L. REV. 63, 78 (2006) ("The Greyhound Company had a problem with black and white persons—namely, it segregated according to race. Though Greyhound has since changed its policy, it did successfully refuse to include a shareholder proposal condemning segregation on its busses. Apparently 'leave the driving to us' once meant 'get in the back of the bus.'").

238. D. A. Jeremy Telman, *Is the Quest for Corporate Responsibility a Wild Goose Chase? The Story of* Lovenheim v. Iroquois Brands, Ltd., 44 AKRON L. REV. 479, 489 (2011) ("[T]he court denied Peck's motion to enjoin Greyhound from soliciting proxies and holding its shareholder meeting unless Peck's proposal was included in Greyhound's proxy materials, finding that Peck had failed to exhaust available administrative remedies. The court believed that Peck must first pursue SEC review of its staff's no-action letter before seeking the injunction.").

239. Daniel E. Lazaroff, *Promoting Corporate Democracy and Social Responsibility: The Need to Reform the Federal Proxy Rules on Shareholder Proposals*, 50 RUTGERS L. REV. 33, 50 (1997) ("It is difficult to discern from Peck whether it reflects judicial hostility towards use of the shareholder proposal rule to raise social questions, or whether it is a narrow ruling based on administrative law principles."); *Liberalizing Sec Rule 14a-8 Through the Use of Advisory Proposals*, 80 YALE L.J. 845, 855 n.45 (1971) ("In one of the few court cases involving the shareholder proposal rule, [the SEC Securities Exchange Act of 1934 Release No. 3638] was used to justify the omission from Greyhound's proxy of a proposal recommending that management consider the advisability of abolishing the segregated seating system in the South.").

240. Marilyn B. Cane, *The Revised SEC Shareholder Proxy Proposal System: Attitudes, Results and Perspectives*, 11 J. CORP. L. 57, 76 (1985) ("By 1952 the Commission promulgated specific rules which delineated 'proper subject.' Among those proposals which could be excluded (i.e., those not proper subjects) were those relating to general political, social or economic matters."); Thomas W. Joo, Comment, *Corporate Governance and the "D-Word"*, 63 WASH. & LEE L. REV. 1579, 1588 (2006) ("As a shareholder of Greyhound Corporation, Peck attempted to use the federal shareholder proposal rule to advance a resolution against segregated bus seating. The SEC advised Greyhound in 1951 that it need not allow shareholders to use the proposal rule for 'political' issues and codified this position in a 1952 amendment to the rule.").

the 1960s and 1970s, the SEC sided with companies that wanted to keep "political matters" off the proxy.[241] The few political matters that were left on the proxy saw little shareholder support.[242]

C. How a Chemical Weapon Expanded Shareholder Rights

This inability of shareholders to raise social and political issues on the proxy after *Peck v. Greyhound* all changed with the effort by shareholders at Dow to get the firm to stop producing the chemical weapon napalm for use in the Vietnam War.[243] The shareholders in question were the Medical Committee for Human Rights ("MCHR"),[244] which acquired stock in Dow Chemical Company as a gift.[245] MCHR was founded in July 1964 and began as an organization dedicated to providing emergency medical care for civil rights workers in Mississippi.[246]

After the SEC sided with Dow that the napalm issue could be kept off the proxy, the MCHR sued the SEC.[247] In the *MCHR* case, the D.C. Circuit Court, in a surprise to many, wrote an opinion that embraced a

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241. Henry G. Manne, *Shareholder Social Proposals Viewed by an Opponent*, 24 STAN. L. REV. 481, 486 (1972) ("*Peck v. Greyhound Inc.* is the only proposal dealing with what we now term a 'social issue' which was litigated prior to about two and a half years ago. . . . Now, only twenty years later, it is almost eerie to contemplate the lack of public concern that the case aroused.").

242. Dale A. Oesterle & Alan R. Palmiter, *Judicial Schizophrenia in Shareholder Voting Cases*, 79 IOWA L. REV. 485, 487 (1994) ("During the 1950s and 1960s, proxy contests were still infrequent, and insurgents were still unsuccessful; management-sponsored initiatives won and shareholder-sponsored initiatives lost, each by wide margins.").

243. Jill E. Fisch, *From Legitimacy to Logic: Reconstructing Proxy Regulation*, 46 VAND. L. REV. 1129, 1152 (1993) ("In the 1950s and 1960s, shareholders . . . display[ed] increasing concern over the corporation's relationship to society at large. Issues such as the Vietnam War, the civil rights movement, and environmentalism became important not merely on the political agenda, but also on the corporate agenda. Shareholders began to use the corporate proxy to debate these issues.").

244. Med. Comm. for Human Rights v. SEC, 432 F.2d 659, 682 (D.C. Cir. 1970) (remanding cause to Commission to reconsider MCHR's claim), *vacated*, 404 U.S. 403 (1972).

245. Letter from Med. Comm. for Human Rights to L. Geoffrey Cowan from Quentin D. Young (Mar. 6, 1968) (thanking Cowan for the gift of Dow stock to MCHR) (on file with author).

246. *Medical Committee for Human Rights*, http://www.crmvet.org/docs/64_mchr.pdf (last visited June 29, 2016).

247. *The Bright Image: The SEC, 1961—1973: Proxy Regulation*, SEC HIST. SOC'Y, http://www.sechistorical.org/museum/galleries/tbi/voice_b.php (last visited June 29, 2016).

strong vision of corporate democracy.[248] Indeed, the D.C. Circuit found that shareholder votes on political matters were fully appropriate and distinguishable from ordinary business decisions, which are corporate managers' proper domain.[249] As the Court explicated:

> We think that there is a clear and compelling distinction between management's legitimate need for freedom to apply its expertise in matters of day-to-day business judgment, and management's patently illegitimate claim of power to treat modern corporations with their vast resources as personal satrapies implementing personal political or moral predilections.[250]

The Supreme Court did not rule on the merits of the case because they deemed the controversy between MCHR and Dow to be moot as the original events were, at that point, years in the past and unlikely to repeat.[251] This left the D.C. Circuit with the controlling opinion.[252] The SEC eventually relented and changed Rule 14a-8 to allow for shareholders to raise social and political issues on the proxies of publicly traded firms.[253] This change in the rules has allowed shareholders to raise issues as varied as animal cruelty, to climate change, to corporate political spending after *Citizens United*.[254] Undeniably this rule change has allowed shareholders to bring

248. *See generally* Ciara Torres-Spelliscy, *Corporate Democracy from Say on Pay to Say on Politics*, 30 CONST. COMMENT. 431 (2015).

249. *Med. Comm. for Human Rights*, 432 F.2d at 676.

250. *Id.* at 681; *see also* Roosevelt v. E.I. Du Pont de Nemours & Co., 958 F.2d 416, 421 (D.C. Cir. 1992) ("Access to management proxy solicitations to sound out management views and to communicate with other shareholders on matters of major import is a right informational in character, one properly derived from section 14(a) and appropriately enforced by private right of action.").

251. SEC v. Med. Comm. for Human Rights, 404 U.S. 403, 405–07 (1972).

252. *See Med. Comm. for Human Rights*, 432 F.2d at 680–81.

253. Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 12,999 (Nov. 22, 1976).

254. See *Resolutions*, AS YOU SOW, http://www.asyousow.org/our-work/current-resolutions/ (last visited June 29, 2016), for a running tally of socially responsible shareholder proposals. *See also* Conference Board Committee on Corporate Political Spending, *Corporate Political Spending*, THE CONFERENCE BOARD 7–8 (2d. ed. 2015) (showing 97 shareholder proposals at S&P 500 companies on corporate political spending in both 2013 and 2014 and that the average level of support in 2014 was 23.6% for proposals that requested greater transparency).

numerous shareholder proposals asking for more transparency for corporate political spending.[255]

D. I'll Take My Investing Dollars Elsewhere and So Should You

In addition to staying and slugging it out with firms through shareholder proposals on political and social issues, truly disenchanted shareholders can take the Wall St. Walk—that is to say, they can sell their shares.[256] Or if they are really motivated, they can urge across the board divestment by others.[257] In the 1970s and 1980s shareholders used a divestment campaign to pressure South Africa to end racial Apartheid.[258] The South Africa divestment campaign included various different tactics: "Church groups disrupted corporate shareholder meetings with demands for immediate withdrawal, while more moderate investors pushed corporate boards to adopt the Sullivan principles—a set of rules for companies in South Africa that purported to minimize their complicity with the apartheid regime."[259] States and municipalities, who were shareholders because of their public pension funds, also took a leadership role in the divestment effort against South Africa.[260]

Divestment is also a strategy that is currently in use. As this piece is being written, there is a wide ranging effort to get universities and foundations to divest their endowments from fossil fuels to address

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255. Nell Minow, *Shareholders United: SEC Rules That Political-Spending Proposal Must Go to a Vote*, CBS NEWS: MONEYWATCH (Apr. 6, 2011, 2:14 PM), http://www.cbsnews.com/news/shareholders-united-sec-rules-that-political-spending-proposal-must-go-to-a-vote/.

256. *See* Heather M. Field, *Throwing the Red Flag: Challenging the NFL's Lessons for American Business*, 38 J. CORP. L. 381, 396 (2013).

257. *See* Grace A. Jubinsky, Note, *State and Municipal Governments React Against South African Apartheid: An Assessment of the Constitutionality of the Divestment Campaign*, 54 U. CIN. L. REV. 543, 545–46 (1985).

