

Stockholder Politics

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In the past few years, there has been a dramatic increase in shareholder support for proposals on political, environmental, ethical, and social issues, from climate change and employee diversity to animal welfare and corporate political spending (“social proposals”). But why do investors in a business corporation concern themselves with socially relevant issues? And how should corporate and securities law address this phenomenon?

Based on the analysis of more than 2,900 social proposals submitted from 2010 to 2021, this Article argues that shareholder activism on socially relevant issues (“stockholder politics”) cannot be entirely explained by financial motives or by special interest capture, as the traditional theories hold. Rather, stockholder politics should be understood as a matchmaking enterprise in which a relatively small number of specialized actors (“stockholder politics specialists”) connect shareholders with prosocial and expressive motives on one side with corporate stakeholders, citizens, and social and policy activists on the other side. Specialists “sell” information, monitoring, and voting opportunities to shareholders interested in socially relevant issues, and they “sell” corporate voice externally to outside actors, including employees, consumers, and citizens concerned about corporate externalities.

This complex phenomenon has both potential benefits and costs for corporate governance. On the one hand, it constrains managerial discretion and reduces managerial agency problems on socially relevant issues by monitoring corporate activities and eliciting shareholder preferences. On the other hand, it can engulf corporate decision-making with multidimensional decisions with no clear equilibrium, and it can exacerbate the agency problems of institutional investors.

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INTRODUCTION

Shareholders of large public companies make increasing use of federal rules on shareholder proposals to submit and support resolutions on political, environmental, ethical, and social issues. In the last few years, for example, shareholders have asked Exxon Mobil to reduce its greenhouse gas emissions,¹ Facebook to address its gender pay gap,² and Bristol-Myers Squibb to stop its experiments on animals.³

As this Article documents, from 2010 to 2021, companies included in the S&P 500 received over 2,900 shareholder proposals on socially relevant issues, including political spending and lobbying, climate change, recyclable packaging, race and gender diversity, religious freedom, the use of pesticides, child obesity, the excessive price of prescription drugs, sexual harassment, and many other matters of public relevance. Throughout this Article, I refer to these proposals as “social proposals.”

Crucially, as this Article shows, shareholder support for social proposals has recently exploded. In 2010, social proposals obtained 18% of the votes on average; in 2021, the number of votes had almost doubled to more than 35%. From 2010 to 2019, only 1% of social proposals on average obtained a majority at the annual meeting; in 2020 and 2021, 16% of social proposals did.

But why do investors in business corporations concern themselves with socially relevant issues? And how should corporate and securities law address this phenomenon?

These questions are especially timely. Environmental and social issues for corporations and capital markets have recently taken center stage in the academic and business discourse,⁴ and are now key elements of the Securities

1. Exxon Mobil Corp., SEC No-Action Letter, 2019 WL 1224513 (Apr. 2, 2019).

2. Facebook, Inc., 2019 Proxy Statement (Form 14A) at 65–67 (Apr. 12, 2019).

3. Bristol-Myers Squibb Co., SEC No-Action Letter, 2019 WL 7253981 (Mar. 1, 2019).

4. The recent literature on environmental and social issues in corporate governance is too vast to be summarized here. Two strands of this literature are relevant for the issues discussed in this Article. The first strand focuses on whether corporate leaders should be authorized to consider the interests of all corporate stakeholders. *See generally*, e.g., Chris Brummer & Leo E. Strine Jr., *Duty and Diversity*, 75 VAND. L. REV. 1 (2022); Mark J. Roe, *Corporate Purpose and Corporate Competition*, 99 WASH. U. L. REV. 223 (2021); Emilie Aguirre, *Beyond Profit*, 54 UC DAVIS L. REV. 2077 (2021); Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1309 (2021); Edward B. Rock, *For Whom Is the Corporation Managed in 2020?: The Debate Over Corporate Purpose*, 76 BUS. LAW. 363 (2021); Leo E. Strine, Jr., *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy. A Reply to Professor Rock*, 76 BUS. LAW. 397 (2021); Stephen M. Bainbridge, *Making Sense of the Business Roundtable's Reversal on Corporate Purpose*, 46 J. CORP. L. 285 (2021); Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401 (2020); Matteo Gatti & Chrystin D. Ondersma, *Can a Broader Corporate Purpose Redress Inequality? The Stakeholder Approach Chimera*, 46 J. CORP. L. 102 (2020); Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91 (2020). The second strand focuses on the role of investors in promoting social and environmental goals. *See generally*, e.g., Roberto Tallarita, *The Limits of Portfolio Primacy* (Harvard L. Sch. Program on Corp. Governance Working Paper, Paper No. 2022-7, 2022); Jeffrey N. Gordon, *Systematic Stewardship* (Eur. Corp. Governance Inst. Working Paper, Paper No. 566/2021, 2021); Amanda M. Rose, *A Response to Calls for SEC-Mandated ESG Disclosure*, 98 WASH. U. L. REV. 1821 (2021); James D. Cox & Randall S. Thomas, *The SEC's*

Exchange Commission's (SEC) rulemaking agenda. At the end of 2020, under the Trump Administration, the SEC adopted an amendment to the shareholder proposal rules that makes the submission of shareholder proposals, including social proposals, more difficult.⁵ In 2021 and 2022, under the Biden Administration, the SEC has instead adopted a much more liberal approach in allowing social proposals,⁶ and has proposed ambitious rules concerning the disclosure of public companies' climate risk⁷ and transparency in the use of environmental, social, and governance (ESG) practices by investment managers.⁸

Understanding shareholder activism on social proposals (a phenomenon I will refer to as "stockholder politics") and assessing its policy implications is, therefore, an urgent task. This Article makes three main contributions to this end. First, it presents a comprehensive empirical account of social proposals based on a detailed examination of the 2,933 proposals submitted to S&P 500 companies from 2010 to 2021, including the analysis of over 17,000 pages of documents from the decision record of the SEC. Second, it questions the conventional explanations for this phenomenon and develops an alternative framework in which stockholder politics is understood as a matchmaking enterprise between shareholders with prosocial and expressive preferences and extra-corporate actors in search of corporate voice. Third, it examines the policy promise and perils of stockholder politics.

Shareholder Proposal Rule: Creating a Corporate Public Square, 2021 COLUM. BUS. L. REV. 1147 (2021); Anna Christie, *The Agency Costs of Sustainable Capitalism*, 55 UC DAVIS L. REV. 875 (2021); Paul G. Mahoney & Julia D. Mahoney, *The New Separation of Ownership and Control: Institutional Investors and ESG*, 2021 COLUM. BUS. L. REV. 840 (2021); Michal Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243 (2020); Eleonora Broccardo, Oliver Hart & Luigi Zingales, *Exit vs. Voice* (Harvard L. Sch. John M. Olin Ctr. Discussion Paper, Paper No. 1061, 2020); Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCT. 247 (2017) [hereinafter Hart & Zingales, *Companies Should Maximize Shareholder Welfare*].

5. Procedural Requirements & Resubmission Thresholds Under Exch. Act Rule 14a-8, Exchange Act Release No. 89964, 2020 WL 5763382 (Sept. 23, 2020); see also Jay Clayton, Chairman, U.S. Sec. & Exch. Comm., *Statement on Modernizing the Shareholder Proposal Framework for the Benefit of All Shareholders*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 24, 2020), <https://corpgov.law.harvard.edu/2020/09/24/statement-by-chairman-clayton-on-modernizing-the-shareholder-proposal-framework-for-the-benefit-of-all-shareholders/> (motivating Chairman Clayton's support for the new rule); Caroline Crenshaw, Commissioner, U.S. Sec. & Exch. Comm., *Statement on Procedural Requirements and Resubmission Thresholds Under Rule 14a-8*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 25, 2020), <https://corpgov.law.harvard.edu/2020/09/25/statement-by-commissioner-crenshaw-on-procedural-requirements-and-resubmission-thresholds-under-rule-14a-8/> (explaining Commissioner Crenshaw's dissent on the new rule). For a discussion of the effects on the new rule on social proposals, see *infra* Part III.A.2.

6. See *Shareholder Proposals: Staff Legal Bulletin No. 14L*, U.S. SEC. & EXCH. COMM. (Nov. 3, 2021), <https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals> [hereinafter *SEC Staff Legal Bulletin No. 14L*].

7. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (proposed Apr. 11, 2022) (to amend 17 C.F.R. §§ 210, 229, 232, 239, 249).

8. Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. 36654 (proposed June 17, 2022) (to amend 17 C.F.R. §§ 200, 230, 232, 239, 249, 274, 279).

There are two conventional theories of social proposals.⁹ According to the first theory, social proposals are driven by idiosyncratic preferences that differ from those of most other shareholders. On this view, which I call “conflict theory,” proponents of social proposals are either small individual investors who want to voice their personal opinions on politics and society, or representatives of “special interests,” such as labor unions and public pension funds. In either case, stockholder politics is understood as a way to promote interests that conflict with those of most “regular” shareholders.

According to the second theory, social proposals are instead based on financial motivations, just like governance proposals and other more conventional proposals. This theory, which I call “profit theory,” is premised on the idea that improving the company’s social and environmental performance is good for business. As recently put by BlackRock, “sustainability risk, particularly climate risk, is investment risk,”¹⁰ meaning that companies (and, therefore, investors) have a financial interest in reducing environmental risk.

This Article challenges both these conventional views. I argue that each of these two theories does capture a partial truth, but neither adequately explains important aspects of stockholder politics. As my empirical analysis shows, contrary to the conflict theory, only a small number of social proposals are filed by individual investors,¹¹ and although many proposals are indeed filed by representatives of “special interests,” these proposals have been receiving increasing support from other shareholders.¹² Furthermore, social proposals by unions and public pension funds (considered by the supporters of the conflict theory to be the typical examples of special interest proposals) obtain on average more shareholder support than other social proposals.¹³

At the same time, contrary to the profit theory, many social proposals do not seem to be driven by financial motives. Indeed, in the finance literature there is mixed evidence on whether corporate social responsibility increases firm value, and the data show that many social proposals do not mention a financial rationale or do so in a vague or perfunctory way.¹⁴

To understand stockholder politics, we must take a different approach. We must start from the recognition that shareholder preferences are the product of a bundle of different motives—not only financial motives, but also prosocial and expressive motives.¹⁵ Just like most individuals, in many circumstances shareholders prefer a higher dollar payoff to a lower one (financial motive);

9. See *infra* Parts I.B, III.A, and III.B.

10. Jessica McDougall & Danielle Sugarman, *Climate Risk and the Transition to a Low-Carbon Economy*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 2, 2021), <https://corpgov.law.harvard.edu/2021/03/02/climate-risk-and-the-transition-to-a-low-carbon-economy>.

11. See *infra* Part III.A.1.

12. See *infra* Part III.A.2.

13. See *infra* Part III.A.2.

14. See *infra* Part III.B.

15. For a formal model of shareholders with prosocial preferences, see Hart & Zingales, *Companies Should Maximize Shareholder Welfare*, *supra* note 4.

however, they may be willing, to varying degrees, to accept a lower dollar payoff in order to produce some benefits for others (prosocial motive), or in order to express their political and moral values (expressive motive).¹⁶

At the same time, many economic and social players outside the corporate organization aspire to influence the decisions of large public companies on socially relevant issues. Large corporations wield significant power on stakeholders, such as employees, suppliers, consumers, and local communities, as well as on the environment and society at large. Individuals and groups affected by corporate decisions have an interest in monitoring and influencing such decisions. Furthermore, activists, investors with prosocial and expressive motives, and concerned citizens may be interested in shaping corporate social impact.¹⁷

But while shareholders have the legal tools to monitor and influence management's socially relevant decisions, they lack the expertise and resources to do so effectively. Symmetrically, outside actors that have expertise and resources lack corporate voice: they cannot participate in corporate deliberations.

My contention in this Article is that stockholder politics is a matchmaking enterprise that connects these two groups. A relatively small number of repeat players, which I will call "stockholder politics specialists," perform a two-sided role. On one side, specialists "sell" information and voting opportunities to shareholders with prosocial and expressive motives. When a shareholder proposal makes it to the ballot, shareholders have the opportunity to learn about the relevant issue and express their preferences about it.

On the other side, specialists "sell" corporate voice to employees, consumers, citizens concerned about corporate externalities, investors with strong prosocial or expressive motives, and other extra-corporate actors. Specialists offer these parties representation in the internal forum of the largest corporations, with the aim of affecting the behavior of individual companies and, more importantly, industry-level practices, regulation, and public policy decisions.¹⁸

These two roles are closely connected. Shareholders with prosocial and expressive motives find stockholder politics valuable because it provides them with information and voting opportunities to monitor and influence management decisions on issues they care about. Extra-corporate actors find stockholder politics valuable because it gives them voice within the corporate organization, so that they can try to affect business practices and public policy choices. Stockholder politics specialists play the role of intermediaries by connecting these two groups on matters of common concern. They are matchmakers in the field of corporate social impact.

16. *See infra* Part IV.A.

17. *See infra* Part IV.B.

18. *See infra* Part IV.C.

This framework illuminates some potential benefits of stockholder politics, as well as some potential costs. On the benefit side, stockholder politics can be a powerful tool to mitigate managerial agency problems on socially relevant issues. As with purely financial decisions, corporate managers may make socially relevant decisions that do not reflect the social and political preferences of shareholders. But since most shareholders are apathetic or reticent, they do not have sufficient incentives to monitor and correct the decisions made by corporate managers.¹⁹ Stockholder politics mitigates this problem, as it provides shareholders with information and voting opportunities on socially relevant issues, and it facilitates the realignment of views between shareholders and managers.²⁰

On the cost side, however, expanding the scope of corporate deliberation to include controversial social issues can lead to multidimensional decisions with no clear equilibrium. Shareholders are much more likely to disagree on social than on financial issues; therefore, aggregating their social and environmental preferences can be an impossible task, which could engulf the decision-making process with little or no gain for shareholder welfare. Furthermore, since most voting power is in the hands of asset managers rather than beneficial owners, and the social preferences of asset managers do not necessarily reflect those of their clients, stockholder politics is likely to transfer power from corporate managers to financial managers, rather than from corporate managers to shareholders.²¹ Reasonable policy proposals to regulate stockholder politics should consider both the potential benefits and costs of this phenomenon, by strengthening its role as “check and balance” of managerial power and limiting its potential distortions.

The rest of this Article proceeds as follows. Part I examines the anomaly of social proposals and illustrates the two conventional explanations—the conflict theory and the profit theory. Part II presents the dataset constructed for this Article and provides an overview of social proposals from 2010 to 2021, including the dramatic growth of shareholder support. Part III digs deeper in the

19. “Rational apathetic” and “rational reticent” have become terms of art in corporate governance literature. “Rational apathetic” means that dispersed shareholders do not have sufficient incentives to acquire information on corporate decisions and to act on that information. Rationally apathetic shareholders will remain passive and uninterested in how the corporation is run. “Rationally reticent” means that shareholders are not sufficiently motivated to take an active role but have enough incentive to react to the initiative of others. In the case of shareholder proposals, rationally apathetic shareholders will neither submit a proposal nor vote on it when others submit it; rationally reticent shareholders do not submit proposals but may react to proposals submitted by activist shareholders. The first use of the expression “rational apathy” is found in Robert C. Clark, *Vote Buying and Corporate Law*, 29 CASE W. RES. L. REV. 776, 779 (1979). Clark borrowed the concept from Anthony Downs, *An Economic Theory of Political Action in a Democracy*, 65 J. POL. ECON. 135, 147 (1957), in which the concept of rational apathy is used to explain the decision of most citizens not to acquire political information for the purpose of voting. The concept of rational reticence was introduced by Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 867 (2013).

20. See *infra* Part V.A.

21. See *infra* Part V.B.

data and examines the partial insights and limitations of the conflict theory and the profit theory. Part IV develops an alternative framework for understanding stockholder politics as a matchmaking enterprise that connects shareholders with prosocial and expressive preferences on one side and extra-corporate actors on the other side. Part V examines the potential benefits and costs of stockholder politics and its policy implications.

I. THE ANOMALY OF SOCIAL PROPOSALS

A. SHAREHOLDER PROPOSALS AND SOCIAL ISSUES

Rule 14a-8 provides that shareholder proposals that meet certain formal and substantive conditions must be included in the proxy material that the company distributes to shareholders.²² Shareholders of public companies are geographically dispersed, and they rarely attend the company's annual meeting in person.²³ Since they often vote by proxy, shareholders have no practical way to learn about or vote on proposals that are not included in the company's proxy materials. Rule 14a-8 addresses this problem by obligating companies to make proposals known to all shareholders and to allow them to express their vote on these proposals.²⁴

Most proposals submitted under Rule 14a-8 concern governance issues, director compensation, director elections, takeover defenses, and other internal organizational decisions.²⁵ However, shareholders also make frequent use of Rule 14a-8 to advance proposals that concern the interests of employees, consumers, local residents, citizens, the environment, society at large, or even non-human animals. These "social proposals" include not only big picture problems such as climate change, corporate lobbying, and employee diversity,

22. 17 C.F.R. § 240.14a-8.

23. See, e.g., STEPHEN M. BAINBRIDGE, *THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE* 210 (2008) ("[M]ost shareholders will not attend the meeting in person. Instead, most shareholders vote by proxy.").

24. See *Med. Comm. for Hum. Rights v. SEC*, 432 F.2d 659, 672 n.12 (D.C. Cir. 1970), *vacated*, 404 U.S. 403 (1972) ("It must be recognized that Management's proxy statement is the only effective vehicle through which all of the shareholders can have an opportunity to express themselves, and even to hear any arguments on the questions involved.") (quoting Hon. Benjamin Rosenthal in a speech in the U.S. House of Representatives, 116 Cong. Rec. E-2147 (daily ed., Mar. 17, 1970)).

25. In the period examined in this Article (2010–2021), 66.4% of the 10,291 shareholder proposals recorded in the FactSet database for U.S. companies concern the following topics: supermajorities, board declassification, executive compensation, vote requirements to elect directors, poison pills and other takeover defenses, dual-class structures, size of the board, name change, requirements to call special meetings, by-laws amendments, election of director nominees, removal of directors, say-on-pay, control transactions, separation of chairman and CEO roles, establishment of corporate governance committees, sale or liquidation of the company, term limits for directors, proxy contest expenses, requirements to act by written consent, independent directors, mandatory retirement age for directors, director nominee qualifications, reincorporation in another U.S. state, tax issues, dividends and buybacks, sale of assets, proxy access for director election, limiting the number of boards on which directors may serve, removal of officers, stock splits, advisory agreements, and other issues mostly related to corporate governance. All data have been collected from the FactSet shareholder proposal database.

but also a variety of narrower issues, such as smoke-free areas in the company's premises, energy efficiency in retail stores, the adverse effects of specific drugs, the sale of weapons to foreign governments, the effect of bank overdraft policies on low-income customers, employee ideological diversity, the use of cage-free eggs, or the acceptance of censorship policies in foreign countries.

This phenomenon disproportionately affects the largest corporations. From 2010 to 2021, 85% of all social proposals recorded by FactSet were submitted to companies included in the S&P 500, which comprises leading large-capitalization companies.²⁶ By contrast, S&P 500 companies received only 59% of the proposals on other topics.²⁷

The apparent anomaly of social proposals is that they deal with the social impact of corporate activities rather than with internal corporate affairs. The traditional assumption in corporate finance is that shareholders are driven by financial motives.²⁸ While most shareholder proposals seem intuitively in line with this assumption—for example, they want to curb excessive executive pay, facilitate takeovers, or adopt more efficient corporate governance practices—social proposals instead seem preoccupied with matters of public welfare, rather than firm value.

Consider, for example, a proposal on food waste submitted to Amazon in 2019.²⁹ The shareholder-proponent requested that Amazon “issue an annual report . . . on the environmental and social impacts of food waste generated from the company's operations.”³⁰ The proposal noted that “[d]espite one in seven U.S. households struggling to afford regular, healthy meals, 40 percent of all food produced in the U.S. is wasted,”³¹ and that this phenomenon generates “devastating social and environmental consequences.”³² Although the proposed resolution only requested a report on the food waste generated by Amazon—for reasons that I will discuss in Part II.D—the supporting statement made clear that the main goal of the proposal was to alleviate the social and environmental impact of food waste.

Or consider a proposal on petrochemical plants submitted to DowDuPont in 2019.³³ The proponent explained that in case of severe weather events, petrochemical facilities may release dangerous pollutants that can cause health problems to local residents. The increase in frequency and intensity of storms

26. The S&P 500 “includes 500 leading companies and covers approximately 80% of available market capitalization.” *S&P 500*, SPGLOBAL.COM, <https://www.spglobal.com/spdji/en/indices/equity/sp-500/#overview> (last visited July 31, 2022).

27. FactSet reports a total of 3,457 “social and environmental” proposals and 6,834 other proposals submitted to U.S. public companies, of which 2,933 (84.8%) and 4,057 (59.4%), respectively, were submitted to U.S. companies included in the S&P 500.

28. *See, e.g.*, JEAN TIROLE, *THE THEORY OF CORPORATE FINANCE* 15–16 (2006).

29. Amazon.com, Inc., 2019 Proxy Statement (Form 14A) 15 (Apr. 11, 2019).

30. *Id.*

31. *Id.*

32. *Id.*

33. DowDuPont, Inc., 2019 Proxy Statement (Form 14A) 66 (Apr. 29, 2019).

and hurricanes in the Gulf Coast, caused by climate change, is expected to cause more such incidents in the future. Nonetheless, DowDuPont planned to build new petrochemical facilities in the area. The proposal requested an assessment of the “public-health risks”³⁴ of these new investments and of “the adequacy of the measures the company [was] employing to prevent public health impacts from resultant chemical releases.”³⁵

Another anomaly of these proposals is that they directly concern business decisions, rather than organizational decisions. Conventional shareholder proposals are about the “rules of the games”: how directors are chosen, how to incentivize and discipline management, what powers investors should have, and so forth. In fact, shareholder voice in public corporations is typically confined to organizational decisions, whereas business decisions are the exclusive jurisdiction of management.³⁶ Such conventional governance arrangement is consistent with shareholder incentives: for dispersed shareholders, acquiring and processing the necessary information to discuss a specific business issue is economically irrational.³⁷ Contrary to this traditional paradigm, social proposals often focus on specific business decisions: in the two examples above, the location of DowDuPont’s industrial plants and Amazon’s grocery inventory management.

Unsurprisingly, such anomalies have attracted significant attention from scholars;³⁸ these experts have failed, though, to reach a consensus on the causes and policy implications of the phenomenon. In the next Subpart, I will discuss the two dominant theories of social proposals.

34. *Id.*

35. *Id.*

36. See, e.g., John Armour, Henry Hansmann, Reinier Kraakman & Mariana Pargendler, *What Is a Corporation*, in *THE ANATOMY OF CORPORATE LAW* 11–13 (Reinier Kraakman et al. eds., 2017).

37. See *supra* note 19.

38. A rich legal literature on social proposals developed in the 1970s and 1980s, when the phenomenon first emerged with some strength. See Donald E. Schwartz, *The Socially Relevant Proxy Contest: Reflections on Campaign GM*, 69 MICH. L. REV. 419 (1971); Donald E. Schwartz, *Towards New Corporate Goals: Co-Existence with Society*, 60 GEO. L.J. 57 (1971) [hereinafter Schwartz, *Towards New Corporate Goals*]; Henry G. Manne, *Shareholder Social Proposals Viewed by an Opponent*, 24 STAN. L. REV. 481 (1972); Donald E. Schwartz & Elliott J. Weiss, *An Assessment of the SEC Shareholder Proposal Rule*, 65 GEO. L.J. 635 (1976); Susan W. Liebler, *A Proposal to Rescind the Shareholder Proposal Rule*, 18 GA. L. REV. 425 (1984); Patrick J. Ryan, *Rule 14a-8, Institutional Shareholder Proposals, and Corporate Democracy*, 23 GA. L. REV. 97 (1988). Other important analyses that are relevant for the issues discussed in this Article are found in Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 COLUM. L. REV. 795 (1993) [hereinafter Romano, *Public Pension Fund Activism*]; Roberta Romano, *Less Is More: Making Institutional Investor Activism a Valuable Mechanism of Corporate Governance*, 18 YALE J. REG. 174 (2001) [hereinafter Romano, *Less Is More*]; Lisa M. Fairfax, *Making the Corporation Safe for Shareholder Democracy*, 69 OHIO ST. L.J. 53 (2008). For two excellent overviews of the shareholder proposal rule, see Jill E. Fisch, *From Legitimacy to Logic: Reconstructing Proxy Regulation*, 46 VAND. L. REV. 1129 (1993), and Alan R. Palmiter, *The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation*, 45 ALA. L. REV. 879 (1994).

B. CONFLICT THEORY AND PROFIT THEORY

The use of shareholder proposals to address socially relevant issues is as old as the shareholder proposal rule itself. Right after the SEC adopted the first shareholder proposal rule in 1942,³⁹ the new device was immediately put to use on matters of political and social relevance.⁴⁰ Companies questioned this practice, and the SEC initially sided with them, ruling that companies were allowed to exclude proposals “submitted primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes.”⁴¹ But in the 1970s, following a defeat in the D.C. Circuit⁴² and due to the increasing social and political pressures on large corporations,⁴³ the SEC amended the proxy rules in order to allow the submission of proposals on public policy issues.⁴⁴ This regulatory change led, predictably, to an explosion of social proposals. In 1972, shareholders filed only six social proposals; in 1976, the number of social proposals was 322.⁴⁵

Many prominent corporate law scholars took a critical view of this phenomenon.⁴⁶ The main argument presented by these critics was that proponents of social proposals had idiosyncratic preferences that were radically different from those of most other shareholders, as the very low support obtained at annual meetings proved.⁴⁷ In this view, socially relevant proponents are driven either by frivolous motives (that is, the desire of small individual shareholders to voice their personal views on society and politics, with little or no benefits for

39. Regulation X-14A, Exchange Act Release No. 3347, 1942 WL 34864 (Dec. 18, 1942).

40. The first documented SEC decision on social proposals is from 1945, when a company challenged the proposals of a shareholder concerning an assortment of policy issues, from the taxation of dividends to antitrust law. The SEC Division of Corporate Finance concluded that those topics—and, more broadly, all general political, social, and economic matters—were not, in fact, “a proper subject for action by security holders.” Exchange Act Release No. 3638, 1945 WL 27415 (Jan. 3, 1945).

41. Exchange Act Release No. 4775, 1952 WL 5254 (Dec. 11, 1952). This amendment to the shareholder proposal rule followed the case of *Peck v. Greyhound Corp.*, 97 F. Supp. 679, 681 (S.D.N.Y. 1951). James Peck, owner of three shares of common stock of Greyhound Corp., asked the company to include in the agenda for the 1951 annual meeting his proposal for the desegregation of the company’s seating system in the South. Greyhound rejected the proposal, relying on the SEC decision of 1945, *supra* note 40, and the SEC staff confirmed the company’s interpretation. Peck sought an injunction against Greyhound, but the court denied the request on procedural grounds, without discussing the merits of the question.

42. *Med. Comm. for Hum. Rights v. SEC*, 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1971) (holding that shareholders should be able to keep managers accountable on matters of political and moral significance).

43. See, e.g., Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1517 (2007).

44. First, the SEC amended Rule 14a-8(c)(2) in order to allow social proposals, provided that they were “significantly related to the business of the issuer” and “within the control of the issuer.” Exchange Act Release No. 9784, 1972 WL 125400 (Sept. 22, 1972). Four years later, the SEC removed any references to “economic, political, racial, religious, social or similar cause[s],” and clarified that a proposal could be “significantly related” to the company’s business even if such a relation were not a purely economic one. Adoption of Amendments Relating to Proposals by Sec. Holders, Release No. 12999, 1976 WL 160347 (Nov. 22, 1976).

45. Liebel, *supra* note 38, at 431.

46. See, e.g., *id.*; Manne, *supra* note 38; Romano, *Less Is More*, *supra* note 38.

47. See *infra* Part III.A.2.

the other shareholders),⁴⁸ or by “special interests” (for example, proposals filed by labor unions to advance employee interests or proposals advanced by “highly-politicized” organizations to promote their own political agenda).⁴⁹ In both cases, according to this theory, social proposals serve particular interests that are in conflict with the common interests of all shareholders. I will refer to this theory as the “conflict theory” of social proposals.

An alternative theory, which dates back to the 1970s as well, but has recently gained mainstream status,⁵⁰ is that corporate social responsibility is a way to increase profits and shareholder value. In this view—which I call the “profit theory” of social proposals—social, ethical, and environmental goals are only instrumental goals, whereas the ultimate goal remains shareholder value maximization.⁵¹ The profit theory, embraced by many supporters of social proposals,⁵² tries to reconcile the apparent anomaly of social proposals with the traditional theory of corporate governance. On this account, social proposals are oriented toward profit maximization, just like any other conventional corporate strategy.

These two theories—conflict theory and profit theory—have very different normative implications. The main implication of the conflict theory is that social proposals do not serve the interests of shareholders and should therefore be limited or prohibited. The implication of the profit theory is that social proposals are no less compatible with shareholder value than other kinds of proposals and therefore pose no special normative problem. In this Article, I argue that both theories capture a partial truth but neither adequately explains some important aspect of the phenomenon.

To shed light on stockholder politics, I conducted a comprehensive empirical analysis of all social proposals presented by shareholders to a company included in the S&P 500,⁵³ from January 2010 through December 2019. In Part II, I describe the dataset and the main characteristics of the phenomenon.

48. See, e.g., Randall S. Thomas & James E. Cotter, *Shareholder Proposals in the New Millennium: Shareholder Support, Board Response, and Market Reaction*, 13 J. CORP. FIN. 368, 370 (2007) (“Academic research has generally concluded that corporate governance proposals raise important substantive issues, while the social responsibility proposals are frequently viewed as frivolous.”).

49. See, e.g., Romano, *Less Is More*, *supra* note 38, at 231–32.

50. The study of the link between “corporate social responsibility” and financial performance dates back to the 1970s, but the “profit case” for corporate social responsibility has become mainstream over the last twenty years. For a brief overview of this intellectual history, see Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2612–15 (2021).

51. See, e.g., Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk*, 41 J. CORP. L. 647, 648 (2016) (presenting the “business case for risk-related activism,” which includes the use of nonfinancial factors); Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1402 (2020) (arguing that social and environmental concerns are important to mitigate downside risk for investors).

52. See *infra* Part III.B.

53. A company qualifies for inclusion in the sample if it was a constituent company of the S&P 500 at the time of the relevant annual meeting.

C. STOCKHOLDER POLITICS

Throughout this Article, I refer to the use of social proposals as “stockholder politics.” This shorthand is used mainly for brevity, but it also captures some important results of my analysis. To begin with, these proposals concern the welfare of society at large, rather than the internal affairs of the company. In this regard, the term “politics” is used in its broadest and noblest sense, meaning the activity aimed at the good of the entire community.⁵⁴ I am agnostic on the question whether these proposals actually improve social welfare. What is clear is that, unlike conventional shareholder proposals, which focus on corporate governance issues, these proposals explicitly tackle political and social issues. “Politics,” in this context, refers to this general-welfare dimension of the phenomenon.

Furthermore, the main goal of the proponents of social proposals is, as I will show, the practical advancement of policy objectives. Many of the main players are interested not only in company-level decisions, but also in market and social change. In this sense, “politics” is used in one of its most common meanings, which is the use of power (in our case, shareholder power) to influence public decisions.⁵⁵ As I will discuss at length in Part IV.C, many proponents of social proposals are not shareholders who happen to hold and voice public policy views, but public policy players who happen to be (or to partner with) shareholders.

Finally, shareholder proposals are an inherently political tool used to discipline managerial decisions. In fact, unlike market-based mechanisms, such as investment or divestment decisions or takeovers, shareholder proposals rely on mechanisms similar to those used by citizens in a democracy, such as voting, ballot proposals, and campaigns in support of specific issues.⁵⁶ This political metaphor, I believe, will help us see what is valuable and what is problematic with social proposals.

II. SOCIAL PROPOSALS

This Part provides an overview of social proposals, based on the empirical analysis of more than 2,900 proposals submitted over the past twelve years. Subpart A explains the construction of the dataset. Subparts B through E discuss the companies, industries, topics, proposed resolutions, and outcome of social proposals.

54. See, e.g., ARISTOTLE, *THE POLITICS* 54 (1981).

55. See, e.g., ANDREW HEYWOOD, *POLITICS* 9–12 (2013).

56. On the distinction between market-based models and political models of corporate governance, see generally John Pound, *The Rise of the Political Model of Corporate Governance and Corporate Control*, 68 N.Y.U. L. REV. 1003 (1993).

A. DATASET

To construct my dataset, I relied on the shareholder proposals on social and environmental issues reported by FactSet for the period from 2010 to 2021 at companies included in the S&P 500, and I manually excluded those few proposals that were erroneously categorized as social or environmental proposals. The final sample contains 2,933 proposals. I collected data from FactSet regarding the companies, meeting dates, name of the proponent, text of the proposed resolution, outcome of the vote, management response, and market capitalization at the time of the shareholder meeting.

Then, for each proposal, I reviewed and hand-coded the text of the proposed resolution, and I collected information on the proponents from news sources and corporate websites. For a subsample of 300 recent proposals for which the company sought a no-action letter from the SEC, from 2017 to 2019 (the “SEC Record Subsample”), I reviewed the entire SEC decision record, for a total of 17,297 pages of legal documents, correspondence, and other documentation. Throughout this Article, I will report and discuss the findings of my empirical analysis to examine various critical aspects of this phenomenon. In the following Subparts, I will present a general overview of the main characteristics of this phenomenon.

B. COMPANIES AND INDUSTRIES

Hundreds of large public companies receive shareholder proposals on social issues. In my sample, a total of 399 companies received at least one social proposal over the relevant period. However, not all companies receive the same level of attention on socially relevant matters. Many companies received only a few proposals in total, while some companies received several proposals every year.

Table 1 reports the number of proposals received by the most frequently targeted twenty companies, as well as the distribution of proposals across target companies by quartile group. The data show that the distribution is highly unequal. The companies in the top quartile group account for over 70% of all proposals, while the companies in the bottom quartile group account for less than 8% of the proposals.