258. Field, *supra* note 256, at 396 ("[A]s the public increasingly rallied against South African apartheid, shareholders (in particular, states and localities) increasingly divested themselves of South African companies, choosing to invest elsewhere.").

259. KLEIN, *supra* note 5, at 337.

260. *See* Frederick A. O. Schwarz, Jr., *Lawyers for Government Have Unique Responsibilities and Opportunities to Influence Public Policy*, 53 N.Y.L. SCH. L. REV. 375, 404–05 (2009) (describing Mr. Schwarz's early involvement in New York City's divestment initiatives and his confidence that Mayor Ed Koch was "proud of being an early leader in the pressure against apartheid from America, which clearly helped to accelerate change in South Africa"); Jubinsky, *supra* note 257, at 544–45 (nothing that Connecticut, Maryland, Massachusetts, Michigan, and Nebraska all passed their own divestment laws, and at least twenty-seven states had considered divestment legislation by 1985.).

climate change and to incentivize investments in cleaner energy technologies.[261] Here fossil fuels include coal, oil and gas.[262] Only a handful of smaller universities have actually divested, with the notable exception of Stanford, which has chosen to divest from coal only.[263] One foundation that has chosen to divest from fossil fuels is the Rockefeller Family Foundation.[264] This is notable since the Rockefeller fortune was made through Standard Oil—an oil company.[265] Harvard University, which has the largest endowment in the world, has been subject to an ongoing campaign to convince the trustees who manage its investment portfolio to divest from fossil fuels.[266] So far, Harvard has not budged on the issue.[267]

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261. *See* Adam Vaughan, *Fossil Fuel Divestment: A Brief History*, THE GUARDIAN (Oct. 8, 2014, 11:24 AM), http://www.theguardian.com/environment/2014/oct/08/fossil-fuel-divestment-a-brief-history ("With its roots in US campuses, the campaign to get institutions to pull their financial investments as a way of tackling climate change has seen a total of $50bn divested so far, according to the US Fossil Free campaign."). In addition to fossil fuel divestment efforts, there are also efforts to divest from guns. See *About*, CAMPAIGN TO UNLOAD, http://www.campaign2unload.org/about-us (last visited June 29, 2016).

262. Damian Carrington, *Fossil Fuel Lobby Goes on the Attack Against Divestment Movement*, THE GUARDIAN (Feb. 11, 2015, 1:18 PM), http://www.theguardian.com/environment/damian-carrington-blog/2015/feb/11/fossil-fuel-lobby-goes-on-the-attack-against-divestment-movement ("In a similar vein, but closer to fighting than laughing, is the claim that coal is 'the bedrock of modern life' from the American Energy Alliance, a group with links to the fossil fuel industry.").

263. *See* Steven Davidoff Solomon, *Colleges Use Anti-Apartheid Strategies to Battle Fossil Fuels*, N.Y. TIMES: DEALBOOK (Feb. 10, 2015, 6:52 PM), http://dealbook.nytimes.com/2015/02/10/using-anti-apartheid-divestment-strategies-to-battle-fossil-fuels/?_r=0 ("Stanford and a handful of other colleges have pledged to divest their endowments of such investments, but . . . most of them, including Harvard and Yale, have demurred.").

264. *Rockefellers to Sell Oil Assets as Part of $50B Global Warming Fight*, CBC NEWS (Sept. 22, 2014, 1:01 PM), http://www.cbc.ca/news/business/rockefellers-to-sell-oil-assets-as-part-of-50b-global-warming-fight-1.2773771 ("The Rockefellers, who made their vast fortune on oil, will on Monday join and [sic] other philanthropies and high-wealth individuals in a pledge to sell and get out of a total of $50 billion US worth of fossil fuel assets.").

265. Vaughan, *supra* note 261 ("'We are quite convinced that if he were alive today . . . he would be moving out of fossil fuels . . . ,' said Stephen Heintz of John D. Rockefeller, as he announced that the heirs to one of America's most famous dynasties, which was built on oil, were pulling their philanthropic funds out of fossil fuels.").

266. Matt Rocheleau, *Prominent Alumni Ramp Up Pressure on Universities to Divest*, BOSTON GLOBE (Feb. 20, 2015), https://www.bostonglobe.com/metro/2015/02/19/alumni-withhold-donations-join-student-protests-pressure-colleges-divest-from-fossil-fuels/WgWZ1SQKEAxigN6Gl1pRrI/story.html ("[P]owerful alumni of Harvard University . . . called for other graduates to join the effort . . . . 'Divestment is effective,' said the letter, whose signatories included Portman, Kennedy, former US senator Tim Wirth, philosopher Cornel West, director Darren Aronofsky, and architect Maya Lin. 'While we can't

E. Socially Responsible Shareholders Take Center Stage

Many investors have been increasingly concerned about the impact of corporations on stakeholders like the community, the environment, or employees.[268] Some socially responsible investing has a long lineage that dates back as far as political customer boycotts.[269] Shareholder actions asking for more socially responsible behavior by companies have taken off in the past two decades with so-called socially responsible investing ("SRI").[270] SRI is a growing sector of shareholding in the United States[271] as well as globally.[272] While once thought to be a distraction that would go away,[273] SRI has matured to the point where returns on socially responsible investments are equal to or greater than

bankrupt the oil companies, we can start to politically bankrupt them, complicating their ability to dominate our political life.'").

267. John Schwartz, *Harvard Students Move Fossil Fuel Stock Fight to Court*, N.Y. TIMES (Nov. 19, 2014), http://www.nytimes.com/2014/11/20/us/harvard-students-move-fossil-fuel-divestment-fight-to-court.html ("Harvard students, frustrated by the university's refusal to shed fossil fuel stocks from its investment portfolios, is looking beyond protests and resolutions to a new form of pressure: the courts. . . . The 11-page complaint, with 167 pages of supporting exhibits, asks the court to compel divestment on behalf of the students and 'future generations.'").

268. *See* Virginia Harper Ho, *"Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide*, 36 J. CORP. L. 59, 80–81 (2010).

269. SUZANNE L. SHIER, RESPONSIBLE INVESTING FOR THE MODERN FIDUCIARY: ALIGNING GOALS, DUTIES, INVESTMENTS AND IMPACT 4 (2015), https://www.northerntrust.com/ documents/line-of-sight/wealth-management/responsible-investing-modern-fiduciary.pdf? bc=24453990 ("Socially responsible investing historically focused on the avoidance of social injury through investments. It dates back to the anti-slavery efforts of the Quakers in America in the 1700s, garnered renewed attention with divestiture of investments in South Africa in opposition to apartheid in the 1970s and 1980s, and more recently was the impetus to divest in Rwanda.").

270. *See* Jacob Park & Sonia Kowal, *Socially Responsible Investing 3.0: Understanding Finance and Environmental, Social, and Governance Issues in Emerging Markets*, 18 GEO. PUB. POL'Y REV. 17, 18 (2013).

271. Ho, *supra* note 268, at 88 ("Support for emerging conceptions of enlightened shareholder value is further amplified by its natural overlap with much of the SRI movement, which now accounts for more than 12% of all professionally managed investments in the United States, or $3.07 trillion assets under management.").

272. Park & Kowal, *supra* note 270, at 26–27 ("The global effects of increasing SRI in China . . . will be amplified in the coming decades . . . SRI has the potential to advance a deeper set of social, environmental, and ethical business norms on the global level and is finally becoming a market reality, if not a force, in a number of emerging economies.").

273. Michael S. Knoll, *Ethical Screening in Modern Financial Markets: The Conflicting Claims Underlying Socially Responsible Investment*, 57 BUS. LAW. 681, 681 (2002) ("The proponents of socially responsible investment ("SRI") claim that as of the end of 1999, $1.5 trillion was invested in the United States using social criteria. That is up from $40 billion in 1984, which implies an annualized compound rate of increase of twenty-seven percent. Moreover, rather than slowing down, SRI has been accelerating.").

other investments[274] as major institutional investors have adopted the approach.[275] And many firms are apparently responding to pressure from SRI investors[276] by including reporting about Corporate Social Responsibility ("CSR").[277]

Led by SRI firms, shareholder activism over corporate political spending has been growing for years[278] and hit an inflection point with *Citizens United*.[279] Perhaps sensing that customer and shareholder backlash can accompany corporate political spending, much of the post-*Citizens United* corporate political spending has been done through opaque nonprofit intermediaries to hide the spending from public scrutiny.[280] There is a big fight over dark money happening presently on

274. Sarah Pickering, *Our House: Crowdfunding Affordable Homes with Tax Credit Investment Partnerships*, 33 REV. BANKING & FIN. L. 937, 975 (2014) ("[T]here is evidence that certain forms of SRI may outperform traditional investments in periods of financial crisis. Much in the same way that the conservative lending practices of smaller financial institutions insulated their losses in the most recent financial crisis, SRI also experiences stability in economic downturns.").

275. Li-Wen Lin, *Corporate Social and Environmental Disclosure in Emerging Securities Markets*, 35 N.C.J. INT'L L. & COM. REG. 1, 6–7 (2009) ("SRI has evolved from eccentric practices by a small club of faith-based investors to innovative strategies by a large community of financially-sophisticated investors. Major asset management companies offer a variety of SRI products. Large institutional investors . . . (e.g. CalPERS, the largest public pension fund in the United States), have adopted responsible investment principles.").

276. Michael R. Siebecker, *A New Discourse Theory of the Firm After* Citizens United, 79 GEO. WASH. L. REV. 161, 173 (2010) ("A 2008 survey of international business leaders conducted by IBM indicates that 68% of those surveyed focus on CSR [corporate social responsibility] activities to generate new revenue and that 54% believe current CSR activities give their company an advantage over competitors.").