TABLE 1: MOST FREQUENT TARGETS OF SOCIAL PROPOSALS

<i>Company</i>	<i>Proposals</i>	<i>% of Sample</i>
Exxon Mobil	93	3.2%
Amazon.com	69	2.4%
Chevron	69	2.4%
Dominion Energy	49	1.7%
Walmart	47	1.6%
JPMorgan Chase	45	1.5%
McDonald's	42	1.4%
Pfizer	41	1.4%
AT&T	38	1.3%
Alphabet	38	1.3%
The Home Depot	37	1.3%
Verizon Communications	36	1.2%
ConocoPhillips	32	1.1%
General Electric	31	1.1%
Johnson & Johnson	31	1.1%
Apple	30	1.0%
Bank of America	30	1.1%
FedEx	30	1.0%
PepsiCo	30	1.0%
The Kroger Co.	29	1.0%
<i>Distribution of Proposals</i>		
4th Quartile Group	2049	69.9%
3rd Quartile Group	523	17.8%
2nd Quartile Group	132	4.5%
1st Quartile Group	229	7.8%

The company that received the largest number of proposals is Exxon Mobil, which received more than three times the number of proposals of the twentieth most frequent target, The Kroger Co. In the aggregate, the twenty companies with the largest number of proposals (representing 5% of all the companies in the sample) account for 28.9% of the entire sample.

Social proposals are unequally distributed across industries, as well. The companies in the sample span forty-two of the forty-eight industries in the Fama-French industry classification.⁵⁷ However, the six most frequently targeted

57. See Eugene F. Fama & Kenneth R. French, *Industry Costs of Equity*, 43 J. FIN. ECON. 153 (1997).

industries (Retail, Oil & Gas, Utilities, Banks, Business Services, and Pharmaceutical) account for more than half (51.2%) of all the proposals, while the six least frequently targeted industries (Recreation, Shipping Containers, Electrical Equipment, Real Estate, Beer & Liquor, and Textiles) account for less than 0.4% of the sample. [Table 2: Industries with Most Social Proposals](#) reports the number of proposals for the twenty industries with the most proposals, which account, in the aggregate, for 91.8% of the sample.

TABLE 2: INDUSTRIES WITH MOST SOCIAL PROPOSALS

<i>Industry</i>	<i>Proposals</i>	<i>% of Sample</i>
Retail	364	12.4%
Oil & Gas	358	12.2%
Utilities	274	9.3%
Banks	188	6.4%
Business Services	159	5.4%
Pharma	159	5.4%
Communications	147	5.0%
Transportation	125	4.3%
Finance	123	4.2%
Insurance	121	4.1%
Meals	114	3.9%
Electronic Equipment	90	3.1%
Food	88	3.0%
Aircraft	85	2.9%
Candy & Soda	53	2.2%
Computers	59	2.0%
Tobacco	50	1.7%
Chemicals	49	1.7%
Machinery	43	1.5%
Medical Equipment	37	1.3%
<i>Distribution of Proposals</i>		
4 th Quartile Group	2132	72.7%
3 rd Quartile Group	597	20.4%
2 nd Quartile Group	164	5.6%
1 st Quartile Group	40	1.4%

C. TOPICS

Social proposals focus on a variety of topics. Based on the text of the proposed resolutions, I divided all 2,933 proposals into four categories—

political activity, environmental issues, social issues, and generic environmental and social (E&S) issues—and forty-eight subcategories. Table 3 reports the number of proposals for each category and the most frequent subcategories.

TABLE 3: SOCIALLY RELEVANT TOPICS

<i>Issues</i>	<i>Proposals</i>	<i>% of Sample</i>
<i>Political Activity</i>		
Political Spending	440	15.0%
Lobbying	373	12.7%
Other Political Issues	87	3.0%
<i>Environmental Issues</i>		
Climate Change	335	11.4%
Sustainability Report	83	2.8%
Lobbying & Advocacy	81	2.8%
Waste	61	2.1%
Renewable Energies	50	1.7%
Toxic Products	37	1.3%
Nuclear Power	28	1.0%
Other Environ. Issues	146	5.0%
<i>Social Issues</i>		
Sex, Gender, and Race	367	12.5%
Human Rights	223	7.6%
Public Health	78	2.7%
Animal Welfare	77	2.6%
Employee Rights	75	2.6%
Economic Inequality	55	1.9%
Charitable Contributions	38	1.3%
Israel-Palestine Conflict	29	1.0%
Other Social Issues	238	8.1%
<i>E&S General Issues</i>	30	1.0%

As the Table shows, more than half (51.6%) of all proposals concern political spending; lobbying; climate change; or sex, gender, and race issues. Proposals on political spending and lobbying typically call for more transparency on the donations and expenditures made by the company to support political candidates, influence elections or ballot proposals, lobby elected officials, or support trade associations or other organizations that promote policy or political causes.⁵⁸ A smaller number of political proposals require disclosure

58. A typical example of political spending proposal is the following resolution submitted in 2019 by the Unitarian Universalist Association to ExxonMobil Corporation:

of policy advocacy activities, assessments of the consistency of political activity with stated corporate values, risks connected with politically sensitive activities, and other issues related to the company's political activities.⁵⁹

Proposals on sex, gender, and race focus on several different issues. Typical examples are proposals requiring disclosure of employee race and gender diversity,⁶⁰ or proposals pushing for the appointment of more women and members of underrepresented minorities on the board of directors,⁶¹ addressing the gender pay gap,⁶² or asking for a corporate policy on racial discrimination.⁶³

The shareholders of Exxon Mobil Corporation ('Exxon' or 'Company') hereby request that the Company prepare and semiannually update a report, which shall be presented to the pertinent board of directors committee and posted on the Company's website, that discloses the Company's: (a) Policies and procedures for making electoral contributions and expenditures with corporate funds (both direct and indirect), including the board's role (if any) in that process; and (b) Monetary and non-monetary contributions or expenditures that could not be deducted as an 'ordinary and necessary' business expense under section 162(e)(1)(B) of the Internal Revenue Code, including (but not limited to) contributions or expenditures on behalf of candidates, parties, and committees and entities organized and operating under section 501(c)(4) of the Internal Revenue Code, as well as the portion of any dues or payments made to any tax-exempt organization (such as a trade association) used for an expenditure or contribution that, if made directly by the Company, would not be deductible under section 162(e)(1)(B) of the Internal Revenue Code.

ExxonMobil Corp., 2019 Proxy Statement (Form 14A) 66 (Apr. 11, 2019). A typical example of a lobbying proposal is the following resolution submitted in 2019 by the International Brotherhood of Teamsters to FedEx Corp.:

Resolved, the stockholders of FedEx request the preparation of a report, updated annually, disclosing:
 1. Company policy and procedures governing lobbying, both direct and indirect, and grassroots lobbying communications. 2. Payments by FedEx used for (a) direct or indirect lobbying or (b) grassroots lobbying communications, in each case including the amount of the payment and the recipient. 3. FedEx's membership in and payments to any tax-exempt organization that writes and endorses model legislation. 4. Description of management's and the Board's decision-making process and oversight for making payments described in section 2 and 3 above.

FedEx Corp., 2019 Proxy Statement (Form 14A) 99 (Aug. 12, 2019).

59. For example, a proposal submitted in 2017 to Caterpillar, Inc. requested that the company report "on the process for identifying and prioritizing legislative and regulatory public policy advocacy activities" and explain "the business rationale for prioritization." Caterpillar, Inc., 2017 Proxy Statement (Form 14A) 63 (Apr. 26, 2017). Another example is a proposal submitted in 2016 to CVS Health Corp., which requested a "congruency analysis between corporate values as defined by CVS's stated policies . . . and [the company and the company's PAC] political and electioneering contributions." CVS Health Corp. 2016 Proxy Statement (Form 14A) 64 (Apr. 8, 2016).

60. *See, e.g.*, The Home Depot, Inc., 2019 Proxy Statement (Form 14A) 25 (Apr. 8, 2019) (requesting a "chart identifying employees according to their gender and race in each of the nine major EEOC-defined job categories" and information on the company policies and actions to "increas[e] diversity in the workplace").

61. *See, e.g.*, Discovery, Inc., 2015 Proxy Statement (Form 14A) 95 (Apr. 3, 2015) (requesting a report "on plans to increase diverse representation on the Board as well as an assessment of the effectiveness of these efforts").

62. *See, e.g.*, Microsoft Corp., 2019 Proxy Statement (Form 14A) 60 (Oct. 16, 2019) (requesting a report "on the company's global median gender pay gap, including associated policy, reputational, competitive, and operational risks, and risks related to recruiting and retaining female talent").

63. *See, e.g.*, Amazon, Inc., 2017 Proxy Statement (Form 14A) 16-17 (Apr. 12, 2017) (requesting an evaluation of "the risk of racial discrimination that may result from the use of criminal background checks in hiring and employment decisions").

However, many proposals focus on narrower topics, including very specific questions, such as the use of tobacco by young customers,⁶⁴ health-based employee discrimination,⁶⁵ the risks posed by facial recognition technology,⁶⁶ or the sale of weapons to foreign governments.⁶⁷

D. EXPLICIT AND IMPLICIT REQUESTS

Shareholder proposals cannot be longer than 500 words.⁶⁸ Within this maximum length, proponents typically include the text of a resolution, which is the proposed action that the proponents request or recommend, and a supporting statement, which illustrates the factual premises and arguments supporting the proposal.

It is important to note that shareholder proposals are generally not binding.⁶⁹ It is commonly understood that state corporate law does not allow shareholders to make binding corporate decisions, except when these decisions concern the election of directors, amendments to the company's charter and by-laws, mergers, and other major organizational issues.⁷⁰ Therefore, in almost all cases, shareholder-proponents present their proposals in the form of recommendations to management (so-called "precatory proposals") rather than binding resolutions. Only twenty-two proposals in my sample (0.7%) are binding.

Furthermore, shareholder proposals tend to avoid being overly specific about the corporate actions that they recommend. In particular, most proposals do not request or recommend that the company adopt a specific policy (for example, the reduction of greenhouse gas emissions below a certain level), but rather request disclosure of some information or a report describing the company's plans with respect to a certain issue (for example, a report describing how the company plans to reduce its greenhouse gas emissions). This is due to

64. See, e.g., Altria Group, Inc., 2011 Proxy Statement (Form 14A) 75 (Apr. 8, 2011) (requesting that "Altria stops the production of any of its tobacco products with characterizing flavoring added, as well as their distribution and their marketing, unless and until it can be proven by independent and evidence-based research that such added characterizing flavors do not contribute significantly to youth initiation of tobacco use").

65. See, e.g., Johnson & Johnson, Inc., 2011 Proxy Statement (Form 14A) 64-65 (Mar. 16, 2011) (requesting the company to "amend its Equal Employment Opportunity Policy to explicitly include the prohibition of discrimination based on the health status of an applicant").

66. See, e.g., Amazon.com, Inc., 2019 Proxy Statement, *supra* note 29 (requesting that the board of directors "prohibit sales of facial recognition technology to government agencies unless the Board concludes, after an evaluation using independent evidence, that the technology does not cause or contribute to actual or potential violations of civil and human rights").

67. See, e.g., ITT Corp., 2010 Proxy Statement (Form 14A) 15-16 (Mar. 29, 2010) (requesting a report "of ITT Industries' foreign sales of military and weapons-related products and services").

68. 17 C.F.R. § 240.14a-8(d) (2021).

69. See, e.g., Ryan, *supra* note 38, at 101 (mentioning the "consensus understanding" that the "typical rule 14a-8 proposal is . . . advisory or precatory in nature").

70. See generally Robert B. Thompson & Paul H. Edelman, *Corporate Voting*, 62 VAND. L. REV. 129, 130 (2009) ("Shareholders have binding votes on only two things: the election of directors and ratifying fundamental corporate changes such as mergers.").

the regulatory constraints on “micromanagement,” which prevent shareholder-proponents from phrasing their proposal in an “overly prescriptive” manner.⁷¹

Despite these formal constraints, the substantive goal of social proposals is not only to elicit information about a particular issue, but also to change the way the company operates with respect to that issue. This goal may be accomplished through two different channels. First, disclosure of what the company presently does might create internal and external pressure toward changing the company’s behavior in the future.⁷² Second, proposals formally asking for disclosure or for the study of a given problem often indicate, in an indirect or informal manner, what the correct policy goal should be or even what specific actions the company should take to achieve such a goal. In this way, proposals aim to convey shareholders’ substantive preferences to management.

To understand this second aspect, it is useful to distinguish between the *explicit request* contained in a shareholder proposal and the *implicit request* that can be inferred from the entirety of the text. For example, a proposal submitted to Target Corp. in 2011 requested that “the board of directors prepare a report . . . on policy options, above and beyond legal compliance, to minimize the environmental impacts of its electronic recycling activities.”⁷³ While the explicit request contained in the proposal was limited to the preparation of a report, the language used in the resolution made clear that the ultimate goal of the proponent was to improve the company’s recycling programs and to reduce the environmental impact of electronic waste. In fact, the proposal included some specific actions, such as “providing mechanisms for [the] take back of all electronics sold”⁷⁴ or “preventing export to non-OECD countries of hazardous e-waste,”⁷⁵ which were presented as mere examples of what the report could discuss but were clearly meant to provide concrete suggestions about specific policies to implement.

To illustrate this aspect, I analyzed the language of a random subsample of 100 proposals. The vast majority of *explicit requests* are either for the

71. See *SEC Staff Legal Bulletin No. 14K*, U.S. SEC. & EXCH. COMM’N (Oct. 16, 2019), <https://www.sec.gov/corpfin/staff-legal-bulletin-14k-shareholder-proposals> (“Notwithstanding the precatory nature of a proposal, if the method or strategy for implementing the action requested by the proposal is overly prescriptive, thereby potentially limiting the judgment and discretion of the board and management, the proposal may be viewed as micromanaging the company.”). But see *SEC Staff Legal Bulletin No. 14L*, *supra* note 6 (rescinding the Staff Legal Bulletin No. 14K and suggesting that social proposals will be allowed if they focus on socially significant issues, regardless of the business connection with the company, and that the micromanagement exception will be applied more favorably to the shareholder-proponent). Note however, that the Staff Legal Bulletin No. 14L was adopted in November 2021 and does not affect the sample analyzed in this Article.

72. See, e.g., David W. Case, *The Law and Economics of Environmental Information as Regulation*, 31 ENVTL. L. REP. 10773, 10775 (2001) (“[E]ven in the absence of more traditional regulatory controls, post-disclosure pressures brought to bear by [the social institutions of market and public opinion] will create market incentives positively affecting the attitudes of regulated entities toward environmental performance.”).

73. Target Corp., 2011 Proxy Statement (Form 14A) 64 (Apr. 28, 2011).

74. *Id.* at 65.

75. *Id.* at 64.

preparation of a report (69%) or the creation of a committee to study the particular issue (6%). Only a quarter of the resolutions explicitly request that the company adopt a policy. For example, a proposal submitted to Wells Fargo in 2017 asked the board “to develop and adopt a global policy regarding the rights of indigenous people . . . which includes respect for the free, prior and informed consent of indigenous communities affected by [the company’s] financing.”⁷⁶ Another example is a proposal submitted to Reynolds American in 2015, which asked the board “to create a policy that all its suppliers throughout its tobacco procurement supply chain verify (with independent monitoring) their commitment and compliance regarding non-employment . . . of laborers who have had to pay to cross the U.S. border.”⁷⁷

However, regardless of their explicit request, 50% of the proposals in the subsample contain an *implicit request* to pursue certain policy goals or even to implement specific concrete actions. In sum, approximately half of the proposals in the subsample indicate, whether explicitly or implicitly, the policy goals or the specific actions that the company should pursue. Table 4 reports the results of this analysis.

TABLE 4: PROPOSED RESOLUTIONS

<i>Explicit Request</i>	<i>Implicit Request</i>				<i>Total</i>
	<i>Neutral Policy</i>	<i>Policy Goals</i>	<i>Specific Action</i>	<i>None</i>	
Report	46.4%	26.1%	7.3%	20.3%	69.0%
Committee	16.7%	66.7%	0.0%	16.7%	6.0%
Policy	8.0%	40.0%	52.0%	0.0%	25.0%
Total	35.0%	32.0%	18.0%	15.0%	

E. OUTCOME

Not all social proposals go to a vote. I found that 18% of the proposals in my sample were withdrawn by the proponents at some point during the process. From the analysis of the correspondence between proponents and management (for the proposals included in the SEC Record Subsample), it appears that a withdrawal almost always follows a company’s commitment or, at the very least, an informal indication that the company’s management is willing to engage in an ongoing conversation with the proponent.

Furthermore, 19% of the proposals are successfully excluded by the company. Under Rule 14a-8, companies may exclude a shareholder proposal

76. Wells Fargo & Co., 2017 Proxy Statement (Form 14A) 96 (Mar. 15, 2017).

77. Reynolds America, Inc., 2015 Proxy Statement (Form 14A) 99 (Mar. 20, 2015).

from the proxy statement if the proposal does not meet certain criteria.⁷⁸ The standard process is that the company must file a request for a no-action letter with the SEC, presenting its reasons for excluding the proposals. The proponent may then respond to the no-action request, and the SEC's staff subsequently decides whether it agrees with the company.⁷⁹ In my sample, in 39% of the cases management tries to exclude the proposal from the proxy statement by seeking a no-action letter from the SEC, and it succeeds approximately half of the times (49.5% of no-action requests are granted by the SEC).

When the proposal makes it to the ballot (about 65% of all the proposals in the sample), management virtually always recommends that shareholders vote against these proposals. Of the 1,902 proposals in the sample that were included in the proxy statement, management took no explicit position (neither in favor nor against) on three proposals and recommended to vote in favor of four proposals. For all the remaining 1,895 proposals, management encouraged shareholders to vote against them.