277. Michael R. Siebecker, *Trust & Transparency: Promoting Efficient Corporate Disclosure Through Fiduciary-Based Discourse*, 87 WASH. U. L. REV. 115, 127 (2009) ("In 2008, 86% of companies in the S&P 100 Index included information about social and environmental business practices on their websites.").

278. *See* Robert K. Kelner, *Responding to Corporate Political Disclosure Initiatives*, HARV. L. SCH. FORUM ON CORP. GOV'T. & FIN. REG. (Jan. 30, 2015), http://blogs.law.harvard.edu/corpgov/2015/01/30/responding-to-corporate-political-disclosure-initiatives/.

279. Heidi Welsh, *Mid-Year Review: Corporate Political Activity Proposals in the 2014 Proxy Season*, SUSTAINABLE INV. INST. 10 (2014), https://si2news.files.wordpress.com/2014/08/si2-2014-proxy-season-mid-year-review-corporate-political-activity-excerpt.pdf. "A broad coalition of investors continued to file resolutions asking companies to tell stockholders and the public more about what they spend on political campaigns and lobbying, both directly and most particularly through intermediary groups . . . . [S]hareholders have filed 530 resolutions on these subjects in the last five years, with 136 in 2014." *Id.*

280. James Kwak, *Corporate Law Constraints on Political Spending*, 18 N.C. BANKING INST. 251, 255–56 (2013) ("In one case, the head of a 501(c)(4), asking potential donors for money to fund a political advertising campaign, said, 'Contributions to the [Republican

many corporate proxies.[281] Since *Citizens United*, socially responsible investors have played a key role in shaping corporate behavior about political spending by placing shareholder proposals about corporate political spending transparency on corporate proxies.[282] As the US SIF reported, "[i]n the 2014 season, the bulk of the 130-plus resolutions on political spending [requested more transparency] . . . including [money routed] through indirect channels such as trade associations and non-profit organizations that do not have to report their donors."[283] Recently, mutual funds have become more engaged on the issue of transparency of corporate political spending.[284] In 2014, shareholder proposals asking for more transparency received shareholder votes averaging 23.7%.[285] And at a few firms a majority of shareholders voted for transparency.[286] In 2014, five public firms witnessed a majority of

Jewish Coalition] are not reported. We don't make our donors' names available. We can take corporate money, personal money, cash, shekels, whatever you got.'" (alteration in original)).

281. RESOLUTIONS WITH REPORTS TO THE HOUSE OF DELEGATES 4 (AM. BAR. ASS'N 2013) (citing Ciara Torres-Spelliscy, *Hiding Behind the Tax Code, The Dark Election of 2010 and Why Tax-Exempt Entities Should be Subject to Robust Federal Campaign Finance Disclosure Laws*, 16 NEXUS: CHAP. J.L. & POL'Y 59, 79 (2010–2011)); Liz Bartolomeo, *The Political Spending of 501(c)(4) Nonprofits in the 2012 Election*, SUNLIGHT FOUNDATION (May 21, 2013, 4:18 PM), http://sunlightfoundation.com/blog/2013/05/21/the-political-spending-of-501c4-nonprofits-in-the-2012-election/ ("We often use the term 'dark money' to describe these groups since they can spend an unlimited amount on independent expenditures and electioneering communications yet they do not have to disclose their donors."); Minow, *supra* note 255 ("Companies that want to avoid more new rules should begin to reach out to their shareholders to explain their procedures and criteria for political campaign and lobbying contributions and be able to show how they support both the brand and long-term shareholder returns.").

282. Tracey M. Roberts, *Innovations in Governance: A Functional Typology of Private Governance Institutions*, 22 DUKE ENVTL. L. & POL'Y F. 67, 79 (2011) ("Socially responsible investment (SRI) firms use capital markets and screening programs to incentivize firm management to shift firm practices into alignment with their investors' social and environmental concerns.").

283. *Shareholder Resolutions*, US SIF: THE FORUM FOR SUSTAINABLE & RESPONSIBLE INV. (2015), http://www.ussif.org/resolutions; *see also* Welsh, *supra* note 279, at 10 ("A broad coalition of investors continued to file resolutions asking companies to tell stockholders and the public more about what they spend on political campaigns and lobbying, both directly and most particularly through intermediary groups.").

284. Bruce F. Freed, *Corporate Political Spending and the Mutual Fund Vote*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Dec. 9, 2013), http://blogs.law.harvard.edu/corpgov/2013/12/09/corporate-political-spending-and-the-mutual-fund-vote/ ("Forty large US mutual fund families voted in favor of corporate political spending disclosure an unprecedented 39% of the time, on average.").

285. Welsh, *supra* note 279, at 9.

286. Sara Murphy, *What Companies Don't Want You to Know About the Millions They Spend*, MOTLEY FOOL (July 13, 2014, 2:07 PM), http://www.fool.com/investing/general/2014/07/13/what-companies-dont-want-you-to-know-about-the-mil.aspx (referencing

their shareholders vote in favor of such political transparency. Those firms were Sallie Mae, Lorillard, and Valero Energy, where a majority voted for disclosure of lobbying[287]—and Dean Foods and Smith & Wesson, where a majority voted for disclosure of campaign spending.[288] These victories can be added to the victory at Sprint Nextel in 2011, which also received a majority vote in favor of transparency.[289] One driver of high votes in favor of disclosure of corporate political spending could be the largest proxy advisor ISS's pro-disclosure stance.[290]

Many firms have increased the transparency of their political spending under pressure from investors and the Center for Political Accountability.[291] And some corporations have taken a leadership role in advocating transparent politics for corporations.[292] Unfortunately, even the disclosure that is available from some firms or from some governmental agencies is not particularly user-friendly or easily comparable apples to apples.[293] Or as one shareholder put it: "[it is]

majority vote at Sallie Mae); Lorillard, Inc., Annual Report (Form 8-K) (May 16, 2014), http://www.sec.gov/Archives/edgar/data/1424847/000119312514202966/d730685d8k.htm (showing majority vote at Lorillard); Valero Energy Corp., Annual Report (Form 8-K) (May 1, 2014), https://www.sec.gov/Archives/edgar/data/1035002/000119312514182502/d723421d8k.htm (showing majority vote at Valero).

287. Ciara Torres-Spelliscy, *Who's Afraid of Shareholder Democracy?*, BRENNAN CTR BLOG (Dec. 11, 2014), https://www.brennancenter.org/blog/whos-afraid-shareholder-democracy.

288. Dean Foods Co., Annual Report (Form 8-K) (May 20, 2014), https://www.sec.gov/Archives/edgar/data/931336/000119312514206650/d729533d8k.htm (showing majority vote at Dean Foods); Smith & Wesson Holding Corp., Annual Report (Form 8-K) (Sept. 26, 2014), http://www.sec.gov/Archives/edgar/data/1092796/000119312514354852/d794739d8k.htm (showing majority vote at Smith & Wesson).

289. Heidi Welsh & Timothy Smith, *Proxy Season 2011: A Tipping Point for Social and Environmental Issues?*, HLS FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Sept. 18, 2011), *https://corpgov.law.harvard.edu/2011/09/18/proxy-season-2011-a-tipping-point-for-social-and-environmental-issues/*.

290. INT'L S'HOLDER SERVS., INC., 2012 U.S. PROXY VOTING SUMMARY GUIDELINES 64 (2012), http://www.issgovernance.com/files/2012USSummaryGuidelines1312012.pdf.

291. Peter Overby, *More Corporations Shed Light on Political Spen*ding, NPR (Oct. 27, 2011, 2:02 PM), http://www.npr.org/2011/10/27/141767870/more-corporations-shed-light-on-political-spending (noting Charles Grezlak, head of government affairs for Merck, discussed how increased political spending disclosure can be a good thing for companies, because "we need trust among consumers, we need trust among physicians who prescribe our products").

292. Dan Bross & Trevor Potter*, Contribution Clarity*, CORP. RESP. MAG. (May 9, 2012), http://www.thecro.com/content/contribution-clarity ("We believe corporations subject themselves to perhaps unwarranted criticism and risk by not sharing with stakeholders a broad overview of their governance philosophy related to participation in the political process.").

293. US SIF: THE FORUM FOR SUSTAINABLE & RESPONSIBLE INV., CONFRONTING CORPORATE MONEY IN POLITICS: A GUIDE FOR INDIVIDUAL & INSTITUTIONAL INVESTOR 4

increasingly a game of whack-a-mole: as soon as a company agrees to disclose one avenue of contributions, the money starts flowing through another avenue."[294] The then- Chair of the FEC Ann Ravel encouraged greater transparency urging "[d]isclosure is in the company's interest not only because it is good governance and helps manage risk, but it is also an important way for corporations to build and maintain the trust of customers, investors, policy makers, and the public."[295] This dark money problem[296] has prompted a move by certain investors and academics to require disclosure of corporate political spending for all publicly traded firms.[297] Shareholders—over one million of them—have been clamoring for more disclosure by seeking a new rule from the SEC.[298]

(2014), http://www.ussif.org/Files/Publications/Corporate_Money_in_Politics.pdf ("Information that is publicly available on [corporate] political spending is scattered among several federal, state and local government agencies and is available in widely varying formats ill-suited to providing investors with a clear picture of corporate efforts to influence the political system.").