Remarkably, only a very small fraction of the proposals that go to a vote are approved by shareholders. Of the 1,851 proposals in the sample on which shareholders voted, only 61 (3.3%) obtained the required majority. All the other 1,596 proposals did not pass.

* * *

The data discussed in this Part confirm the two anomalies commonly associated with social proposals. These proposals focus on matters of public welfare or on extra-corporate interests, and they often address specific strategic or business decisions, rather than organizational issues. In Part III, I will examine the two conventional explanations for these anomalies (conflict theory and profit theory), their insights, and their limitations.

III. THE LIMITS OF THE CONVENTIONAL THEORIES

In this Part, I will examine the two conventional theories of stockholder politics—the conflict theory and the profit theory—and I will discuss their insights and limitations. Each of these two theories, I contend, captures a partial truth, but neither adequately explains important aspects of stockholder politics. Contrary to the conflict theory, only a small number of social proposals are filed by individual investors, and even if many proposals are indeed filed by representatives of “special interests,” these proposals have been receiving

78. A proposal can be excluded for failure to meet a procedural requirement, if the procedural deficiency has not been remedied following the process set forth in Rule 14a-8(f), or for one of the substantive exclusion criteria set forth in Rule 14a-8(i). 17 C.F.R. § 240.14a-8 (2021).

79. *Id.* Technically, SEC no-action letters do not contain a binding decision of the SEC but only the “informal views” of the staff. See SEC Staff Legal Bulletin No. 14, 2001 WL 34886112 (July 13, 2001), § 11. However, despite their informal nature, SEC no-action letters have become the main source of jurisprudence on Rule 14a-8, and courts take them into consideration even if they do not automatically defer to them. See, e.g., *Trinity Wall St. v. Wal-Mart Stores, Inc.*, 792 F.3d 323, 332 (3d Cir. 2015); *Tosdal v. Nw. Corp.*, 440 F. Supp. 3d 1186, 1194 (D. Mont. 2020).

increasing shareholder support over the past few years. At the same time, contrary to the profit theory, many social proposals do not seem driven by financial motives and use financial motivations in a perfunctory way.

A. CONFLICT THEORY

As discussed in Part I.B, the conflict theory, which is mostly embraced by critics of stockholder politics, posits that proponents of social proposals have idiosyncratic preferences that are radically different from those of most other shareholders. On this view, proponents of social proposals are driven either by frivolous motives (that is, the desire of small individual shareholders to voice their personal views on society and politics, with little or no benefits for the other shareholders) or by “special interests” (for example, proposals filed by labor unions to advance employee interests at the expense of shareholders or proposals advanced by “highly-politicized” organizations to promote their own political agendas).

The normative implications of the conflict theory are clear. Since the review, printing, and distribution of proposals to shareholders is costly,⁸⁰ and since examining these proposals and voting on them uses up time that would otherwise be devoted to other matters, proposals that are systematically misaligned with the preferences and goals of shareholders are an inefficient use of shareholders’ time and resources and should be restricted or prohibited.⁸¹

To assess the validity of this theory, I examined the identity of the proponents for all the 2,933 proposals in the sample and the level of shareholder support received by proposals submitted by each category of proponents. My findings show that the conflict theory highlights some accurate aspects of social proposals, but it overstates their significance and ultimately does not adequately explain the phenomenon. I will examine these aspects in the following Subparts.

1. The “Gadfly” Critique

Some critics of stockholder politics believe that many social proposals are “motivated more by narcissism than by any heartfelt concern about . . . social responsibility.”⁸² According to this view, these proposals are driven by frivolous or idiosyncratic preferences of individual shareholders, who obtain some personal utility from this form of small-scale activism but create little or no value for the other shareholders.⁸³ These “independent public stockholders” or, more colloquially, “corporate gadflies” have often been criticized for wasting shareholder resources on personal crusades.⁸⁴

80. See *infra* Part V.A.

81. See, e.g., Liebler, *supra* note 38, at 439.

82. Douglas M. Branson, *Corporate Social Responsibility Redux*, 76 TUL. L. REV. 1207, 1215 (2002).

83. See Thomas & Cotter, *supra* note 48, at 370.

84. “Independent public stockholder” is the term used by Lewis Gilbert, one of the first individual shareholder activists, in a 1950 article. Lewis D. Gilbert, *Management and the Public Stockholder*, 28 HARV. BUS. REV. 73 (July 1950). Gilbert, together with his brother, was responsible for a significant fraction of

Indeed, if we measure how valuable a proposal is for shareholders by the percentage of votes in favor that the proposal receives (hereinafter, “shareholder support”),⁸⁵ proposals submitted by individuals create less value than proposals submitted by institutional actors, even after controlling for size and industry of the company, year, and topic of the proposal.

Table 5 reports results of regressions where the outcome variable is the average shareholder support, and the independent variable is an indicator variable for whether the proposal was submitted by an individual shareholder or by an institutional shareholder. The proposals examined are all the proposals in the sample that went to a vote, with the exclusion of the proposals for which FactSet does not report the name of the proponent, for a total of 1,603 proposals. Column (1) reports the regression coefficient without any control variables. The result indicates that proposals submitted by individual shareholders obtained an average shareholder support that is 6.12 percentage points lower than the support received by proposals submitted by institutional shareholders. Column (2) estimates the coefficient after controlling for market capitalization, industry, year of the annual meeting, and topic of the proposal.⁸⁶ The result indicates that proposals submitted by individual shareholders obtained an average shareholder support that is 4.83 percentage points lower than the support received by proposals submitted by institutional shareholders. In both models, the results are statistically significant ($p < 0.001$).

shareholder proposals submitted in the early years of shareholder activism. For example, a survey of shareholder proposals submitted between 1948 and 1951 found that Lewis and John Gilbert were the authors of 47% of all the proposals. Frank D. Emerson & Franklin C. Latham, *The SEC Proxy Proposal Rule: The Corporate Gadfly*, 19 U. CHI. L. REV. 807, 830 (1952). For a discussion of this phenomenon, see, for example, Martin Lipton & Steven A. Rosenblum, *A New System of Corporate Governance: The Quinquennial Election of Directors*, 58 U. CHI. L. REV. 187, 231–32 (1991) (proposing the abolition of Rule 14-8 proposals, on the grounds that it is used only by gadflies who do not promote the interests of shareholders); Morgan N. Neuwirth, *Shareholder Franchise—No Compromise: Why the Delaware Courts Must Proscribe All Managerial Interference with Corporate Voting*, 145 U. PA. L. REV. 423, 428 (1996) (characterizing the use of the proxy rules by gadflies as aimed at gaining publicity); Marleen A. O'Connor, *Organized Labor as Shareholder Activist: Building Coalitions to Promote Worker Capitalism*, 31 U. RICH. L. REV. 1345, 1361 (1997) (reporting the view that “social proposals involv[e] emotional issues [and are] brought by “gadflies” and “crazies” seeking publicity for quixotic causes”); Stephen J. Choi & Jill E. Fisch, *How to Fix Wall Street: A Voucher Financing Proposal for Securities Intermediaries*, 113 YALE L.J. 269, 301 (2003) (suggesting that “shareholder gadflies may reap personal value from the attention associated with the sponsorship of proxy proposals”).

85. I measure shareholder support as the percentage of votes in favor out of the total votes in favor and against. Therefore, “abstain” votes are not counted in the numerator or the denominator.

86. Market capitalization is adjusted for inflation using the Consumer Price Index released by the U.S. Labor Department’s Bureau of Labor Statistics. Industry is one of the twelve Fama-French industries, determined on the basis of the companies’ SIC code. Topic of the proposal is one of the twenty-one main sub-categories reported in Table 3.

TABLE 5: SHAREHOLDER SUPPORT FOR INDIVIDUAL PROPOSALS

	<i>Average Shareholder Support</i>	
	(1)	(2)
Individual Proponent	-6.12*** (1.02)	-4.83*** (0.89)
Market Cap	NO	YES
Topic	NO	YES
Industry	NO	YES
Year	NO	YES
Observations	1,603	1,601

However, the data also show that proposals by individual shareholders are a marginal phenomenon. Unlike corporate governance proposals, a significant fraction of which are submitted by “gadflies,”⁸⁷ the vast majority of social proposals are submitted by institutional actors. Table 6 reports data on the type of proponents for 2,680 social proposals in my sample.⁸⁸ As the table shows, individual proponents account for less than a quarter of the total proposals.

TABLE 6: TYPES OF PROPONENTS

Type of Proponent	Proposals
Individuals	21.8%
Socially Responsible Inv. Manag.	20.4%
Public Pension Funds	16.4%
Religious Orgs	14.4%
Policy and Social Orgs	12.8%
Labor Orgs	7.6%
Charities and Foundations	4.5%
Other	2.0%

Furthermore, my analysis of the SEC decision record reveals that many individual proponents are not the actual authors and promoters of the proposals they formally submit. In many cases, individual shareholders serve as mere “nominal proponents” for other organizations—typically, shareholder advocates or other institutional actors—who file and promote the proposals on behalf of the individual proponents. Based on my review of the documentation filed with

87. See generally Nickolay Gantchev & Mariassunta Giannetti, *The Costs and Benefits of Shareholder Democracy: Gadflies and Low-Cost Activism*, 34 REV. FIN. STUD. 5629 (2021); Yaron Nili & Kobi Kastiel, *The Giant Shadow of Corporate Gadflies*, 94 S. CAL. L. REV. 569, 573 (2021) (finding that in 2018, five individual shareholders filed 40% of all shareholder proposals at S&P 1500 companies).

88. I excluded 253 proposals for which FactSet does not report the name of the proponent. To establish the category of proponent, I collected information from corporate websites, news sites, and personal and professional websites.

the SEC in relation to the proposals in the SEC Record Subsample, I estimate that more than half of the individual proposals (52.7%) are in fact submitted (and, arguably, conceived and prepared) by institutional actors that specialize in stockholder politics.⁸⁹

Therefore, it is reasonable to believe that social proposals filed by retail shareholders independently (that is, without the professional support of shareholder advocates, socially responsible investment managers, or other activists in social proposals) comprise approximately 10% of the total social proposals filed.⁹⁰ Thus, contrary to the “gadfly” critique, proposals by “gadflies” or other individuals acting independently are a very small fraction of social proposals and an insignificant part of the overall phenomenon.

2. The “Special Interests” Critique

Another critique of social proposals is that many of these proposals are driven by “special interests,” that is, by organizations protecting outside groups and outside interests, such as workers, consumers, minorities, the environment, or non-human animals. According to this view, stockholder politics aims at narrow goals that are not necessarily aligned, and often conflict, with the interests of the company and its shareholders.

Indeed, as shown in Table 6, a substantial number of social proposals are submitted by organizations that have the institutional purpose of protecting the interests of their constituents (such as unions and other labor organizations, which are responsible for 8.8% of all proposals),⁹¹ promoting the social and moral values of a religious group (such as the various confessional organizations, which are responsible in the aggregate for 14.8% of all proposals), pursuing philanthropic goals (such as charitable organizations and foundations, which are responsible for 4% of all proposals), or advocating social and policy changes for the protections of specific interests (such as environmental activists, animal welfare organizations, and other social and policy organizations).

If we adopt a broad interpretation of “special interests,” including all organizations whose main purpose is the pursuit of extra-corporate objectives, special interest proponents submitted 39.3% of all proposals in my sample. If we expand this category further to include public pension funds, which are often

89. See *infra* Part IV.C.

90. It is plausible that the percentage of individual proponents assisted by advocates or other institutional actors is smaller in the SEC Record Subsample than in the whole sample. Indeed, the SEC Record Subsample comprises of proposals for which the company has sought a no-action letter request, and therefore low-quality proposals (i.e., proposals lacking formalities or failing to meet regulatory conditions) might well be over-represented in the SEC Record Subsample. If this were true, and assuming that independent individual proposals are likely to be less sophisticated than proposals prepared by professional activists, the percentage of independent individual proposals in the whole sample would be much less than 10%.

91. For a discussion of shareholder activism by organized labor, see Marleen O'Connor, *Organized Labor as Shareholder Activist: Building Coalitions to Promote Worker Capitalism*, 31 U. RICH. L. REV. 1345 (1997); DAVID H. WEBBER, *THE RISE OF THE WORKING-CLASS SHAREHOLDER: LABOR'S LAST BEST WEAPON* (2018) [hereinafter WEBBER, *THE RISE OF THE WORKING-CLASS SHAREHOLDER*].

managed by political appointees or elected officials⁹² and, according to the supporters of the conflict theory, are heavily influenced by political motives,⁹³ special interest proposals account for the majority (55.7%) of social proposals.

Critics of “special interests” proposals point out that the low shareholder support received by these proposals is strong evidence that the proponents have goals and preferences that are very different from those of other shareholders. Indeed, when social proposals first appeared on the corporate landscape,⁹⁴ shareholders showed very little support for them. The proposals of Campaign GM, for example, which was the first important instance of stockholder politics in the 1970s, obtained less than 3% of shareholder votes.⁹⁵ Throughout the 1980s, social proposals obtained very low support on average;⁹⁶ in the 1990s, the highest vote category of social proposals received on average only 12.4% of the votes;⁹⁷ and in the period between 2000 and 2003, the average support for the most voted social proposals (those on climate change and renewable energies) was 13% (while the average overall support for social proposals was much lower, reaching a four-year high of 9.4% in 2003).⁹⁸

However, the picture emerging from my empirical analysis is significantly different from the old pictures from the 1970s throughout the early 2000s. Indeed, despite the systematic opposition of management, shareholder support for social proposals has been increasing dramatically. On average, social proposals in my sample received 23.1% of shareholder support. However, as Figure 1 shows, whereas in 2010 average shareholder support was 18%, in 2021 it had almost doubled to 35.4%.

92. Aleksandar Andonov, Yael V. Hochberg & Joshua D. Rauh, *Political Representation and Governance: Evidence from the Investment Decisions of Public Pension Funds*, 73 J. FIN. 2041, 2052–55 (2019).

93. See, e.g., Romano, *Less Is More*, *supra* note 38, at 226; see also Romano, *Public Pension Fund Activism*, *supra* note 38.

94. See, e.g., Gordon, *supra* note 43; Liebel, *supra* note 38.

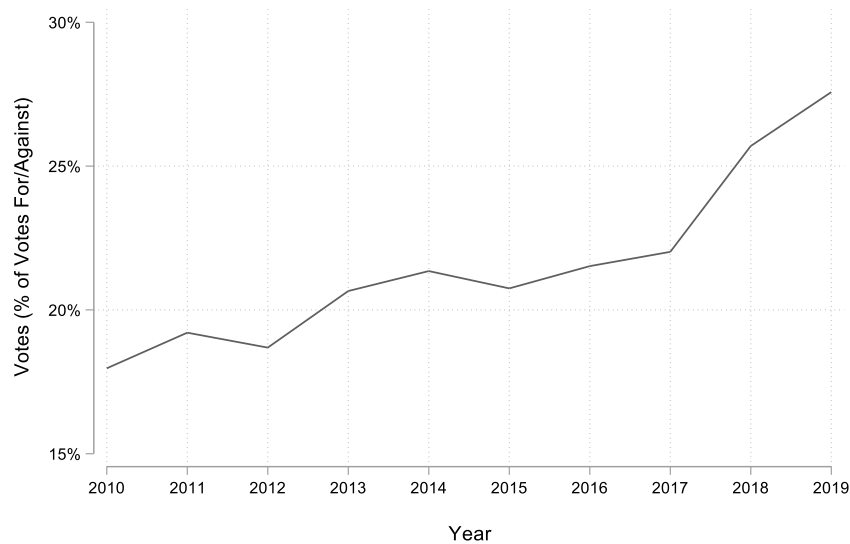
95. Schwartz, *Towards New Corporate Goals*, *supra* note 38, at 59.

96. See, e.g., Romano, *Less Is More*, *supra* note 38, at 186 n.30 (reporting that in the 1980s social responsibility proposals gained less than 3% of the votes).

97. *Id.*

98. Robert Monks, Anthony Miller & Jacqueline Cook, *Shareholder Activism on Environmental Issues: A Study of Proposals at Large US Corporations (2000-2003)*, 28 NAT. RES. F. 317, 321 (2004).

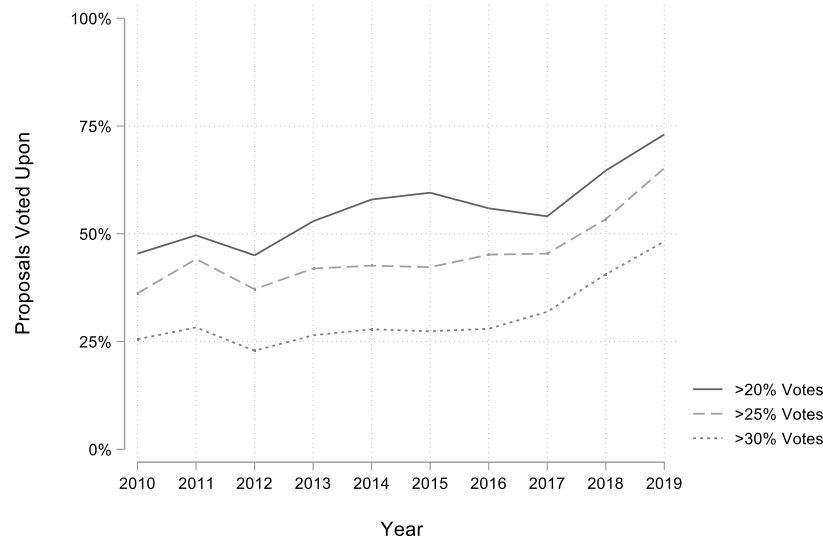
FIGURE 1: AVERAGE SHAREHOLDER SUPPORT



The recent rise in the level of average shareholder support varies based on the topic of the proposal. Shareholder support for proposals on climate change rose from 20.3% in the first half of the sample period (2010–2015) to 32.2% in the second half (2016–2021); shareholder support for proposals on political spending and activity rose from 24.7% (2010–2015) to 30.3% (2016–2021); shareholder support for proposals on sex, gender and race issues remained relatively stable, from 26.4% (2010–2015) to 27.4% (2016–2021); and shareholder support for proposals on labor and inequality issues rose from only 10.3% (2010–2015) to 26.8% (2016–2021).