294. Christopher P. Skroupa, *Investors Want Disclosure of Corporate Political Contributions and Lobbying Expenditures*, FORBES (Apr. 20, 2012, 1:04 PM), http://www.forbes.com/sites/christopherskroupa/2012/04/20/investors-want-disclosure-of-corporate-political-contributions-and-lobbying-expenditures-2/ (quoting Scott Zdrazil Head of Corporate Governance for Amalgamated Bank). "Zdrazil emphasizes the importance of being mindful that, 'Companies increasingly "report" but do not include all avenues by which they are funneling money into politics.'" *Id.*

295. Ann M. Ravel, *Taking the Lead on Political Disclosure in Corporate Political Spending*, CONFERENCE BD. (2016), https://www.conference-board.org/politicalspending/index.cfm?id=35095

296. Brief for United States Representatives Robert Brady, et al., as Amici Curiae Supporting Respondents, Am. Tradition P'ship, Inc. v. Bullock, 132 S. Ct. 2490 (2012) ("Citizens and shareholders are too often unable to see, as the Court put it, 'whether elected officials are in the pocket of 'so-called moneyed interests,' and are thus unable 'to hold corporations and elected officials accountable for their positions and supporters.'" (quoting Citizens United v. FEC, 558 U.S. 310, 370 (2010))).

297. Michael Megaris, *The SEC and Mandatory Disclosure of Corporate Spending by Publicly Traded Companies*, 22 KAN. J.L. & PUB. POL'Y 432, 436 (2013) ("Yet without disclosure of corporate political spending, a shareholder may not even be aware that corporate political contributions are occurring. Disclosure, as contemplated by the Supreme Court, is necessary, and must be mandatory, in order for shareholders to actually hold corporations accountable.").

298.

> To the extent that a company's political spending is consistent with shareholder interests, there is no reason to expect that disclosure would deter directors and executives from such spending. And to the extent that disclosure deters directors and executives from engaging in spending that is disfavored by the company's shareholders, discouraging that spending should be considered a benefit, not a cost, of the proposed disclosures.

Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923, 966 (2013); John Light, *One Million Americans Want*

VI. ANNOYED BY CORPORATE POLITICAL ACTIVITY? THERE'S AN APP FOR THAT.

Against this backdrop of a corporate constitutional right to spend in politics thanks to *Citizens United*[299] (and its predecessor *Bellotti*),[300] and an increasingly polarized customer base, entering from stage left and stage right are new technologies to empower consumers to tap into databases to learn the politics behind mass-marketed brands.[301] Once consumers know a brand's politics, they may alter their purchasing patterns accordingly. As *The Washington Post* explained to its readers: "[a]re you a staunch Republican who would never pull the Democratic lever? Chances are some of your purchases at the grocery store go toward helping a Democratic candidate. Die-hard Democrat? Ditto for you."[302]

New technologies also allow consumers/shareholders to register their dismay with a brand instantaneously to potentially everyone with a Twitter or Facebook account at nearly zero marginal cost. They can use social media technologies to broadcast their objections. When customers think of the "bad behind the good,"[303] this alienation can spread like a contagion to far-flung corners of the world through democratizing technologies, from viral videos on YouTube[304] to hashtag activism on Twitter.[305] This doesn't go unnoticed by brand owners.[306]

Corporations to Reveal Political Spending, MOYERS & CO (Sept. 8, 2014), http://billmoyers.com/ 2014/09/08/one-million-americans-want-corporations-to-reveal-political-spending/.

299. Citizens United v. FEC, 558 U.S. 310, 485 (2010).

300. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 826–28 (1978).

301. Drew DeSilver, *How The Most Ideologically Polarized Americans Live Different Lives*, PEW RESEARCH CTR. (June 13, 2014), http://www.pewresearch.org/fact-tank/2014/06/13/big-houses-art-museums-and-in-laws-how-the-most-ideologically-polarized-americans-live-different-lives/ (suggesting that liberals want walkable communities; conservatives prefer bigger houses).

302. Al Kamen & Colby Itkowitz, *Want to Stop Enriching People Whose Politics You Hate? There's an App for That*, WASH. POST (Aug. 12, 2014), https://www.washingtonpost.com/politics/want-to-stop-enriching-people-whose-politics-you-hate-theres-an-app-for-that/2014/08/12/bcf68d42-2251-11e4-86ca-6f03cbd15c1a_story.html.

303. GLICKMAN, *supra* note 161, at 79 (explaining how abolitionists linked everyday products with the suffering of the slaves who produced them. "[Abolitionist] Garnet . . . wished, through such imagery, to convey the bad behind the good.").

304. Other98, *Target Ain't People*, YOUTUBE (Aug. 15, 2010), https://www.youtube.com/watch?v=9FhMMmqzbD8 (which as of June 29, 2016 had been viewed over 1.7 million times).

305. *See* Anushay Hossain, *Things Can Only Get Better: How Feminists Rocked 2014*, HUFFINGTON POST (Dec. 30, 2014, 5:47 PM), http://www.huffingtonpost.com/anushay-hossain/things-can-only-get-bette_b_6393740.html ("As feminist hashtag after hashtag trended on Twitter, it became undeniable that women online had some serious

Companies spend time and energy monitoring how their brands are received on social media[307] and, increasingly, webpages are reporting back to firms about the habits of end-users.[308]

One fact that impeded boycotts from being launched or sustained in the past was the high transaction costs of organizing them. Boycotts require communications to vast numbers of people informing consumers of what is being boycotted and why, as well as whether the object of the boycott has changed their behavior in a positive way. All of this takes time, money and resources both on the part of the boycott organizer as well as on the part of the consumer who needs to keep a running tally of what is copacetic to buy at the grocery store this week.[309] And much of the problem simply boils down to a purchaser either not knowing or not being able to remember which company is doing which objectionable thing. As one journalist summed up: "Nice Nike runners. Did an underage girl from Punjab province stitch them? Nice ring. Did a gaggle of impoverished children mine the gold it's made with? I love that cereal! Was it made by one of 36 companies that funded the opposition

digital capital . . . . From #BringBackOurGirls to #YesAllWomen to #AllMenCan, hashtag activism showed us if there was ever a place feminists could mobilize to take our power back, it is the Internet."); Michael Luciano, *The 'Boycott Burger King' Hashtag is Perfect For Privileged Yuppies*, THE DAILY BANTER (Aug. 26, 2014), http://thedailybanter.com/2014/08/boycott-burger-king-hashtag-perfect-lazy-privileged-yuppies/.

306. Alexander Haldemann, *The 3 Things You Can Do to Help Make a Brand Support Equality*, HUFFINGTON POST (June 4, 2014, 7:45 PM), http://www.huffingtonpost.com/dr-alexander-haldemann/the-three-things-you-can-_b_5446659.html ("[D]ecision makers at brands are paying attention to what consumers are saying on their various [social media] channels.").

307. Felix Gillette, *Why Chick-fil-A and Other Brands Aren't Being Bullied*, BLOOMBERG BUS. (Aug. 2, 2012, 8:55 PM), http://www.businessweek.com/articles/2012-08-01/why-chick-fil-a-and-other-brands-arent-being-bullied#p2 ("These days, brand strategists possess precise social media monitoring software, which can tell them exactly how many people are expressing disgust and whether the outrage is growing or dissipating. That makes it easier to know when to spring into action, and when to ride it out."); *see also* Patrick Barwise & Sean Meehan, *The One Thing You Must Get Right When Building a Brand*, HARV. BUS. REV., Dec. 2012, at 80, 82 (measuring the amount of media attention a brand gets or how often it is discussed in social media can be indicative of "brand awareness.").

308. Julia Angwin, *The Web's New Gold Mine: Your Secrets*, WALL ST. J. (Jul. 30, 2010), http://online.wsj.com/news/articles/SB10001424052748703940904575395073512989404 ("Tracking activity is exploding. Researchers at AT&T Labs and Worcester Polytechnic Institute last fall found tracking technology on 80% of 1,000 popular sites, up from 40% of those sites in 2005.").

309. Ashlee Kieler, *If A Boycott Works, It's Not Just Because People Stopped Buying Stuff*, CONSUMERIST (May 17, 2014), http://consumerist.com/2014/05/17/if-a-boycott-works-its-not-just-because-people-stop-buying-stuff/.

to GMO labeling in California?"[310] Busy shoppers may not have time for keeping track of all of this.[311]

In a keynote speech at Netroots Nation's 2012 annual meeting, Darcy Burner suggested that technologies were needed to better inform end users of the links between products they buy and their political implications.[312] As reported in *Huffington Post*:

> [Darcy Burner] proposed a smartphone app allowing shoppers to swipe barcodes to check whether conservative billionaire industrialists Charles and David Koch were behind a product on the shelves. Burner figured the average supermarket shopper had no idea that buying Brawny paper towels, Angel Soft toilet paper or Dixie cups meant contributing cash to Koch Industries through its subsidiary Georgia-Pacific. Similarly, purchasing a pair of yoga pants containing Lycra or a Stainmaster carpet meant indirectly handing the Kochs your money (Koch Industries bought Invista, the world's largest fiber and textiles company, in 2004 from DuPont).[313]

Ms. Burner did not know at the time but other developers were already working to make what she envisioned real. Technology is solving boycotts' time intensive organizational problem. For once, the consumer does not have to be part of a pre-existing large membership group to get pulled into a boycott effort. Rather boycotts can be more atomized, self-driven, and miniature. Call it a "micro-boycott," if you will. A micro-boycott is one where an individual is not prompted by others, but rather individually decides to stop buying a particular good or service. The Smartphone technology discussed in this piece below enables coordination of boycotts through campaigns on the Buycott webpage as well as fostering micro-boycotts at the individual level by using the BuyPartisan or 2nd Vote Apps.[314]

310. Sonya James, *Q&A: Ivan Pardo, Creator of Buycott, On Politically Savvy Consumerism*, ZDNET (Aug. 16, 2013, 11:00 PM), http://www.zdnet.com/article/qa-ivan-pardo-creator-of-buycott-on-politically-savvy-consumerism/.

311. *Id.*

312. Netroots Nation, *Darcy Burner Keynote, Netroots Nation 2012*, YOUTUBE (June 8, 2012), https://www.youtube.com/watch?v=4h_y7ypyb1Q.

313. Clare O'Connor, *New App Buycott Lets Users Protest Koch Brothers, Monsanto and More*, HUFFINGTON POST (May 15, 2013, 10:40 AM), http://www.huffingtonpost.com/2013/05/15/buycott-app_n_3279214.html.

314. BUYCOTT APP, http://www.buycott.com/ (last visited June 29, 2016).

Social media provides the ability of the micro-boycott to be transformed into a general boycott. All the single boycotter needs to do is make an argument on Twitter or Facebook or other social media platforms of why a boycott is appropriate. If the customer/shareholder leading a boycott effort happens to be a celebrity or in a position of power, there is more chance of copy-cat behavior by their social media followers. But modern technology truly is democratizing in this sense: a tiny nonprofit or a single individual can put together a video or a graphic or even just a clever tweet and it can be copied and pasted, and shared, and it can go viral. As Professor Gary Minda put it, "[w]ith little capital, lots of imagination, and some luck, anyone can organize a cyberboycott. The boycott can be initiated without speakers and listeners revealing their identities."[315] Boycotts may be particularly effective in the hands of teenagers and other young digital natives,[316] who are a technologically connected and sought after target demographic for retailers.[317]

A. Buycott

Customers have the power to boycott businesses which do not match their political preferences. And this power has just been given a technological boost by smart phone apps called Buycott and BuyPartisan, which allow individuals to learn more about the ideological affiliations between corporations and thus can enable micro-boycotting or even general boycotts. Thus political spending may open firms up to a specific and new type of reputational risk.

A "buycott" is when consumers buy the products of companies whose behavior is admired by the consumer.[318] Buycotts, like boycotts,

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315. MINDA, *supra* note 192, at 185.

316.

> Twitter is the equivalent of the town square or the National Mall in Washington, D.C. for Millennials. Most of them do not read physical newspapers or watch *Meet the Press*. . . . It's not that they are stupid; it's that they receive news and information in a different way than their parents and grandparents.

Larry Atkins, *Hashtag Activism Is a Good Thing, Despite Its Conservative Critics*, HUFFINGTON POST (May 29, 2014, 2:37 PM), http://www.huffingtonpost.com/larry-atkins/hashtag-activism-is-a-goo_b_5368173.html.

317. *See* KLEIN, *supra* note 5, at 403 ("[A] leader in exile of Burma's elected National League for Democracy, observed that 'PepisCo very much takes care of its image. It wanted to press the drink's image as 'the taste of a young generation,' so when the young generation participates in boycotts, it hurts that effort.'").

318. GLICKMAN, *supra* note 161, at 72 ("[Free produce activists] were the first consumer activists to propose what scholars today call the 'buycott,' a commercial alternative to abstention, and the first to suggest labeling ethical goods."); Monroe Friedman, *A Positive*

have a long lineage in America dating back to founding father Benjamin Franklin.[319] As Professor Glickman explained:

> [M]any free producers were doubtless aware of the maple sugar craze of the early 1790s, in which Benjamin Franklin and others encouraged entrepreneurial Americans to market the sweet sap of the maple tree as an alternative to slave-grown cane sugar. The successful marketing of maple sugar, claimed one advocate, would "diminish so many strokes of the whip, which our luxury draws upon the blacks."[320]

As of May 2013, Buycott is also a popular application available on various smartphone platforms.[321] Buycott was created by Ivan Pardo, a programmer from California.[322] Mr. Pardo told an interviewer one of the reasons he created the app was to empower younger shopper because "[s]tudies show 48 percent of global consumers aged 18 to 25 believe that their consumption choices can change society more than politicians."[323] Buycott allows users to create an account and then a user can join "campaigns" that align with the users' beliefs.[324] The campaigns are not controlled by the application's developers as users can create new campaigns through the buycott.com website.[325] The point of the program is to "make[] it easier for consumers to make sure what's in their cart is aligned with what's in their heart."[326] As its creator explained to the press: "I see Buycott as the next stage for how people can organize themselves using technology."[327]

Once campaigns are selected, Buycott users can use the application when shopping by scanning the barcode of a product using their smart

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Approach to Organized Consumer Action: The "Buycott" as an Alternative to the Boycott, 19 J. CONSUMER POL'Y 439, 440 (1996).

319. *See* GLICKMAN, *supra* note 161, at 63.

320. *Id.*

321. BUYCOTT APP, *supra* note 314.

322. O'Connor, *supra* note 313.

323. Carlen Altman, *This New App Reveals the Surprising Truth About What Our Grocery Money Really Supports*, MTV (Dec. 8, 2015), http://www.mtv.com/news/2682766/buy cott-app-where-groceries-come-from/ (quoting Mr. Pardo).

324. BUYCOTT APP, *supra* note 314.

325. BUYCOTT APP, *All Campaigns*, http://www.buycott.com/campaign/all (last visited June 29, 2016); Jeffrey L. Wilson, *Buycott (for iPhone)*, PC MAG. (Aug. 1, 2013), http://www.pcmag.com/article2/0,2817,2422581,00.asp.

326. M. Joy Hayes, *Buycott App Makes It Easier to Put Your Money Where Your Ideals Are*, AOL NEWS (June 12, 2013, 5:00 AM), http://www.aol.com/article/2013/06/12/buycott-app-put-your-money-where-your-ideals-are/20617657/?gen=1.

327. James, *supra* note 310.

phone's camera.[328] The application alerts a user when a particular product is owned by a company that conflicts with one of the campaigns a user has followed (boycott) or is aligned with a user's campaign (buycott).[329] The application provides users with information on the company producing the product like the corporate office address, brands owned by the company, contact information, and links to the company's website and social media sites.[330] This helps a shopper navigate the complexities that are endemic in vertically integrated companies that market under multiple brands. And as a result, "Buycott highlights companies related to a variety of causes, allowing you to boycott companies that supported SOPA / PIPA, products created by climate change denier Koch Industries, or companies that have fought against gay marriage."[331]

ABC News named Buycott the "App of the week" in May 2013 and concluded, "[t]he app's premise rests on the demand for more information about the choices we make as consumers."[332] *Salon* argued that a smartphone app that empowered consumers was a good thing: "Buycott . . . [is] a powerful demonstration of how we can use new technology to cut through the marketing campaigns and political power of corporate interests. It's an app that should be on everyone's phone . . . ."[333] But others are not so sure, calling Buycott "a smartphone app that guarantees you will be insufferably outraged no matter where you are. Say you're at the grocery store. . . . Does Wonder Bread secretly funnel money to Third World despots? Wonder no more."[334]

The Buycott platform is catching on. This could be generational. One young shopper wrote of the Buycott App: "Buycott is not only handy, it gamifies groceries. . . . Buycott made me more aware of where my money goes and of the ramifications of supporting certain companies. . . . Buycott will be the quickest way [for people] to align

328. *See* BUYCOTT APP, *All Campaigns*, *supra* note 325; Wilson, *supra* note 325.

329. M.J. Angel, *To Buy or Boycott—Brands Beware*, SYDNEY MORNING HERALD (July 29, 2013, 9:34 AM), http://www.smh.com.au/action/printArticle?id=4599088.

330. BUYCOTT APP, *supra* note 314.

331. Erin Griffith, *Forget Armchair Activism, New App Buycott Helps People Shop with a Conscience*, PANDO (May 20, 2013), https://pando.com/2013/05/20/forget-armchair-activism-new-app-buycott-helps-people-shop-with-a-conscience/.

332. Mary Godfrey, *App of the Week: Buycott*, ABC NEWS (May 18, 2013), http://abcnews.go.com/blogs/technology/2013/05/app-of-the-week-buycott/.

333. Andrew Leonard, *App of the Week: Buycott*, SALON (June 2, 2013, 2:00 PM), http://www.salon.com/2013/06/02/app_of_the_week_buycott/.

334. Christian Schneider, Opinion, *'Buycott' At Your Own Risk*, MILWAUKEE J. SENTINEL (Aug. 26, 2014), http://www.jsonline.com/news/opinion/buycott-at-your-own-risk-b99337719z1-272760731.html.

their spending—and their bodies—with their ethical convictions."[335] According to press reports in 2015, Buycott had 1.5 million users.[336]

B. BuyPartisan

In contrast to Buycott, BuyPartisan allows shoppers to scan the bar codes on products and to learn about the politics of the corporation behind it.[337] As the *L.A. Times* described it:

> BuyPartisan, a free smartphone application developed by former Capitol Hill staffer Matthew Colbert, gives users the chance to learn more about the political leanings of the makers of supermarket items.
>
> By compiling campaign finance data from the top Fortune 500 companies and matching it with their products, the app lets consumers scan their groceries and immediately find out which political party stands to profit most from the sale.[338]

The data sources behind BuyPartisan are the nonpartisan nonprofits the Sunlight Foundation, the Center for Responsive Politics, and the National Institute on Money in State Politics.[339] While Buycott allow users to keep track of her buycotts and boycotts, "BuyPartisan doesn't directly urge users to boycott products, but that's likely how many consumers will use it."[340] Like Buycott, Buypartisan uses

335. Ethan Jacobs, *Buycott Is an App to Help You Boycott Your Least-Favorite Food Corporations*, INVERSE (Feb. 26, 2016), https://www.inverse.com/article/12086-buycott-is-an-app-to-help-you-boycott-your-least-favorite-food-corporations.