Although only a very small fraction of the proposals (3.3%) is formally approved by shareholders, the fraction of proposals obtaining substantial minority support has grown drastically over the examined period. As Figure 2 shows, of all social proposals put to a vote, the number of proposals obtaining more than 30% of shareholder support has grown from 25.5% in 2010 to 60% in 2021, and the number of proposals obtaining more than 20% of shareholder support has grown from 45.4% in 2010 to 71% in 2019.

FIGURE 2: PROPOSALS WITH SIGNIFICANT MINORITY SUPPORT



While it is true that these proposals rarely obtain a majority of votes, this does not necessarily imply that most shareholders are opposed to them. Shareholders do not have strong incentives to focus on corporate decisions, both financial and social ones, and follow management recommendations unless some issues become particularly salient or contentious.⁹⁹ Therefore, substantial minority support for a proposal opposed by management is often a reliable indicator that the issue is, in fact, relevant to most shareholders.¹⁰⁰ In recognition of this fact, the SEC, for example, adopted in the past important regulatory reforms or interpretive guidance that were explicitly demanded by a small minority of shareholders, on the grounds that such minority support showed the significance of those demands for investors in general.¹⁰¹

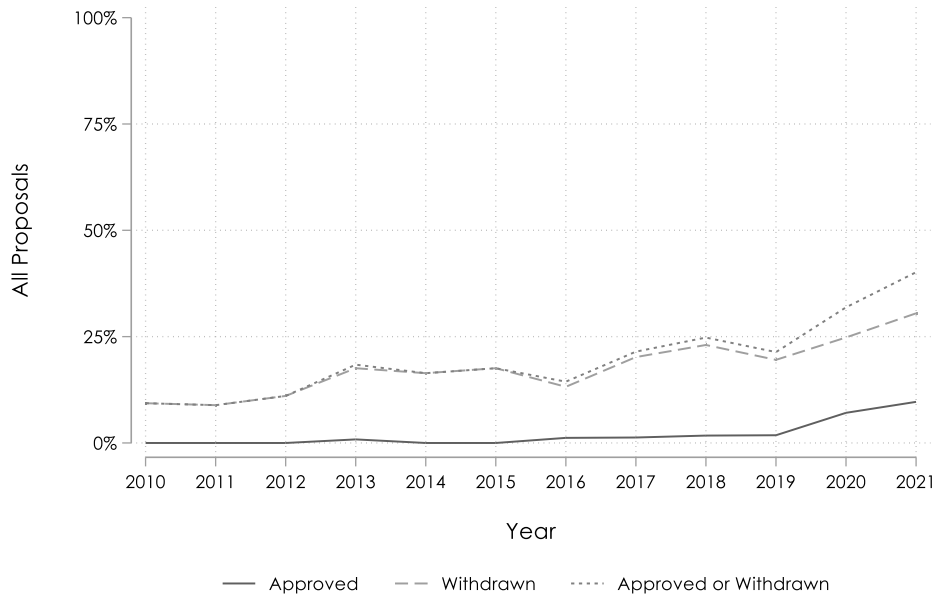
99. See, e.g., Fabrizio Ferri & David Oesch, *Management Influence on Investors: Evidence from Shareholder Votes on the Frequency of Say on Pay*, 33 CONTEMP. ACC. RES. 1337, 1339–40 (2016) (arguing, based on empirical evidence, that management recommendation has a causal effect on shareholder support and, in particular, that proposals supported by the management obtain an additional 26% of votes compared to proposals opposed by the management, other things being equal).

100. See, e.g., Lucian A. Bebchuk, Robert J. Jackson, Jr., James D. Nelson & Roberto Tallarita, *The Untenable Case for Keeping Investors in the Dark*, 10 HARV. BUS. L. REV. 1, 16–18 (discussing various arguments for why minority support for shareholder proposal does not necessarily mean that a majority would oppose the proposal and might be an indication that the proposed resolution is in fact widely desirable for most shareholders).

101. For example, in 1992, the SEC mandated disclosure of executive compensation arrangements for public companies, in part on the grounds that a significant minority of shareholders had consistently demanded more information on executive compensation, although the average shareholder support for these proposals was only 11.2%. Similarly, the significant rise of (minority) shareholder support for proposals on climate change in the

Furthermore, the number of approved proposals has been growing dramatically, from about 1% from 2010 to 2019 to 12.4% in 2020 and 19.2% in 2021. Finally, 18% of all the proposals in the sample were withdrawn by the proponents before the annual meeting, typically after a settlement with the company.¹⁰² It is reasonable to consider these withdrawals as successful cases for the proponents. Indeed, this is how the most active proponents of social proposals view them.¹⁰³ If we combine approved and withdrawn proposals in the same category of successful proposals, as Figure 3 does, in 2021, 40.1% of all submitted proposals were fully successful, up from only 9.3% in 2019.

FIGURE 3: APPROVED AND WITHDRAWN PROPOSALS



The evidence discussed above does not seem consistent with the view that social proposals aim at exceedingly narrow and idiosyncratic objectives that conflict with those of other shareholders. Interestingly, among all the social responsibility proposals submitted by institutional actors, those submitted by labor unions and public pension funds (often regarded as the quintessential examples of special interest proposals) receive substantially more shareholder support than proposals submitted by socially responsible investment managers.

1990s and 2000s, together with the pressure from large institutional investors, was one of the motivating factors leading the SEC to release its 2010 interpretive guidance on climate change disclosure.

102. For a study of shareholder proposal settlements, see generally Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262 (2016).

103. See *infra* Part IV.C.5.

Table 7 reports results of regressions where the outcome variable is the average shareholder support obtained by social proposals, and the independent variable is a categorical variable for the type of proponent. The proposals examined are all the proposals in the sample that went to a vote, with the exclusion of the proposals submitted by individuals and proposals for which FactSet does not report the name of the proponent, for a total of 1,330 proposals. The baseline group of proponents is socially responsible investment managers, which, although driven by both financial and social objectives, respond directly to their clients and do not necessarily represent specific interest groups (although they may advise nonprofit organizations with specific social goals).

TABLE 7: SHAREHOLDER SUPPORT FOR “SPECIAL INTERESTS” PROPOSALS

	<i>Average Shareholder Support</i>	
	(1)	(2)
Social & Policy Orgs	-0.87 (1.02)	-0.44 (0.94)
Labor Orgs	2.63* (1.43)	3.69*** (1.31)
Public Pension Funds	8.84*** (1.18)	5.88*** (1.14)
Market Cap	NO	YES
Topic	NO	YES
Industry	NO	YES
Year	NO	YES
Observations	1,330	1,328

Column (1) reports the regression coefficients without any control variables. The result indicates that proposals submitted by “special interests” obtain equal or larger shareholder support than proposals submitted by socially responsible investment managers. Proposals by social and policy organizations obtain on average slightly lower shareholder support but the result is not statistically significant. By contrast, proposals by labor organizations and public pension funds obtain larger support than proposals by socially responsible investment managers and the result is statistically significant.

Column (2) estimates the coefficient after controlling for market capitalization, industry, year of the annual meeting, and topic of the proposal.¹⁰⁴ The result confirms the aforementioned conclusions: proposals by social and policy organizations obtain substantially the same shareholder support as proposals by socially responsible investment managers, whereas proposals by labor organizations and public pension funds obtain larger support. Thus, contrary to the conflict theory, shareholders consider proposals by “special

104. See *supra* note 86.

interests” as being similar and perhaps more valuable than social proposals by other proponents.¹⁰⁵

B. PROFIT THEORY

An alternative theory—the profit theory—argues that the anomaly of social proposals is only apparent. According to this view, the political, social, and environmental goals of social proposals are only intermediate goals, whereas their ultimate goal is the maximization of profits and shareholder value. If this theory held true, stockholder politics would be just another form of shareholder value maximization, consistent with the traditional understanding of the public corporation. Like the conflict theory, the profit theory captures some partial truths but fails to explain important aspects of this phenomenon.

Over the past two decades, an emerging literature has provided empirical support to the claim, consistent with the profit theory, that social responsibility might be good for business. For example, some studies have found that a value-weighted portfolio of companies with high employee satisfaction “earned an annual four-factor alpha of 3.5% from 1984 to 2009, and 2.1% above industry benchmarks”;¹⁰⁶ that “firms with good ratings on material sustainability issues significantly outperform firms with poor ratings”;¹⁰⁷ that customers are willing to pay an average premium of 16.8% for “socially responsibly produced” products and services;¹⁰⁸ that social responsibility proposals that pass by a small margin improve labor productivity and sales;¹⁰⁹ that companies with higher social and environmental performance are more competitive in the market for government procurement contracts;¹¹⁰ and that companies that adopt sustainability policies outperform their counterparts in the long run, in terms of both stock market and accounting performance.¹¹¹ A recent meta-analysis found

105. In a 1998 study, Randall Thomas and Kenneth Martin reported a similar result with respect to labor-sponsored shareholder proposals. Randall S. Thomas & Kenneth J. Martin, *Should Labor Be Allowed to Make Shareholder Proposals*, 73 WASH. L. REV. 41, 44 (1998) (“[L]abor-sponsored proposals received a statistically significant higher percentage of favorable votes than did similar proposals sponsored by private institutions and individuals.”).

106. Alex Edmans, *Does the Stock Market Fully Value Intangibles? Employee Satisfaction and Equity Prices*, 101 J. FIN. ECON. 621, 621 (2010); see also Alex Edmans, Lucius Li & Chendi Zang, *Employee Satisfaction, Labor Market Flexibility, and Stock Returns Around the World 1* (ECGI Finance, Working Paper No. 433/2014, 2014), <https://ssrn.com/abstract=2461003> (finding that employee satisfaction is associated with superior long-run returns in flexible labor markets, such as the US and UK).

107. Mozaffar Khan, George Serafeim & Aaron Yoon, *Corporate Sustainability: First Evidence on Materiality*, 91 ACCT. REV. 1697, 1697 (2016).

108. Stephanie M. Tully & Russell S. Winer, *The Role of the Beneficiary in Willingness to Pay for Socially Responsible Products: A Meta-Analysis*, 90 J. RETAILING 255, 255 (2014).

109. Caroline Flammer, *Does Corporate Social Responsibility Lead to Superior Financial Performance? A Regression Discontinuity Approach*, 61 MGMT. SCI. 2381, 2549 (2015).

110. Caroline Flammer, *Competing for Government Procurement Contracts: The Role of Corporate Social Responsibility*, 39 STRATEGIC MGMT. J. 1299, 1299 (2018).

111. Robert G. Eccles, Ioannis Ioannou & George Serafeim, *The Impact of Corporate Sustainability on Organizational Processes and Performance*, 60 MGMT. SCI. 2835, 2835 (2014).

“a highly significant [and] positive” relation between corporate social responsibility and financial performance.¹¹²

However, the evidence is not as clear as it may seem. For example, some studies have found that, on average, “investors respond slightly negatively to the release of positive [corporate social responsibility] news”¹¹³ and that the relationship between social and environmental performance and financial performance is positive for some firms and negative for other firms.¹¹⁴ A survey of 128 academic papers found that the causal link between corporate social responsibility and financial performance is not demonstrated, and “59% of studies report a positive relationship between [corporate social performance] and financial performance, 27% report a mixed relationship, and 14% report a negative relationship.”¹¹⁵ The current approach to the problem in management studies includes the recognition that the relationship between corporate social responsibility and financial performance is complex and likely depends on several contingencies.¹¹⁶

Moreover, the fact that some socially responsible strategies increase firm value and that some shareholders might indeed be advancing social proposals for their indirect effect on stock value does not imply that most such proposals are profit enhancing or that most shareholder-proponents act for that reason. It is quite easy to think of an array of possible measures in favor of employees, product safety, or the environment that, beyond a certain point, would likely result in a net cost for shareholders. Indeed, even a quick review of the proposals in my sample show that many proposed resolutions seem primarily or exclusively driven by social and environmental concerns, not by financial concerns.

Consider, for example, the proposal on food waste submitted to Amazon in 2019 and discussed in Part I.A. The proposal requested the company to issue a report “on the environmental and social impacts of food waste generated from the company’s operations given the significant impact that food waste has on societal risk from climate change and hunger.”¹¹⁷ According to the profit theory, reducing food waste would not only produce social and environmental benefits but would also improve Amazon’s firm value, perhaps by enhancing Amazon’s reputation with some groups of customers. Or consider a proposal on “inequitable employment practices” submitted to Alphabet in 2019.¹¹⁸ The

112. Timo Busch & Gunnar Friede, *The Robustness of the Corporate Social and Financial Performance Relation: A Second-Order Meta-Analysis*, 25 CORP. SOC. RESPONS. & ENV’T MGMT. 583, 583 (2018).

113. Philipp Krüger, *Corporate Goodness and Shareholder Wealth*, 115 J. FIN. ECON. 304, 306 (2015).

114. Michael L. Barnett & Robert M. Salomon, *Does It Pay to Be Really Good? Addressing the Shape of the Relationship Between Social and Financial Performance*, 33 STRATEGIC MGMT. J. 1304, 1304 (2012).

115. John Peloza, *The Challenge of Measuring Financial Impacts from Investments in Corporate Social Performance*, 35 J. MGMT. 1518, 1521 (2009).

116. See, e.g., Kwang-Ho Kim, MinChung Kim & Cuili Qian, *Effects of Corporate Social Responsibility on Corporate Financial Performance: A Competitive-Action Perspective*, 44 J. MGMT. 1097 (2018).

117. Amazon.com, Inc., 2019 Proxy Statement, *supra* note 29, at 15.

118. Alphabet, Inc., 2019 Proxy Statement (Form 14A) 64 (Apr. 30, 2019).

shareholder-proponent criticized “a suite of contractual arrangements involving their employees,” including “no-poaching agreements” with competitors Apple and Microsoft,¹¹⁹ non-compete covenants for entry-level employees, and mandatory arbitration clauses.¹²⁰ The proposal requested Alphabet to commit not to use any of these contractual practices. In this case, the profit theory would argue that more equitable employment practices would allow Alphabet to attract talented employees, improve their morale, and ultimately increase productivity and profits.

On a closer look, however, the profit rationale of these proposals is far from clear. It is certainly plausible that adopting some policies to reduce food waste might in theory have a positive effect on Amazon’s brand value. However, it is not obvious that such effect would be larger than the cost. Yet the proposal does not even try to compare the costs of the proposed policies with the expected benefits for shareholders. In fact, the text of the proposal is almost exclusively focused on social and environmental problems and how Amazon could alleviate those problems by reducing food waste.¹²¹

Likewise, in the “inequitable employment practices” proposal, the proponent claims that Alphabet and its main competitors have entered into “no-poaching” arrangements, whereby they committed not to hire the employees of one another. But if Alphabet and its competitors entered into such pacts, they did it as a way to restrict competition in the labor market, and thus reduce the salaries they pay to their employees.¹²² It is not obvious that putting an end to this practice, in addition to benefitting employees, would also provide a financial benefit to the company and its shareholders. In fact, it is reasonable to expect the opposite effect.¹²³

These examples are not isolated cases. Although measuring quantitatively the prevalence and type of financial rationale in shareholder proposals is impractical, my review of the social proposals in the sample reveals that many

119. In a no-poaching pact, two or more companies agree not to recruit one another’s employees.

120. Alphabet, Inc., 2019 Proxy Statement, *supra* note 118, at 64.

121. *Id.* (Most of the supporting statement focuses on the public dimension of these practices, which according to the proponent “burden the economy,” “impede labor mobility,” “prevent the discovery and redress of misconduct,” “introduce labor market inefficiencies,” “preclude employees from suing in court for wrongs like wage theft,” and hold other detrimental consequences for employees and for society at large rather than for Amazon and its shareholders. The proposal very briefly mentions “employee morale” and “human capital management” as possible business reasons to abandon inequitable employment practices).

122. For a discussion of “no-poaching” agreements, see, for example, Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 544–47 (2018).

123. A different conclusion might be reached if the company enters into “no-poaching” agreements that are in violation of antitrust law. In that case, the legal liability might potentially exceed the benefit derived from the use of the agreements. For example, in 2015, several tech companies including Alphabet (then Google) settled for \$415 million a class action suit brought by former employees on the grounds that the no-poaching agreements among their employers illegally reduced their salaries. Dan Levin, *U.S. Judge Approves \$415 Million Settlement in Tech Worker Lawsuit*, REUTERS (Sept. 3, 2015), <https://reut.rs/2GaraTK>. However, it is worth noting that the 2019 shareholder proposal discussed in the example does not even mention the class action and the relevant settlement. See Alphabet, Inc., 2019 Proxy Statement, *supra* note 118, at 64.

proposals do not even mention a financial rationale or do so in a perfunctory or superficial way, without explaining how the proposed resolution is supposed to increase shareholder value.

For example, many proposals on the disclosure of corporate political spending fail to include a financial rationale and instead mention the importance of transparency for shareholders and its relevance for the proper functioning of the U.S. democracy.¹²⁴ Other proposals follow the same template but add a sentence stating that the lack of transparency may create reputational and business risks, without further elaboration.¹²⁵

Furthermore, many proposals (especially on environmental issues) mention regulatory risk as a reason to adopt the proposed policy. But if regulatory risk were the real driver of these proposals, we should conclude that the proponents would be largely indifferent between the elimination of the regulatory risk and the elimination of the underlying environmental problem. Indeed, both solutions would address the regulatory risk. A regulatory risk can be addressed, for example, by lobbying legislators and regulators in order to avoid or reduce the expected regulatory burden. But while oil companies, for instance, are known for lobbying, directly and indirectly, against environmental regulation,¹²⁶ it seems implausible that supporters of environmental proposals would approve of such strategy.

On the contrary, the text and context of these proposals clearly suggest that the proponents' preoccupation is about the environmental risk, not the regulatory restrictions that such risk might prompt. In fact, the data shows that many proposals are presented or supported by organizations that actively advocate for more aggressive regulation on environmental and social issues.¹²⁷ The purported rationale of regulatory risk, therefore, does not seem a genuine motivation for

124. See, e.g., Cintas Corp., 2019 Proxy Statement (Form 14A) 36 (Sept. 17, 2019); CarMax, Inc., 2019 Proxy Statement (Form 14A) 68 (May 6, 2019); American Airlines Group, Inc., 2019 Proxy Statement (Form 14A) 19 (Apr. 29, 2019); Roper Technologies, Inc., 2019 Proxy Statement (Form 14A) 45 (Apr. 30, 2019); Range Resources Corp., 2018 Proxy Statement (Form 14A) 67 (Apr. 6, 2018); Wynn Resorts, 2018 Proxy Statement (Form 14A) 53 (Apr. 18, 2018); J.B. Hunt Transport Services, Inc., 2018 Proxy Statement (Form 14A) 41 (Mar. 13, 2018).

125. See, e.g., Western Union Co., 2018 Proxy Statement (Form 14A) 72 (Apr. 4, 2018); AT&T, Inc., 2011 Proxy Statement (Form 14A) 26 (Mar. 3, 2010); NextEra Energy Inc., 2017 Proxy Statement (Form 14A) 25 (Mar. 27, 2017).

126. See, e.g., Jillian Ambrose, *ExxonMobil Tried to Get European Green Deal Watered Down*, THE GUARDIAN (Mar. 6, 2020), <https://www.theguardian.com/business/2020/mar/06/exxonmobil-tried-to-get-european-green-deal-watered-down-claims-climate-lobbying-watchdog>.

127. Several frequent filers of environmental proposals in my sample explicitly advocate for stricter environmental regulation. For some recent examples among the ten most frequent filers of environmental proposals, see *Environment*, PARK FOUND., <https://parkfoundation.org/program-interests/?id=2#id-2> (last visited July 31, 2022) (mentioning its commitment to "resisting all new gas and oil drilling"); *A Green New Deal Is a Smart Deal for Investors*, AS YOU SOW: BLOG (July 30, 2019), <https://www.asyousow.org/blog/2019/7/30/green-new-deal-investors> (supporting federal regulation to achieve net-zero greenhouse gas emissions); *1st Quarter 2021 ESG Impact Report*, BOS. TR. WALDEN (Apr. 9, 2021), <https://www.bostontrustwalden.com/insights/1st-quarter-2021-esg-impact-report> (mentioning an "investor letter to the U.S. Environmental Protection Agency and Congress against large-scale mining in Alaska's Bristol Bay").

these proposals and is, instead, either a rhetorical device or a perfunctory formula aimed at persuading financially driven shareholders.

* * *

The discussion in this Part has shown that both the conflict theory and the profit theory capture some partial truths on stockholder politics but fail to explain important aspects of it. We need a richer theory to understand this phenomenon. I will try to propose one in Part IV.

IV. AN ALTERNATIVE THEORY OF STOCKHOLDER POLITICS

Part III has shown that the conventional theories of stockholder politics—the conflict theory and the profit theory—fail to adequately explain important aspects of the phenomenon. This Part presents an alternative framework, in which stockholder politics should be understood as a matchmaking enterprise that connects shareholders with prosocial and expressive motives on one side and extra-corporate actors (stakeholders, activists, concerned citizens) on the other side. A relatively small number of specialized players (“stockholder politics specialists”) perform this matchmaking role. Specialists “sell” information, monitoring, and voting opportunities to shareholders interested in socially relevant issues, and they “sell” corporate voice to outside actors, including employees, consumers, and citizens concerned about corporate externalities.

Subpart A argues that shareholder preferences are the product of a bundle of diverse motives—financial, prosocial, and expressive—rather than the product of financial motives alone. Subpart B examines the group of extra-corporate actors interested in accessing corporate voice. Subpart C examines the role of “stockholder politics specialists,” a group of specialized players with a peculiar structure of costs and incentives that connect the two groups of shareholders and extra-corporate actors.

A. SHAREHOLDERS WITH PROSOCIAL AND EXPRESSIVE MOTIVES

1. *Preferences and Motives*

Economists use the term “preference” to indicate an agent’s ranking of available options.¹²⁸ Suppose that a shareholder can choose between full disclosure and secrecy of the company’s political donations. We say that the shareholder prefers disclosure if, all things considered, she ranks disclosure higher than secrecy. But why does the shareholder end up ranking the two options in that particular order?

I contend that the determinants of a particular ranking (or preference) are many and complex. As our daily experience suggests, we hardly rank our options

128. See DANIEL M. HAUSMAN, PREFERENCE, VALUE, CHOICE, AND WELFARE 7 (2011) (“[P]references in economics are rankings that express *total* subjective comparative evaluations.”).

according to a single criterion. At a restaurant, we choose from the menu based on several factors, including our tastes, our concern for health and appearance, and sometimes, our desire to impress our companions. When evaluating a job offer, we give a lot of weight to salary, but we also consider location, reputation of the firm, or the social value of the job. Some of these factors are weightier than others, but more than just one factor eventually influences our final decision. A decision model that reduces our preferences to a single dimension would struggle to make sense of our choices.

Similarly, assuming that shareholders only care about the return on their investment is a very useful simplification in most contexts, but it seems unhelpful when we study social proposals. How would shareholders decide, in our example, whether to vote in favor of disclosure of the company's political donations or against it? To make such a decision, shareholders would probably consider the financial effects of the disclosure of political donations. For example, opaque donations might be used by managers to obtain personal benefits from politicians at the expense of shareholders, but at the same time, disclosure of profit-maximizing donations might create reputational damage, which would harm shareholder value (consider, for example, an oil company lobbying to block socially desirable environmental regulation).¹²⁹

However, shareholders might also consider, at least to some extent, the political consequences of those donations—which candidates and policy proposals are supported with shareholder money, and which moral and political values are associated with the company's political spending. Most people care about these aspects and are willing to bear some financial cost in this regard. Therefore, the final ranking of the available options will be the product of a combination of different criteria—or, to employ the terms that I will use in this Article, the final “preference” of shareholders will be the product of a combination of different “motives.”

2. *Prosocial and Expressive Motives*

When evaluating social proposals, which focus on issues affecting public welfare, shareholders might be driven, at least to some extent, by prosocial motives.¹³⁰ In the literature on social and ethical investing, prosocial motives have been modeled in different ways. These models posit that some shareholders refuse to hold shares in companies that engage in some socially or ethically

129. For a discussion of the issues raised by the transparency of political spending, *see generally* Bebchuk, et al., *supra* note 100.

130. *See, e.g.*, Hart & Zingales, *Companies Should Maximize Shareholder Welfare*, *supra* note 4 (proposing a model in which shareholders have prosocial motives); David H. Webber, Professor, Boston U. Sch. of L., Remarks as 2016 Visting Scholar in Residence in Corporate and Business Law at Delaware Law: Rethinking “Political” Considerations in Investment (Sept. 12, 2016), <https://ssrn.com/abstract=3736936> (arguing that many shareholders are interested not only in financial performance but also in policy or political goals).

unacceptable behavior,¹³¹ that they discount the share price of “bad” companies,¹³² or that they treat shares as a composite instrument blending “an investment vehicle together with a charitable giving vehicle.”¹³³

In these and other similar models, the key assumption is that some investors have pure or impure altruistic motivations, and, therefore, they consider the non-financial impact of the company’s activities when making investment decisions.¹³⁴ The existence of partially altruistic motives behind consumption and investment decisions fits many people’s intuitions and experiences, and it has found support in empirical studies.¹³⁵

This theory seems to explain some of the aspects of social proposals that the conventional profit theory seemed unable to explain. In particular, it explains why the text of social proposals focuses on social and environmental benefits rather than the financial benefits for shareholders, and why shareholders vote for policies that are likely to impose net financial costs on the company. Driven by prosocial motives, some shareholders may decide to pay a price in order to benefit others and therefore may prefer a given prosocial policy even if it results in a net financial cost.

Shareholders may also choose a given socially relevant option in order to express their moral and political values. Both financial motives and prosocial motives follow a consequentialist pattern: shareholders act in a certain way because they expect that those actions will bring about a desired state of the world, whether it is an increase in profits or an increase in welfare for employees, local communities, or society as a whole.

However, people sometimes act to express their moral and political stances, regardless of the effects of their actions on future states of the world. Some social proposals might be an instance of this phenomenon. In one version of this hypothesis, these proposals are mere “statements” or “social signaling,” aiming

131. See, e.g., Robert Heinkel, Alan Kraus & Josef Zechner, *The Effect of Green Investment on Corporate Behavior*, 36 J. FIN. & QUANT. ANALYSIS 431, 434 (2001).

132. See, e.g., Amir Barnea, Robert Heinkel & Alan Kraus, *Corporate Social Responsibility, Stock Prices, and Tax Policy*, 46 CAN. J. ECON. 1066, 1067–69 (2013).

133. Joshua Graff Zivin & Arthur Small, *A Modigliani-Miller Theory of Altruistic Corporate Social Responsibility*, 5 TOPICS IN ECON. ANALYSIS & POL’Y 1, 2 (2005).

134. A pure altruistic motivation is the mere desire for certain goods being provided to other individuals. By contrast, an impure altruist gives to others for partially selfish motivations: for example, because of the status or social recognition associated with charitable giving, or because of the psychological reward (“warm glow”) associated with giving. See James Andreoni, *Giving with Impure Altruism: Applications to Charity and Ricardian Equivalence*, 97 J. POL. ECON. 1447, 1447 (1989).

135. See generally, e.g., James Andreoni & John Miller, *Giving According to GARP: An Experimental Test of the Consistency of Preferences for Altruism*, 70 ECONOMETRICA 737 (2002) (reporting results of a laboratory experiment in which subjects show varying degrees of “rational” altruistic preferences, i.e., altruistic preferences that are consistent with a utility maximization function); Gary Charness & Matthew Rabin, *Understanding Social Preferences with Simple Tests*, 117 Q. J. ECON. 817 (2002) (finding that experimental subjects show altruistic preferences for choices that increase total social welfare, especially when benefitting subjects with low payoffs); Arno Riedl & Paul Smeets, *Why Do Investors Hold Socially Responsible Mutual Funds?*, 72 J. FIN. 2505 (2017) (finding that a majority of investors in socially responsible funds expect these funds to underperform relative to conventional funds, and that prosocial motives have a key role in the decision to invest in such funds).

at conveying information about the proponent (for example, that the proponent has certain values or belongs to a certain cultural or political group).¹³⁶ In another version, social proposals are principle-based actions, chosen for their intrinsic value rather than for their expected consequences.¹³⁷ I will refer to both types of motives as “expressive motives.”

While versions of this theory are common in moral and legal philosophy,¹³⁸ limited attention has been paid to it by corporate governance scholars.¹³⁹ A significant advantage of an expressive theory of stockholder politics is that it offers a plausible explanation for the observed gap between aspiration and voting outcome. As shown in Part II.E above, only 3.3% of the social proposals in my sample received the required majority of votes. From a mere consequentialist perspective, whether rooted in financial interests or in altruistic goals, such systematic misalignment between actions and consequences seems puzzling and, perhaps, even irrational. By contrast, if we think of these proposals as expressive acts, whose value is in the act itself rather than in its effects, their failure to result in approved resolutions does not seem problematic.¹⁴⁰ When we allow for the coexistence of different motives—financial, prosocial, and expressive motives—the apparent anomalies of social proposals become much less evident.

3. *Passive, Reactive, and Proactive Shareholders*

The above “bundle of motives” theory explains why shareholders may be interested in how corporate decisions affect outside groups and society in general. However, acting on prosocial and expressive motives can be expensive

136. For a discussion of social signaling in consumer behavior, see, for example, Olivia Johnson & Veena Chattaraman, *Conceptualization and Measurement of Millennial's Social Signaling and Self-Signaling for Socially Responsible Consumption*, 18 J. CONSUMER BEHAV. 32 (2019).

137. For a classic discussion of the importance of “integrity” as a motivation for human action, see Bernard Williams, *A Critique of Utilitarianism*, in *UTILITARIANISM: FOR AND AGAINST* 108–10 (J.J.C. Smart & Bernard Williams eds., 1973).

138. For a discussion of the role of “symbolic utility” in policy, see, e.g., ROBERT NOZICK, *THE NATURE OF RATIONALITY* 26–35 (1994). For a theory of “expressive norms,” see ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 17–43 (1993). For the role of the “expressive dimension” in regulatory policy, see, for example, Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 65–72 (1995), and Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

139. Some exceptions are Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 95–97 (2010) (mentioning the expressive significance of corporate political spending as a reason for aligning the preferences of directors and shareholders with respect to such spending); Bebchuk, et al., *supra* note 100, at 20 (discussing expressive significance as one of the reasons for mandating disclosure of corporate political spending to shareholders). An adjacent view is the one proposed in Marcel Kahan & Edward B. Rock, *Symbolic Corporate Governance Politics*, 94 B.U. L. REV. 1997 (2014) (explaining shareholder activism on some controversial corporate governance issues, from supermajority votes to proxy access, as rituals with a symbolic social function).

140. This hypothesis echoes, to some extent, the expressive theories of voting in democratic systems. For the first modern formulation of this problem, see ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957). For a modern discussion of the problem, see, for example, DENNIS C. MUELLER, *PUBLIC CHOICE* III 303–32 (2003). For an overview of expressive theories in public choice theory, see Alan Hamlin & Colin Jennings, *Expressive Voting*, in 1 THE OXFORD HANDBOOK OF PUBLIC CHOICE 333, 334 (2019).

and therefore shareholders might remain passive despite their social and political preferences. It is well established in the corporate governance literature that shareholders are mostly apathetic or reticent with respect to traditional corporate decisions.¹⁴¹ The same attitude applies, I argue, to socially relevant decisions.

A shareholder proposal on social and environmental issues must be prepared and drafted carefully in order to comply with the intricate rules and interpretations developed by the SEC over the years. Then, it must be submitted to the company within the applicable deadline and with the proper modalities. The proponent must provide a proof of compliance with certain formal requirements; and if, as often happens, the company seeks a no-action letter from the SEC in order to exclude the proposal, the proponent should be ready to file a response to the company's objections.¹⁴²

To gauge the magnitude of effort by shareholder-proponents, I analyzed the documents filed by the parties in the no-action request process regarding the 300 proposals included in the SEC Record Subsample. I considered three different dimensions: the size of the decision record, which is an imperfect, but reasonable proxy of the time and resources spent by the involved parties; whether the proponent filed a written response to the company's no-action letter request; and whether the record contains evidence that the proponent and the company discussed the content of the proposal. Table 8 reports the findings of this analysis.

141. See *supra* note 19 and accompanying text.

142. Although the proponent has no obligation to respond to the company's requests, most do respond, as shown *infra* in Table 8: Active Effort of Proponents.

TABLE 8: ACTIVE EFFORT OF PROPONENTS

Effort Dimension	Measure
File Size	
Mean	57.7 pages
Median	41.5 pages
25% Percentile	27 pages
75% Percentile	65 pages
Proponent Written Response	
No Response	47.7%
Response	52.3%
In-house	27.3%
Outside Counsel	25.0%
Engagement with the Company	
Evidence of engagement	21.3%
Withdrawal	15.9%

As the data show, the mean (median) size of the decision record is 57.7 (41.5) pages. Records in the top quartile group are sixty-five pages long or more. More importantly, proponents filed a formal response with the SEC about half of the time (52.3%). These responses were prepared either in house (27.3%) or by outside counsel (25%).

Finally, the last dimension I considered is whether the proponent discussed the proposal with the company in writing, in person, or by audio or video conference. The record shows evidence of engagement in 21.3% of the cases. In some cases, the engagement consisted only of a phone call or an exchange of written comments by email, but in many cases the company and the proponent met in person to discuss the proposal, sometimes more than once. In many cases, the company and the proponent negotiated and reached a settlement in which the proponent agreed to withdraw the proposal and the company committed to take certain steps in the direction indicated in the proposal. In several cases, the company and the proponent memorialized the agreement in an email or in a signed written document.