336. Caroline O'Donovan, *How Buycott Intends To Put Bad Brands "On Blast,"* BUZZFEED NEWS (Dec. 7, 2015, 11:01 PM), http://www.buzzfeed.com/carolineodonovan/how-buycott-intends-to-put-bad-brands-on-blast#.hkv4gxJRe.

337. John Brownlee, *How Republican Is Whole Foods? I Used an App To Find Out*, FAST COMPANY (Aug. 29, 2014, 9:45 AM) http://www.fastcodesign.com/3035033/how-republican-is-whole-foods-i-used-an-app-to-find-out ("Spoiler: it's almost impossible to buy anything in Whole Foods without, in a roundabout way, supporting the Republican Party.").

338. Rebecca Bratek, *Smartphone App Reveals the Politics in Your Shopping Cart*, L.A. TIMES (Aug. 25, 2014, 5:30 AM), http://www.latimes.com/nation/la-na-buy-partisan-20140825-story.html.

339. Aaron Lanton, *'BuyPartisan' App Allows Users to Scan Groceries to View Political Affiliations*, TECH TIMES (Sept. 4, 2014, 10:30 AM), http://www.techtimes.com/articles/14754/20140904/buypartisan-app-allows-users-to-scan-groceries-to-view-political-affiliations.htm.

340. Bratek, *supra* note 338.

smartphone cameras to scan bar codes.[341] "The process is simple: Users scan a bar code using their phone's camera, and within seconds data are displayed on the screen. A red and blue bar breaks down the percentage of Republican and Democratic support the manufacturer and its employees provided, while a green bar signifies 'other.'"[342] The data on the partisanship of the firms is based on the political spending at the CEO, board, corporate PACs and employees.[343] The creator of BuyPartisan argued, "'[i]n light of Chick-fil-A and Hobby Lobby . . . people have become much more attuned to a company's deeper impact,' Colbert said, referring to those companies' corporate support for conservative causes."[344]

A *Time Magazine* reporter used the BuyPartisan App to test the partisanship of pens and found,

> Bic's cheap-o ball pens, nearly Soviet in quality, are predictably leftist with more than 80% of their donations since 2002 . . . going to Democrats. The ostentatious decadence of the ink gushing roller pen from Uni-Ball—the pen where you can draw a lake by leaving it in one spot—is, unsurprisingly, 95% Republican.[345]

Another user reported in *Daily Kos* about feeling enlightened by the App to discover that "Angel Soft, Northern Tissue and all Georgia Pacific paper products will stay on the shelves as I walk buy with my grocery cart. They are products of the Koch Brothers who represent everything that's wrong in this country today. My money will go to their competitors."[346] Or as one user joked, "[f]inally, consumers can get answer to questions, like: 'What would Reagan eat?' or 'Is this macaroni trying to take away my right to bear arms?'"[347]

One advocate working to foster partisanship Margaret Kimbrell, executive director of No Labels, was critical of BuyPartisan's approach, stating: "'Knowing what kind of cereal, whether it's a Democratic or

341. *Id.*
342. *Id.*
343. *Id.*
344. *Id.* (alteration in original).
345. Denver Nicks, *My Shopping Trip with BuyPartisan Changed Everything*, TIME (Sept. 23, 2014), http://time.com/3418502/shopping-beer-buypartisan-politics/.
346. Leslie Salzillo, *Free 'BuyPartisan' App Shows If Your Groceries Lean Left or Right*, DAILY KOS (Sept. 7, 2014, 8:49 PM), http://www.dailykos.com/story/2014/9/7/1326715/-Free-App-BuyPartisan-Reveals-Which-Party-Direction-Your-Grocery-List-Leans.
347. Dell Cameron, *BuyPartisan App Lets You Vote with Your Wallet*, DAILY DOT (Sept. 8, 2014, 1:48pm CT), http://www.dailydot.com/politics/buy-partisan-app/.

Republican cereal, that's just not adding into the political discourse.'"[348] And another bipartisan advocate Jack Marshall, president of ProEthics, was similarly concerned that BuyPartisan is trying to turn every trip into the grocery store into election day.[349] then he retorted, "[y]ou don't want every day to be an election . . . . That's why we have elections periodically, so people can calm down and work together."[350]

The Economist, for one, doesn't like the idea of consumers bringing their partisanship into the grocery store. In a hostile review of the BuyPartisan App, the magazine clucked, "the prissiest Americans are haunted by a different fear: that they may buy cheese made by someone whose opinions they do not share."[351] A piece in *Commentary* advised, "[t]he instinct to have everything on your grocery shopping list conform to an unyielding loyalty to a political party is not a healthy one. And neither is an app that caters to it."[352] As a writer from the UK gazed across the pond at the US concluded, "[t]aken to its natural conclusion, this would only deepen divisions in a country that is already increasingly hyper-partisan. If every Democrat were to avoid Walmart . . . and every Republican were to avoid Whole Foods . . . , then people with differing views wouldn't even have to make polite conversation in the snacks aisle."[353] *The Washington Post* editorial page agreed: "If the app succeeds, it would be a sign that Democrats and Republicans aren't even willing to do business with one another any longer. . . . [W]e hope BuyPartisan fails."[354] But in 2014, BuyPartisan "attracted nearly 100,000 users and landed BuyPartisan in the top 20 on the iTunes app page."[355]

348. Jessica Glenza, Mae Ryan & Ana Terra Athayde, *BuyPartisan: Are Your Groceries Democratic or Republican?—Video*, GUARDIAN (Sept. 9, 2014 7:35 AM), http://www.theguardian.com/world/video/2014/sep/05/buypartisan-app-video (quoting Ms. Kimbrell).

349. Bratek, *supra* note 238.

350. *Id.*

351. *BuyPartisan: Voting with your Wallet an App that Brings Partisan Rage to the Grocery Store*, ECONOMIST (Sept. 13, 2014), http://www.economist.com/news/united-states/21616976-app-brings-partisan-rage-grocery-store-voting-your-wallet.

352. Seth Mandel, *BuyPartisan and Our Polarized, Overly Politicized Civic Culture*, COMMENTARY (Sept. 2, 2014), https://www.commentarymagazine.com/politics-ideas/buypartisan-and-our-polarized-overly-politicized-civic-culture/.

353. Tim Walker, *The Politics of the Weekly Shop*, INDEPENDENT (Sept. 22, 2014), http://www.independent.co.uk/life-style/food-and-drink/features/the-politics-of-the-weekly-shop-9749609.html.

354. Editorial, *Democrat? Republican? There's an App for That*, WASH. POST (Aug. 17, 2014), http://www.washingtonpost.com/opinions/democrat-republican-theres-an-app-for-that/2014/08/17/1d4b3086-2323-11e4-86ca-6f03cbd15c1a_story.html.

355. *Scan barcode, See Company's Political Leanings*, CBS NEWS (Sept. 2, 2014, 8:23 AM), http://www.cbsnews.com/news/buypartisan-app-scans-barcodes-and-shows-political-contributions-of-company/; *see also* Marty Hobe, *Politics as Usual: Politics of Your*

C. 2nd Vote

Finally, there is an App tailored for conservative shoppers called 2nd Vote, which works on the same principles as Buycott and Buypartisan, but is being targeted at Republican and libertarian consumers.[356] This App will alert users whether a particular product is associated with gun control or pro-choice spending.[357] As *Politico* explains, "2nd Vote is designed to allow conservative voters to see how companies score on five issues: gun rights, abortion, the environment, same-sex marriage and federal subsidies."[358] And 2nd Vote gives "each company a score from 1 to 10, [and] the app rates everything from the airline industry to Internet businesses as actively liberal, passively liberal, passively conservative and actively conservative."[359] As the *Washington Times* summed up for its conservative readership: "Holiday shoppers worried about inadvertently supporting left-wing causes when buying that turkey or computer game, take heart: There's an app for that."[360] The pitch for right wing consumers parallels the pitch for left wing consumers, "[y]ou research who you vote for before heading to the polls, so why wouldn't you research where you chose to spend your money, thereby funding a company's activism activity?"[361]

Of course there is no way to limit 2nd Vote's users to just conservatives and so the App could be used by liberals to "buycott" the very stores that 2nd Vote's developers want to boycott. As one writer observed:

> This is an app intended to help conservatives vote with the pocketbooks . . . . It is however, also an app that could be used

Products, THE REGISTER-MAIL (Dec. 19, 2014 11:02 AM), http://www.galesburg.com/article/ 20141219/BLOGS/141219677 (indicating BuyPartisan had 200,000 downloads).

356. *See About 2nd Vote*, 2ND VOTE, http://www.2ndvote.com/about (last visited June 29, 2016).

357. Tal Kopan, *App Grades Companies' Political Bent*, POLITICO (Oct. 22, 2013, 10:15 PM), http://www.politico.com/story/2013/10/app-grades-companies-on-their-political-bent-98697.html#ixzz3UvxZ1JqQ.

358. *Id.*

359. *Id.*

360. Valerie Richardson, *Partisan iPhone Wars: Even Purchasing Apps Have a Right and Left Divide!*, WASH. TIMES (Nov. 20, 2014), http://www.washingtontimes.com/news/2014/nov/20/2nd-vote-app-helps-consumers-apply-partisanship-to/?page=all.