Taken together, these findings show that social proposals are, at least in many cases, an expensive activity, which involves not only the elaboration and filing of the proposal, but often also the review of lengthy documents, the filing of a formal response, and active engagement with the company. While many shareholders may have prosocial and expressive motives, to varying degrees, in most cases these motives are unlikely to be strong enough to induce shareholders to incur the substantial costs required to file and promote social proposals. Just like they are rationally apathetic or reticent with respect to financial issues, most shareholders are likely to be equally apathetic or reticent with respect to socially relevant issues. They may react and vote on proposals that have been prepared,

submitted, and presented by someone else, but they are much less likely to take an active role.

We can therefore propose a taxonomy of shareholder attitude on social issues, based on the intensity of their motives. Passive shareholders are those who are unlikely both to submit proposals and to vote on proposals submitted by others. Reactive shareholders are those who are unlikely to submit proposals but are likely to review and vote on proposals submitted by others. Active shareholders are those who have sufficiently strong motives to invest the resources to submit proposals to the company.

As I will show in Subpart C, most social proposals are submitted by a relatively small number of repeat players, but an increasing number of these proposals receive substantial minority or even majority support. Therefore, a plausible estimate of the average composition of shareholders in large public companies is that only a very small minority of shareholders is active, while a growing number of shareholders is reactive.

B. EXTRA-CORPORATE ACTORS

A widely accepted view among economists and legal scholars is that social welfare is best served when private goods are provided by private actors through the market and public goods are provided by the government.¹⁴³ In the real world, however, large public companies are powerful players in the public sphere. They wield significant influence on social and ethical issues, spend money on political elections, lobby legislators and regulators on policy issues, and shape the public debate.¹⁴⁴ Therefore, the ideal separation between corporations and the public sphere is a normative construction with little correspondence to reality.

Within the corporate machinery, managers occupy the most powerful position. By commanding significant financial resources as well as social and political connections (with the media, elected officials, regulators, providers of financial capital, etc.), managers are central nodes in the sociopolitical network in which companies operate. To borrow a term of art from network theory, managers play a pivotal role—that is, many other important nodes of the network cannot be reached (or cannot be reached so easily) without the kind of access to the corporate machinery that corporate leaders enjoy.

Economists and sociologists who study social networks measure this characteristic in several ways.¹⁴⁵ For our purposes, however, we can simply refer to a central position in a network as a position of “power.”¹⁴⁶ Corporate

143. For a discussion of the classic economic theoretical approach to corporate social responsibility, see, for example, Markus Kitzmueller & Jay Shimshack, *Economic Perspectives on Corporate Social Responsibility*, 50 J. ECON. LITERATURE 51 (2012).

144. For an analysis of corporate spending on political elections, see, for example, Bebchuk et al., *supra* note 100.

145. See, e.g., MATTHEW O. JACKSON, *SOCIAL AND ECONOMIC NETWORKS* 61–69 (2008).

146. See DAVID EASLEY & JON KLEINBERG, *NETWORKS, CROWDS, AND MARKETS* 339–42 (2010).

managers occupy a position of power in the broad sociopolitical network thanks to their role within the corporation. CEOs have become influential thought leaders, trusted by the government and by citizens on policy matters. They not only spend shareholder funds to influence public decisions, but also leverage their role to operate in the public space in their individual capacity.¹⁴⁷

It is thus unsurprising that many people who formally operate outside the corporate organization are interested in how corporate managers exercise their power and are willing to influence the relevant process. The management literature traditionally refers to these interested actors as “stakeholders,”¹⁴⁸ although the question of who should be considered a stakeholder is quite contentious.¹⁴⁹ For our purposes, however, we do not need to delve into any definitional dispute: many individuals, groups, and institutional actors may have legitimate reasons to try to influence corporate decisions, whether because they are a contractual counterparty (employees, suppliers, customers), because they are directly or indirectly affected by corporate behavior (local residents, local government, human beings generally affected by global climate change), or because of their moral, social or political values.

While shareholders with prosocial and expressive motives have the legal tools to influence corporate decisions but lack strong incentives to do so effectively, many outside actors do have strong incentives but lack corporate voice. In order to accomplish their goals, these two groups need to connect. This is what stockholder politics specialists do.

C. STOCKHOLDER POLITICS SPECIALISTS

A remarkable finding of my empirical analysis is that a majority of social proposals in the sample (53.4%) are submitted by only twenty-five organizations.¹⁵⁰ Table 9 lists these leading players.

147. See Alma Cohen, Moshe Hazan, Roberto Tallarita & David Weiss, *The Politics of CEOs*, 11 J. L. ANALYSIS 1, 9–12 (2019).

148. The seminal work in this literature is R. EDWARD FREEMAN, *STRATEGIC MANAGEMENT* (1984). For a recent overview of the management literature on stakeholder theory, see generally Sergiy D. Dmytriev, R. Edward Freeman & Jacob Hörisch, *The Relationship Between Stakeholder Theory and Corporate Social Responsibility: Differences, Similarities, and Implications for Social Issues in Management*, 58 J. MGMT. STUD. 1441 (2021).

149. For an overview of the literature on stakeholder identification, see generally Donna J. Wood, Ronald K. Mitchell, Bradley R. Agle & Logan M. Bryan, *Stakeholder Identification and Salience After 20 Years: Progress, Problems, and Prospects*, 60 BUS. & SOC. 196 (2018).

150. This calculation is based on a total of 2,680 for which FactSet records the name of the main proponent.

TABLE 9: LEADING STOCKHOLDER POLITICS SPECIALISTS

Proponent	Proposals
New York City Retirement Systems	201
New York State Common Retirement Fund	169
The National Center for Public Policy Research	133
Trillium Asset Management LLC	132
Harrington Investments, Inc.	70
NorthStar Asset Management, Inc.	56
Boston Trust Walden, Inc.	55
AFL-CIO Reserve Fund	50
Mercy Investment Services, Inc.	49
Unitarian Universalist Association	41
The Nathan Cummings Foundation	40
As You Sow	38
Domini Impact Investments LLC	37
Green Century Capital Management, Inc.	37
People for the Ethical Treatment of Animals	37
Calvert Investment Management, Inc.	33
International Brotherhood of Teamsters	33
The Sisters of St. Francis of Philadelphia	33
The Province of St. Joseph of the Capuchin Order	30
AFSCME Employee Pension Fund	28
Friends Fiduciary Corp.	28
Holy Land Principles, Inc.	27
Trinity Health System	26
The Park Foundation, Inc.	25
Philadelphia Public Employees Retirement System	22
Total	1,430

As I will argue below, these and other repeat players, which I refer to as “stockholder politics specialists,” perform the role of connecting shareholders and outside actors on socially relevant issues. Their motivations and business models vary, but they enjoy two crucial advantages over “regular” shareholders, which make them especially fit to perform such role. First, their costs for preparing, submitting, and promoting social proposals are much lower than those of other shareholders, thanks to specialization, economies of scale, and economies of scope. Second, their incentives to pursue certain socially relevant goals are larger, since they aggregate and represent outside constituencies and outside interests, as well as donors concerned about those constituencies and interests. I will examine each of these aspects in turn.

1. *Specialized Players*

One peculiar feature of stockholder politics is that, in many cases, shareholder-proponents play only a nominal role compared to the substantive role that is played by professional intermediaries. To illustrate, consider a proposal presented at the 2019 annual meeting of DowDuPont, regarding some public health risks related to the construction of new petrochemical plants in the Gulf Coast region.¹⁵¹ The shareholder submitting the proposal was The Gun Denhart Living Trust, a trust created by entrepreneur and impact investor Gun Denhart.¹⁵² However, the Trust did not act directly vis-à-vis the company. Instead, it was represented by As You Sow, a non-profit organization engaged in environmental and social responsibility advocacy.¹⁵³ As You Sow, like other similar organizations, performs the role of shareholder advocate on behalf of the actual shareholder-proponent. It identifies potential target companies on social and environmental issues, prepares the proposal and the accompanying statements and materials, interacts with the company's management, and files a formal response with the SEC when the company seeks a no-action letter.

I found that 35% of all the proposals in the SEC Record Subsample were filed by shareholder advocates or other representatives of shareholders on behalf of individuals, charities, family foundations, or other shareholders. Furthermore, 82% of all direct filings (without an intermediary) were made by institutional actors with substantial expertise in socially relevant shareholder proposals. Therefore, almost nine proposals out of ten were prepared and promoted by stockholder politics specialists, whether in their own name or on behalf of other shareholders.

Specialists operate according to different models. Some are advocates (such as As You Sow, Investor Voice, or Proxy Impact) that partner with nominal shareholders to file proposals on their behalf.¹⁵⁴ Others (such as Jantz Management, Trillium Asset Management, or Zevin Asset Management) are registered investment advisers, and, therefore, offer their clients both standard investment management services (which include, however, social and environmental considerations) and socially oriented corporate voice.¹⁵⁵ Some of

151. DowDuPont, Inc., 2019 Proxy Statement (Form 14A) 66 (Apr. 29, 2019).

152. Andy Giegerich, *Gun Denhart Talks Impact Investing*, BUS. J. (Sept. 6, 2011), <https://www.bizjournals.com/portland/blog/sbo/2011/09/gun-denhart-talks-impact-investing.html>.

153. *About Us*, AS YOU SOW, <https://www.asyousow.org/about-us> (last visited July 31, 2022).

154. These organizations are not asset managers and, based on my own findings, do not seem to invest directly in the companies they engage with. Occasionally, the leaders of the organization buy stock in the company and serve as nominal shareholder-proponent. For example, Andrew Behar, CEO of As You Sow, is the proponent of fifteen proposals in my entire sample, and Christine Jantz, CEO and principal owner of Jantz Management LLC is the shareholder-proponent of eight proposals.

155. *See, e.g.*, Jantz Management, LLC., Brochure 4, 17 (Jan. 31, 2021) ("The firm's objective is to provide our clients with active return at an acceptable level of risk in a diversified stock portfolio. We aspire to do this while being a socially responsible enterprise that is respectful of our client's values . . . In addition, it is JM's policy to actively engage with companies whose securities are held in client portfolios; specifically it is [Jantz

these socially responsible investment managers also advise mutual funds that incorporate social and environmental goals in their investment strategy (so called “ESG funds”).¹⁵⁶

By contrast, religious groups typically invest their own assets (or the assets of affiliated congregations and organizations), and in doing so, they give significant weight to the moral and social beliefs and values of their members. For example, the Unitarian Universalist Common Endowment Fund is an investment vehicle for endowment funds, trust funds, and other funds of the Unitarian Universalist Association and related organizations,¹⁵⁷ and is responsible for forty-one proposals in my sample. Similarly, Mercy Investment Services, Inc., which filed forty-one of the proposals in my sample, coordinates the investment of endowment funds and other assets of the Sister of Mercy, with a view to “advocate for systemic change and enhance their financial resources for the mission and the support of their members.”¹⁵⁸

Policy and social activists buy shares in public companies or receive shares from donors in order to be able to submit shareholder proposals on topics of interest for the organization members and supporters.¹⁵⁹ For example, PETA (People for the Ethical Treatment of Animals), which filed thirty-seven proposals in my sample, “file[s] resolutions, attend[s] meetings, and engage[s] in negotiations on a regular basis in order to ensure that companies are working toward eliminating animal testing.”¹⁶⁰ The National Center for Public Policy Research, which filed 133 of the proposals in my sample, is a conservative

Management]’s policy to bring shareholder proposals encouraging companies in the portfolios to reduce greenhouse gas emissions . . . [and] to address their humanitarian crises responses.”).

156. See, e.g., Trillium ESG Global Equity Fund, Prospectus 17 (Oct. 31, 2020) (“We are devoted to aligning stakeholders’ values and objectives, combining impactful investment solutions with active ownership with the goal to provide positive impact, long-term value, and “social dividends.” Trillium’s shareholder advocacy is primarily conducted by a dedicated advocacy team which uses multiple tools of engagement including direct dialogue, filing or co-filing shareholder proposals, working within multi-stakeholder institutions, convening company/stakeholder meetings, investor and proxy advisor education, and speaking publicly about ESG topics. We work in coalitions and individually. Examples of Trillium’s shareholder engagement topics include, but are not limited to, climate change, workplace diversity, supply chain responsibility, and human rights. Trillium votes Funds’ shares on shareholder proposals and other proxy matters consistent with our fiduciary duties to the Fund. Many of those proposals are on ESG topics and our proxy voting guidelines incorporate ESG matters and votes are executed accordingly. Trillium regularly voices its perspective on public policy matters that relate to ESG topics.”).

157. THE UNITARIAN UNIVERSALIST COMMON ENDOWMENT FUND, LLC., INVESTMENT INFORMATION MEMORANDUM 1 (2020), <https://uuecf.org/files/2020/03/Investment-Information-Memorandum-1-2020-sdh-v2.pdf>.

158. *History*, MERCY INV. SERVS., INC., <https://www.mercyinvestmentservices.org/history-.aspx> (last visited July 31, 2022).

159. See, e.g., *Shareholder Campaigns*, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, <https://www.peta.org/issues/animals-used-for-experimentation/shareholder-campaigns> (“Over the years, PETA has obtained shares in companies by purchasing them or receiving them as donations from members and supporters. As partial owners of a publicly traded company, shareholders are entitled to bring resolutions to a vote during its annual meeting, and PETA does just that in order to encourage the company to replace animal testing with non-animal methods.”) (last visited July 31, 2022).

160. *Id.*

organization that “files shareholder resolutions, engages corporate CEOs and board members at shareholder meetings, petitions the SEC for interpretative guidance, and sponsors effective media campaigns to create the incentives for corporations to stay focused on their missions.”¹⁶¹

Finally, union and public pension funds manage retirement savings in the interest of their members.¹⁶² In performing this role, these funds tend to stress the importance of engagement on governance and social and environmental issues as a means to improve corporate performance.¹⁶³ The language used by these investors resembles the key tenets of the profit theory discussed in Part III.B; however, such theory might be used by these institutions only to provide a legal justification to their sociopolitical activism,¹⁶⁴ whereas in reality these funds might pursue some political and policy goals independently of their instrumental effect on profits and financial returns.¹⁶⁵ Indeed, a prominent legal scholar has compellingly shown that pension funds’ capital has been used to promote labor’s interests and is indeed “labor’s last best weapon.”¹⁶⁶

Regardless of their specific business model, all these organizations are highly specialized repeat players, with dedicated staff and substantial expertise in shareholder proposals. Unlike regular shareholders who happen to voice their personal social and political views, stockholder politics specialists have in depth knowledge of specific sociopolitical issues and of the shareholder proposal mechanism.

2. Coalitions and Networks

Many leading players of stockholder politics frequently cooperate with one another. They have established long-standing relationships, cooperate on the filing of many proposals, and coordinate large-scale campaigns on specific issues. Table 10 shows that more than one in five proposals in the SEC Record Subsample (21.7%) have at least one other major specialist as a co-filer.

161. *About the Free Enterprise Project*, NAT’L CTR. FOR PUB. POL’Y RSCH., <https://nationalcenter.org/programs/free-enterprise-project> (last visited July 31, 2022).

162. See generally Dana M. Muir, *Fiduciary Principles in Pension Law*, in *THE OXFORD HANDBOOK OF FIDUCIARY LAW* (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019).

163. See, e.g., *Shareholder Advocacy*, AFL-CIO, <https://aflcio.org/what-unions-do/social-economic-justice/shareholder-advocacy> (“In recent years, corporate social responsibility has become an increased focus area for shareholder resolutions. This reflects a growing recognition that these issues affect company performance.”) (last visited July 31, 2022); N.Y. COMMON RET. FUND, 2020 CORPORATE GOVERNANCE STEWARDSHIP REPORT 2 (2021) (“At the center of the Fund’s ESG investment philosophy is the belief that high-performing, diverse boards of directors, good governance, and prudent management of environmental and social factors provide the foundation for sustainable long-term company success.”).

164. See Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of EG Investing by a Trustee*, 72 STAN. L. REV. 381, 397–98 (2020) (arguing that pension fund trustees are allowed to take social and environmental factors into account only to the extent relevant to maximize return).

165. See, e.g., Brad M. Barber, *Pension Fund Activism: The Double-Edged Sword*, in *THE FUTURE OF PUBLIC EMPLOYEE RETIREMENT SYSTEMS* 271, 288–89 (Olivia S. Mitchell & Gary Anderson eds., 2009).

166. WEBBER, *THE RISE OF THE WORKING-CLASS SHAREHOLDER*, *supra* note 91.

Moreover, in 38.7% of those proposals, the main filer is affiliated with Ceres or the Interfaith Center on Corporate Responsibility (ICCR), two of the most active shareholder advocacy organizations on social and environmental matters. If we count both the affiliation of the main proponent and the affiliation of representatives and co-filers, 61.3% of the proposals in the SEC Record Subsample are handled by affiliates of Ceres or ICCR.