361. Liz Klimas, *App Encourages Conservatives to Take Control of Their '2nd Vote' by Outing Corporate Activism*, THE BLAZE (Oct. 19, 2013, 10:45 AM), http://www.theblaze.com/stories/2013/10/19/app-encourages-conservatives-to-take-control-of-their-2nd-vote-by-outing-corporate-activism/.

> by liberals to support the very companies that the conservatives don't want supported. As television political pundits know all too well, information can be spun by whoever holds it.[362]

Even Ginni Thomas (the wife of Supreme Court Justice Clarence Thomas) wrote about 2nd Vote: "[i]magine the purchasing power to be harnessed if the center-right started using its spending power, like the left has, to influence corporate America."[363] But, by contrast, former Republican candidate for President Mike Huckabee is not excited by the potential uses of 2nd Vote.[364] As he warned:

> [I]f you plan to use it [2nd Vote] to decide which grocer to patronize or which bicycle to ride or which cigar to smoke, and on and on, I hope you'll reconsider. We get more than enough politics from our politicians. Before you let politics take over and poison every corner of your life, remember the words of Sigmund Freud, spoken in a completely different context: "Sometimes, a cigar is just a cigar."[365]

Whether any of these three Apps will be widely adopted and widely used at rate that will impact corporate behavior remains to be seen. But they are being adopted by large numbers of users. Buycott has over a million users and even 2nd Vote boasted over 100,000 users.[366] The potential is quite striking, as this technology could take the human organizer and many man-hours out of organizing a boycott and could lead to powerful simultaneous micro-boycotts.

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362. Daniel Rasmus, *Review: 2nd Vote, The Conservative App that May Unintentionally Help Liberals Choose Where to Shop*, IPHONE LIFE (Dec. 2, 2013), http://www.iphonelife.com/blog/28823/review-2nd-vote-conservative-app-may-unintentionally-help-liberals-choose-where-shop.

363. Ginni Thomas, *Conservative Shopper App Wakes Americans Up to How Liberal Name-Brand Stores Are*, BPR (Feb. 28, 2016), http://www.bizpacreview.com/2016/02/28/conservative-shopper-app-wakes-americans-up-to-how-liberal-name-brand-stores-are-310992.

364. *See* Mike Huckabee, *Don't Let Politics Take Over Your Life (Or Your Shopping List)*, W. JOURNALISM (Mar. 1, 2016, 9:16 AM), http://www.westernjournalism.com/dont-let-politics-take-over-your-life-or-your-shopping-list/.

365. *Id.*

366. Richardson, *supra* note 360.

VII. IS THE ALEC EXODUS THE WAVE OF THE FUTURE?

No one can be certain what the future may hold for the politically active corporation, but the recent experience of corporations being pressured to leave American Legislative Exchange Council ("ALEC") may presage the future.[367] With the boycott of Target in 2010 fading into the background, customers and shareholders found another focus in 2012, 2013 and 2014 in their efforts to get publicly traded firms to drop their affiliation with ALEC.[368] This had been a long-term goal of many activists.[369] But the turning point for this effort was the death of an unarmed teenager in Florida.[370]

After the highly publicized killing of teenager Trayvon Martin at the hands of George Zimmerman, national attention by the media focused on the Florida Stand Your Ground law that Zimmerman used as a defense.[371] Public interest groups rightly pointed out that "Stand Your Ground" laws[372] had been adopted on the behest of ALEC, an association of conservative legislators and corporate members.[373] ALEC is a 501(c)(3) that, among other things, introduces model ALEC legislation in state capitols around the country.[374] Some of these ALEC bills have become state laws.[375]

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367. *See* Dylan Scott, *The ALEC Exodus: Which Big Companies Have Dropped Out?*, TALKING POINTS MEMO (Sept. 23, 2014, 11:56 AM), http://talkingpointsmemo.com/dc/alec-exodus-companies-list.

368. *Id.*

369. *ALEC CEO Nelson: Activists Want to Destroy Groups*, NEWSMAX (Oct. 3, 2014, 5:50 PM), http://newsmax.com/Newsmax-TV/alec-corporations-google-activists/2014/10/03/id/598563.

370. Ed Pilkington & Suzanne Goldenberg, *ALEC Facing Funding Crisis from Donor Exodus in Wake of Trayvon Martin Row*, GUARDIAN (Dec. 3, 2013, 1:06 PM), https://www.theguardian.com/world/2013/dec/03/alec-funding-crisis-big-donors-trayvon-martin.

371. COURTENEY KEATINGE & DAVID EATON, POLITICAL CONTRIBUTIONS: A GLASS LEWIS ISSUE REPORT 9 (2013), http://www.glasslewis.com/wp-content/uploads/2015/10/2013_ Political_Contributions.pdf.

372. William Alan Nelson II, *Post-*Citizens United*: Using Shareholder Derivative Claims of Corporate Waste To Challenge Corporate Independent Political Expenditures*, 13 NEV. L.J. 134, 157–58 (2012) ("'ALEC promotes business-friendly legislation in state capitols [sic] and drafts model bills for state legislatures to adopt.' However, the organization has also supported 'controversial measures, including voter-identification laws and stand[-]your[-]ground laws.'" (alterations in original)).

373. Anthony Kammer, *Privatizing the Safeguards of Federalism*, 29 J.L. & POL. 69, 121 (2013) ("[A]ccording to . . . ALEC's tax filings, . . . [i]n 2009, . . . 'legislative dues came to $82,891, and all the corporate tax-free donations and other income amounted to $6.1 million.' Notwithstanding ALEC's official nonpartisan status as a 501(c)(3) organization, both its leadership and legislative members are predominantly Republican.").

374. Molly Jackman, *ALEC's Influence over Lawmaking in State Legislatures*, BROOKINGS (Dec. 6, 2013), http://www.brookings.edu/research/articles/2013/12/06-

After a leak at ALEC, many of their internal documents were published by *Pro Publica* and the Center for Media and Democracy, which made clear that the use of model ALEC legislation was propagating nationwide.[376] In protest of not only the Stand Your Ground Laws, but also certain voter suppression laws, an advocacy group called Color of Change threatened to boycott companies if they did not leave ALEC,[377] demonstrating that on occasion, a full boycott is not even necessary to change corporate behavior if the threat of a boycott is credible.[378] "Because of the outcry caused by these laws, Kraft and Coca-Cola were urged to withdraw support from ALEC, and subsequently had to make public statements affirming that they would

american-legislative-exchange-council-jackman ("First, ALEC model bills are, word-for-word, introduced in our state legislatures at a non-trivial rate. Second, they have a good chance—better than most legislation—of being enacted into law.").

375. *United States of ALEC—A Follow-Up*, MOYERS & CO. (June 21, 2013), http://billmoyers.com/episode/full-show-united-states-of-alec-a-follow-up/ ("In state houses around the country, hundreds of pieces of boilerplate ALEC legislation are proposed or enacted that would, among other things, dilute collective bargaining rights, make it harder for some Americans to vote, and limit corporate liability for harm caused to consumers—each accomplished without the public ever knowing who's behind it.").

376. Lois Beckett, *Our Step-By-Step Guide to Understanding ALEC's Influence on Your State Laws*, PROPUBLICA (Aug. 1, 2011, 12:26 PM), http://www.propublica.org/article/our-step-by-step-guide-to-understanding-alecs-influence-on-your-state-laws.

377. Tiffany Hsu, *Coca-Cola, Kraft Leave Conservative ALEC After Boycott Launched*, L.A. TIMES (Apr. 6, 2012), http://articles.latimes.com/2012/apr/06/business/la-fi-mo-coca-cola-kraft-alec-20120406 ("Within hours of advocacy group Color of Change launching a boycott against Coca-Cola for its participation on ALEC's Private Enterprise Board, the soft drink giant issued a statement saying that it had 'elected to discontinue its membership.'").

378. David Ferguson, *Coke and Pepsi Abandon Conservative Group Over Voter ID, Gun Laws*, RAW STORY (Apr. 5, 2012, 3:10 PM), http://www.rawstory.com/rs/2012/04/05/coke-and-pepsi-abandon-conservative-group-over-voter-id-gun-laws/ ("The advocacy group Color of Change began a call-in campaign on Wednesday threatening a boycott of Coca-Cola and its products. The company announced within hours that it will not be renewing their membership in ALEC."); *see also* John M. Broder, *White House Official Resigns After G.O.P. Criticism*, N.Y. TIMES (Sept. 7, 2009), http://www.nytimes.com/2009/09/07/us/politics/07vanjones.html ("Mr. Beck called Mr. Obama a racist on a Fox News show, leading Color of Change, an activist group co-founded by Mr. Jones four years ago, to call on Mr. Beck's advertisers to stop sponsoring his television program."); Bruce Horovitz, *CEOs Express Anti-gay Views at Their Peril*, USA TODAY, (Apr. 7, 2014, 8:04 PM), http://www.usa today.com/story/money/business/2014/04/07/chick-fil-a-dan-cathy-mozilla-barilla/7434547/ ("Brendan Eich, CEO of Mozilla, which makes the Firefox Web browser, resigned from his post just a few weeks after taking the job. The reason: In 2008, Eich donated $1,000 in support of a California measure that banned same-sex marriage. Eich's resignation was prompted, . . . by . . . OkCupid, which called for a boycott of Firefox."); Kieler, *supra* note 309 ("Brayden King's report . . . , which studies 221 boycotts between 1990 and 2005, found companies were more likely to give in to boycotter's demands when the issue garnered a great amount of press coverage.").

no longer support the group."[379] Many Fortune 500 companies left ALEC shortly thereafter.[380] Source Watch has a helpful webpage where the public can keep track of corporations that have disassociated themselves from ALEC.[381]

Customers were not the only ones pressuring firms to leave ALEC. Rather, shareholders were also active in urging firms to cut ties with ALEC.[382] In 2014, a large number of tech companies ended their relationship with ALEC after being pressured by shareholders.[383] Google in particular left after a show of disappointment at their annual shareholder meeting in 2014.[384] When Google left ALEC they blamed

379. Nelson, *supra* note 372, at 157–58.

380. Paul Bedard, *Coke Caves in Face of Democratic Boycott Threat*, WASH. EXAMINER (Apr. 4, 2012, 12:00 AM), http://washingtonexaminer.com/article/444346 ("The Coca-Cola Company has elected to discontinue its membership with the American Legislative Exchange Council (ALEC). Our involvement with ALEC was focused on efforts to oppose discriminatory food and beverage taxes, not on issues that have no direct bearing on our business. We have a long-standing policy of only taking positions on issues that impact our Company and industry."); *see also* Joel Connelly, *Amazon Cites "Public Concerns," Quits Right-Wing Legislative Group*, SEATTLE POST INTELLIGENCER (May 24, 2012, 10:52 AM), http://www.seattlepi.com/local/connelly/article/Amazon-cites-public-concerns-quits-right-wing-3583140.php?cmpid=emailarticle&cmpid=emailarticle; Rebekah Wilce, *National Board for Professional Teaching Standards Cuts Ties to ALEC*, PR WATCH (May 1, 2012, 1:50 PM), http://www.prwatch.org/news/2012/05/11491/national-board-professional-teaching-standards-cuts-ties-alec ("Given recent events, the new NBPTS President and CEO decided to discontinue engagement with ALEC. As a result, NBPTS terminated its membership as an Education Task Force Member of ALEC effective April 18, 2012, and also withdrew from participating in the upcoming ALEC conference."); Jessica Wohl, *Wal-Mart Ending Membership in Conservative Group*, REUTERS (May 31, 2012, 9:17 AM), http://www.reuters.com/article/2012/05/31/us-walmart-alec-idUSBRE84U05N20120531?ir pc=932 ("Maggie Sans, Wal-Mart vice president of public affairs and government relations, said in a May 30 letter addressed to ALEC's national chairman and executive director. 'We feel that the divide between these activities and our purpose as a business has become too wide. To that end, we are suspending our membership in ALEC.'").

381. *Corporations That Have Cut Ties to ALEC*, SOURCE WATCH (Nov. 29, 2012), http://www.sourcewatch.org/index.php/Corporations_Who_Have_Cut_Ties_to_ALEC.

382. Rebekah Wilce, *Shareholders Push Firms to Cut Ties to ALEC; 49 Corporations Now Out*, PR WATCH, (June 25, 2013, 7:29 AM), http://www.prwatch.org/news/2013/06/12155/shareholders-push-firms-cut-ties-alec-49-corporations-now-out#sthash.Q2l1HbXE.dpuf.

383. *Id.*

384. Google Investor Relations, *2014 Annual Meeting of Stockholders*, YOUTUBE (May 14, 2014), https://www.youtube.com/watch?v=EDQT7JKiGj0 (showing, at 12:39–14:35, a Google shareholder mentioning ALEC critically and, at 1:12:42-1:13:14, the CLO of Google joking about ALEC).

ALEC's climate change denial.[385] As Google's Eric Schmidt put it, "so we should not be aligned with such people—they're just, they're just literally lying."[386] Visa also left ALEC after pressure from shareholders.[387] This effort around ALEC could be first salvo in a long struggle between corporations who want to exercise their ability to spend in politics and customers/shareholders who want less corporate influence over the political process.

CONCLUSION

There is a perfect storm brewing for corporate political spenders to alienate their customers/shareholders from their brands.[388] The ingredients of this perfect storm includes the high value of brands to the health of firms, the ability of end-users to co-opt the meaning of the brand, politically polarized customers/shareholders, the constitutional right of firms to spend in elections, and technologies that take the human organizer out of organizing a consumer boycott. And with the overlap of retail customers and retail investors, customer/shareholders have the ability to exercise a one-two punch: customer boycotts and the Wall Street Walk. This power is amplified by smart phone apps that empower customers to know the political spending behind a brand. So far adoption has been slow. But the latent potential to be a game changer is real as threats of boycotts and divestment await in the wings and the risks surrounding corporate political activity abound.

385. James Gerken, *Google Chairman: Giving Money to ALEC Was a 'Mistake'*, HUFFINGTON POST (Sept. 22, 2014, 8:43 PM), http://www.huffingtonpost.com/2014/09/22/google-alec-funding_n_5863416.html.

386. Scott, *supra* note 367 (quoting Schmidt).

387. Brendan Fischer, *ALEC Is Not Where Visa Wants to Be*, PR WATCH (Dec. 4, 2013, 4:19 PM), http://www.prwatch.org/news/2013/12/12332/alec-not-where-visa-wants-be#sthash.zVPXE4j3.dpuf ("Visa's departure comes after more than a year of engagement from Boston Common Asset Management over the company's lobbying and political activities, says Lauren Compere, managing director of the socially responsible investment firm.").

388. Evrim Oralkan, *How to Mix Business and Politics Without Ruining Your Business*, ENTREPRENEUR (Oct. 8, 2014), http://www.entrepreneur.com/article/238217 ("On the other hand, committing to a hot-button issue or a political party that alienates your customer base might end up hurting you or your brand in the long run.").

EPILOGUE – CORPORATE REACTION TO THE 2016 RNC CONVENTION

As of June 2016, the presumptive presidential nominee for the Republican Party was Donald Trump, who had made a series of racist, sexist and xenophobic comments throughout his campaign.[389] This motivated several advocacy groups to urge companies to not sponsor the Republican National Convention in Cleveland in the Summer of 2016. For example, "ColorOfChange and a group of advocates sent letters to Coca-Cola Company, Google, Adobe Systems Inc., Xerox Corporation, AT&T Inc., and Cisco Systems Inc. calling on them to cancel their sponsorships of the Republican National Convention if current Republican front-runner Donald Trump is slated to be the nominee."[390] So far, this particular campaign to get companies to drop sponsorship of the RNC Convention has over 360,000 signatories.[391] Apple decided to drop its support of the GOP convention.[392] Other companies dropping sponsorship include Wells Fargo, UPS, Motorola, JPMorgan Chase, and Ford.[393]

The question these advocates urging the boycott have asked these companies is essentially the question explored in this piece: "are you willing to attach your branding to someone so belligerent that they have threatened riots at the convention?"[394] As quoted in the *New York Times*, the question was put even more starkly: "Do they want riots brought to us by Coca-Cola?"[395] Or as I have framed the issue, do

389. Jonathan Capehart, *How Trump is 'Defining Deviancy Down' In Presidential Politics*, WASH. POST (Nov. 23, 2015), https://www.washingtonpost.com/blogs/post-partisan/wp/2015/11/23/how-trump-is-defining-deviancy-down-in-presidential-politics/; *see also* David Brooks, Opinion, *The Governing Cancer of Our Time*, N.Y. TIMES (Feb. 26, 2016), http://www.nytimes.com/2016/02/26/opinion/the-governing-cancer-of-our-time.html?_r=0.

390. Press Release, Color of Change PAC, *Coca-Cola Responds to Pressure from Advocates to Cease Support of the Republican National Convention* (Mar. 30, 2016), http://www. colorofchangepac.org/press-release/coca-cola-responds-to-pressure-from-advocates-to-cease-support-of-the-republican-national-convention/.

391. *Id.*

392. Tony Romm, *Apple Won't Aid GOP Convention over Trump*, POLITICO (June 18, 2016), http://www.politico.com/story/2016/06/apple-wont-aid-gop-convention-over-trump-224513.

393. Harper Neidig, *Major Companies Decline to Fund 2016 GOP Convention*, HILL (June 16, 2016, 05:54 PM), http://thehill.com/blogs/ballot-box/presidential-races/283832-major-companies-pull-sponsorship-of-gop-convention.

394. *Color of Change PAC*, *supra* note 390.

395. Jonathan Martin & Maggie Haberman, *Corporations Grow Nervous About Participating in Republican Convention*, N.Y. TIMES (Mar. 30, 2016), http://www.nytimes.com/ 2016/03/31/us/politics/donald-trump-republican-national-convention.html?_r=0.

mainstream companies really want to shoot their brands in the foot by aligning themselves with political polarizing politicians of one political stripe or another?[396] At least some companies are signaling that they are nervous about getting their brands mixed up in the fractious 2016 presidential race.[397]

396. *See* Editorial, *Time for California Companies to Speak up on Trump*, SACRAMENTO BEE (Mar. 31, 2016, 4:45 PM), http://www.sacbee.com/opinion/editorials/article69326847.html#storylink=cpy ("If it becomes clear that Trump will be the Republican nominee for president, corporate leaders should think long and hard about what role they want to play in July's convention.").

397. Anna Palmer, *Companies Worry Trump-led Convention Could Hurt Brands*, POLITICO (Jan. 28, 2016, 5:19 AM), http://www.politico.com/story/2016/01/donald-trump-cleveland-convention-republicans-brand-218297#ixzz44im3TFTU.