TABLE 10: INSTITUTIONAL ECOSYSTEM

Type of Proponent	Proposals
Coalitions	
Solo Individual Filings	26.0%
Solo Institutional Filings	52.3%
Individual Co-Filings	5.3%
Institutional Co-Filings	16.4%
Networks	
Ceres	32.3%
ICCR	25.7%
Ceres and/or ICCR	38.7%
Coalition with Ceres/ICCR	61.3%

Another telling sign of the level of coalitional networking in stockholder politics is that the same attorney represented the proponent (or its representative) in 68.9% of the cases in the SEC Record Sample for which the proponent was assisted by outside counsel. Collaborations also occur through more informal channels. For example, the Unitarian Universalist Association partnered with the New York City public pension funds to allow the latter to send representatives to the annual meetings of companies targeted by social proposals (thanks to the hundreds of local Unitarian Universalist congregations).¹⁶⁷

3. Horizontal Filings

Many social proposals are simultaneously filed at more than one company. To gauge the magnitude of this phenomenon, I compared the text of the proposed resolutions for the proposals included in the SEC Record Subsample and found that a majority (54%) of those resolutions were filed, over a period of three years, in at least two different companies. Notably, one in four proposals were filed with an identical (or substantially identical) text at six or more companies. Table 11 reports the relevant findings.

167. *Shareholder Advocacy, Partnership with New York City's Comptroller Office*, UNITARIAN UNIVERSALIST COMMON ENDOWMENT FUND, <https://uucef.org/socially-responsible-investing/shareholder-advocacy> (last visited July 31, 2022).

TABLE 11: HORIZONTAL FILINGS

Type of Filing	Proposals
Single company	46.0%
2 or 3 companies	22.6%
4 or 5 companies	6.0%
6 or more companies	25.4%
Total horizontal filings	54.0%

4. *Complementary Advocacy Activities*

Most stockholder politics specialists use their expertise on socially relevant issues as well as complementary activities, such as public policy advocacy, lobbying, thought leadership, media campaigns, and so on. To illustrate, Table 12 reports the complementary activities performed by the twenty proponents with the largest number of proposals in the entire sample, based on the information available on their institutional websites. Seventeen of the twenty most frequent filers of social proposals engage in other forms of socially relevant advocacy, such as direct engagement with public companies (for example, petitions, letters, or dialogue with management) or policy advocacy (in the form of thought leadership, media campaigns, lobbying, etc.) on socially relevant issues. Some of these organizations also use litigation strategies to obtain protections for employees, consumers, animals, or the environment.

TABLE 12: COMPLEMENTARY ACTIVITIES OF TOP TWENTY PROPONENTS

Proponent	Other Engage- ment	Policy Advo- cacy	Litigation
New York City Retirement Systems		X	
New York State Common Retirement Fund	X	X	
Trillium Asset Management LLC	X	X	X
National Center for Public Policy Research		X	
Harrington Investments, Inc.	X		
NorthStar Asset Management, Inc.	X	X	
Boston Trust Walden, Inc.		X	
AFL-CIO Reserve Fund	X	X	X
Mercy Investment Services, Inc.	X		
Unitarian Universalist Association		X	
The Nathan Cummings Foundation		X	
As You Sow	X	X	X
Domini Impact Investments LLC	X		
Green Century Capital Management, Inc.	X	X	
People for the Ethical Treatment of Animals	X	X	X
Calvert Investment Management, Inc.	X	X	
International Brotherhood of Teamsters		X	X
The Sisters of St. Francis of Philadelphia	X		
Province of St. Joseph of the Capuchin Order			
AFSCME Employee Pension Fund		X	X

For example, Trillium Asset Management, a socially responsible investment manager that is recorded as the main filer of 108 proposals in the sample (4.5%), engages companies outside the formal shareholder proposal process (with meetings, letters, etc.),¹⁶⁸ issues white papers on social and environmental policy issues,¹⁶⁹ and has filed amicus briefs in LGBT rights cases.¹⁷⁰ The New York State Retirement System, which is the main filer of 167 proposals in the sample (6.9%), as well as a co-filer of many other proposals, is headed by a democratically elected official, the New York State Comptroller, who pressures regulators on some of the same issues that are the object of the

168. *Firm Overview*, TRILLIUM ASSET MGMT. (2021), <https://www.trilliuminvest.com/documents/firm-overview> (last visited July 31, 2022).

169. *White Papers & Webinars*, TRILLIUM ASSET MGMT., <https://www.trilliuminvest.com/resources/whitepapers-webinars> (last visited July 31, 2022).

170. *See Leadership on LGBT Issues*, TRILLIUM ASSET MGMT., <https://www.trilliuminvest.com/leadership-corporate-engagement/trilliums-leadership-on-lgbt-issues> (“In July 2019, Trillium joined an amicus brief . . . on three United States Supreme Court cases which sought to prohibit employment discrimination based on sexual orientation or gender identity as forms of sex discrimination. Trillium had been part of a similar amicus brief in 2017, and in 2012 Trillium supported another amicus brief challenging the federal Defense of Marriage Act (DOMA) in *Gill v. Office of Personnel Management*.”) (last visited July 31, 2022).

funds' shareholder proposals.¹⁷¹ Similarly, other major institutional proponents, such as the New York City Retirement System and Boston Trust Walden (formerly Walden Asset Management) publicly advocate for policy interventions on the same issues as those addressed in their shareholder proposals.¹⁷² Some organizations occasionally use litigation, as a plaintiff or amicus curiae, to advance social causes.¹⁷³

5. *Representing Extra-Corporate Interests*

The features analyzed so far show that stockholder politics specialists can perform their role at a much lower cost than "regular" shareholders. Specialization and coalitional networking substantially reduce the cost of submitting and promoting social proposals. The average cost of proposals is further lowered by the practice of horizontal filings: in this way, the effort and resources needed to research and elaborate a proposal on a given issue can be spread over several companies for which the issue happens to be relevant. Finally, many leading stockholder politics specialists engage in other socially relevant activities that are to some extent complementary to shareholder proposals. This means that the knowledge acquired with respect to certain issues can be applied not only to shareholder proposals, but also to these other activities, including thought leadership, other forms of engagement with corporate management, media campaigns, lobbying, policy advocacy, and litigation. In short, specialists can rely on substantial economies of scale and scope that make the choice of such an expensive strategy more affordable.

But costs are only one side of the equation. Specialists have strong incentives to engage in stockholder politics because they obtain larger benefits from such activity than regular shareholders. Just like hedge funds take a

171. See, e.g., OFF. OF THE N.Y. STATE COMPTROLLER, EARTH DAY SUSTAINABILITY UPDATE (2020) (reporting that "[i]n an April 2019 letter, Comptroller DiNapoli had argued that [the Environmental Protection Agency's decision not to regulate emissions of mercury and other pollutants] . . . would be 'unconscionable'"). Note that, due to legal constraints, pension funds cannot take into account social and environmental factors that do not have an instrumental link to profits. Therefore, they tend to present financial motives as the main reason for their social proposals and sociopolitical activity in general.

172. See, e.g., *Press Releases*, OFF. OF THE N.Y.C. COMPTROLLER, <https://comptroller.nyc.gov/newsroom/press-releases> (last visited July 31, 2022); BOS. TR. WALDEN, 3RD QUARTER 2020 ESG IMPACT REPORT (2020), <https://www.bostontrustwalden.com/insights/3rd-quarter-2020-esg-impact-report> ("In September, we joined an investor coalition requesting the Massachusetts Department of Public Utilities (DPU) perform an assessment of the future of the natural gas industry, including goals that also achieve a fair and equitable transition [to a low-carbon economy].").

173. See *Leadership on LGBT Issues*, *supra* note 170; see also *AFL-CIO Sues OSHA for Emergency Temporary Standard to Protect Workers*, AFL-CIO (May 18, 2020), <https://aflcio.org/press/releases/afl-cio-sues-osh-emergency-temporary-standard-protect-workers> (reporting that AFL-CIO, which is the main filer of 2% of the proposals in the sample, sued the U.S. Occupational Safety and Health Administration to protect employee rights during the COVID-19 pandemic); *Lawsuit Looms Over Animal Care at Pymatuning Deer Park*, PETA (Dec. 1, 2020), <https://www.peta.org/media/news-releases/lawsuit-looms-over-animal-care-at-pymatuning-deer-park> (reporting that PETA, which is the main filer of 1.4% of the proposals in my sample, sent an official notice Endangered Species Act to the operators of the Pymatuning Deer Park for alleged mistreatment of animals).

proactive role on business strategies because they and their managers have a larger exposure than most other shareholders to the financial performance of the company,¹⁷⁴ stockholder politics specialists take a proactive role on socially relevant issues because they have a larger exposure than many other shareholders to the company's social impact. This larger exposure derives, in part, from stronger prosocial and expressive motives of the individuals directly involved in this activity (for example, socially oriented investors in ESG mutual funds). More importantly, however, stockholder politics specialists act as intermediaries for a large number of extra-corporate actors—workers, consumers, and citizens with specific social and political preferences—who have various financial, prosocial, or expressive interests in those issues. Specialists provide these actors internal corporate representation in exchange for donations, fees, or political support.

An important implication of the extra-corporate dimension of stockholder politics is that the success of social proposals can be measured on a larger scale than that of the individual company. One of the puzzling aspects of stockholder politics is that proponents persevere in spite of a systematic failure to obtain shareholder approval.¹⁷⁵ To solve this puzzle, one might suggest that stockholder politics is largely an expressive phenomenon, and therefore success, as traditionally intended, is not its actual goal. According to this theory, the very act of presenting and promoting the proposal realizes its expressive value.¹⁷⁶

This might be true in part. However, the most active proponents seem to care about the success of their proposals. For example, the New York State Common Retirement Fund tracks and publicizes not only the number of shareholder proposals filed, but also the number of successful settlements reached as well as the few proposals passed.¹⁷⁷ So do the New York City

174. See Lucian A. Bebchuk, Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors*, 31 J. ECON. PERSP. 89, 104–06 (2017).

175. See *supra* Part II.E.

176. See *supra* Part IV.A.2.

177. See, e.g., N.Y. STATE COMMON RET. FUND, 2019 CORPORATE GOVERNANCE STEWARDSHIP REPORT 14 (2020), <https://www.osc.state.ny.us/files/reports/special-topics/pdf/2019-corporate-governance-stewardship-report.pdf> (reporting that in 2019, the Fund filed forty-six shareholder proposals, reached agreements with twenty-five companies “to implement the Fund’s shareholder proposals,” and obtained a seventy-eight percent vote in support of one proposal).

Retirement Systems,¹⁷⁸ Trillium,¹⁷⁹ NorthStar,¹⁸⁰ Boston Trust Walden,¹⁸¹ and many others.

When we consider, however, that stockholder politics specialists represent extra-corporate interests and therefore operate at a larger scale than that of the individual corporation, the anomaly at issue becomes much less obvious.¹⁸² Indeed, some specialists are not interested exclusively in the formal approval of the proposal, or even in the managerial actions taken by the individual target company, but also (and, in some cases, predominantly) in the broader effects of their initiatives on the industry, region, and society at large.¹⁸³

Such broader changes do not necessarily require the formal approval of the proposal at the annual meeting. To begin with, there is empirical evidence that proposals that receive substantial minority support might lead to company-level changes.¹⁸⁴ Moreover, these proposals might lead to changes in industry-level practices or to self-regulation. In this respect, stockholder politics can be interpreted as a strategy similar to boycotts, protests, and other social activism initiatives against corporations. Management literature contains many examples

178. N.Y.C. RET. SYS., 2019 SHAREOWNER INITIATIVES POSTSEASON REPORT 5 (2020), https://comptroller.nyc.gov/wp-content/uploads/documents/2019_Shareowner_Initiatives_Postseason_Report.pdf (“During Fiscal Year 2019, the Comptroller’s Office, on behalf of one or more of the NYCRS, submitted 58 shareowner proposals to a total of 57 portfolio companies. Overall, approximately 72 % of the proposals (42 of 58) were withdrawn after the companies agreed to take steps to implement the request. Fourteen proposals went to a vote during the fiscal year, two of which received majority shareowner support.”).

179. See, e.g., TRILLIUM ASSET MGMT., SHAREHOLDER ADVOCACY HIGHLIGHTS 1–2 (2019), <https://www.trilliuminvest.com/leadership-corporate-engagement/trilliums-q3-q4-2019-shareholder-advocacy-highlights> (“[A] shareholder proposal [on agricultural pesticides presented] at Lamb Weston . . . received a 34% vote, signaling that the company needs to take further steps. A similar proposal filed at General Mills resulted in additional disclosures of its pesticide use reduction strategies . . .”).

180. See, e.g., NORTHSTAR ASSET MGMT., SOCIAL CHANGE AND ACTIVISM ANNUAL REPORT 2019-2020, at 5 (2020) (“NorthStar’s engagements by shareholder proposal continue to be highly productive – resulting in an engagement and/or successful negotiation for 72% of the shareholder proposals we filed this year.”).

181. *Impact Investing*, BOS. TR. WALDEN, <https://www.bostontrustwalden.com/investment-services/impact-investing> (“Since 1987, we have filed 541 shareholder resolutions, with more than 42% withdrawn based on negotiated agreements with companies.”) (last visited July 31, 2022).

182. An early example of this phenomenon was “Campaign GM,” the campaign led in 1970 by the Shareholders Committee for Corporate Responsibility to approve several shareholder social proposals presented at the annual meeting of General Motors. The proposals obtained less than three percent of the votes, but the campaign was nonetheless “hailed as a success,” in that it raised public awareness of certain social and environmental issues and contributed to the creation of a public policy committee at General Motors. Schwartz, *Towards New Corporate Goals*, *supra* note 38, at 59–60.

183. The effect of governance proposals on market practice is recognized in the literature. See, e.g., David H. Webber, *Reforming Pensions While Retaining Shareholder Voice*, 99 B.U. L. REV. 1001, 1006–08 (2019) (arguing that labor unions and public pension funds, through their shareholder activism, were the “driving force” behind important corporate governance innovations such as “proxy access, majority voting, and the destaggering of corporate boards”). My contention here is that stockholder politics activists try to replicate the same model on socially relevant issues.

184. See Jody Grewal, George Serafeim & Aaron Yoon, *Shareholder Activism on Sustainability Issues* (Harv. Bus. School Working Paper, No. 17-003, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2805512; see also Cathy Hwang & Yaron Nili, *Shareholder-Drive Stakeholderism*, U. CHI. L. REV. ONLINE (Apr. 15, 2020), <https://lawreviewblog.uchicago.edu/2020/04/15/shareholder-driven-stakeholderism-hwang-nili>.

of social activism leading to industry-wide initiatives and self-regulation.¹⁸⁵ Stockholder politics specialists could aim at similar results.

Furthermore, a consistent, substantial support by shareholders, although well below the threshold for a formal approval, might lead to regulatory reforms. Finally, social proposals and the complementary advocacy initiatives and media campaigns can affect the public perception of certain issues and, consequently, elected officials' willingness to regulate them. A vast literature in political science has focused on how public opinion affects policy outcomes,¹⁸⁶ and there is empirical evidence that political mobilization by advocacy groups can shift public attitudes and preferences on major policy issues.¹⁸⁷ Therefore, if the goal of proponents of social proposals (and their backers) is not just some company-level decision, but, more generally, policy and social change, the failure to obtain formal shareholder approval should not be seen as a failure to the extent that its proposals contribute, together with complementary activities, to the shifting of public opinion and, ultimately, to policy and social change.

To be sure, it remains an open empirical question whether stockholder politics is in fact successful at the industry and societal level. However, the mere fact that social proposals continue to be filed despite receiving a relatively small fraction of affirmative votes is not conclusive evidence that stockholder politics is inconsequential.

* * *

This Part has proposed an alternative theory to explain stockholder politics and the relevant supporting evidence. According to this theory, stockholder politics is the activity of a relatively small number of specialized players who connect shareholders with prosocial and expressive motives on one side and extra-corporate actors interested in the social impact of corporate decisions on

185. See, e.g., NAT'L ACAD. OF ENG'G, *THE GREENING OF INDUSTRIAL ECOSYSTEMS* 165–70 (1994) (describing the Vehicle Recycling Partnership formed by General Motors, Ford, and Chrysler in 1991 to increase postconsumer recycling of the nonmetallic components of automobiles); JOSE MIGUEL ABITO, DAVID BESANKO & DANIEL DIERMEIER, *CORPORATE REPUTATION AND SOCIAL ACTIVISM* 1–4 (2019) (describing the creation in 1999—in the wake of scandals and protests against sweat shops in Asia—of the Fair Labor Association, an international organization of industry players, activists and experts that sets humane labor standards); Steven Greenhouse & Stephanie Clifford, *U.S. Retailers Offer Plan for Safety at Factories*, N.Y. TIMES, July 11, 2013, at B1 (on the formation in 2013 of the Alliance for Bangladesh Worker Safety, including major U.S. retailers Wal-Mart, Gap, Target and Macy's, to improve fire and safety standards in factory buildings in Bangladesh). For further examples, see John W. Maxwell, Thomas P. Lyon & Steven C. Hackett, *Self-Regulation and Social Welfare: The Political Economy of Corporate Environmentalism*, 43 J.L. & ECON. 583, 584–86 (2000), and David P. Baron, *Private Politics*, 12 J. ECON. & MGMT. STRATEGY 31 (2003).

186. For a general overview, see Benjamin I. Page & Robert Y. Shapiro, *Effects of Public Opinion on Policy*, 77 AM. POL. SCI. REV. 175 (1983); BENJAMIN I. PAGE & ROBERT Y. SHAPIRO, *THE RATIONAL PUBLIC: FIFTY YEARS OF TRENDS IN AMERICANS' POLICY PREFERENCES* (1992); Eric Maskin & Jean Tirole, *The Politician and the Judge: Accountability in Government*, 94 AM. ECON. REV. 1034 (2004).

187. See, e.g., Robert J. Brulle, Jason Carmichael & J. Craig Jenkins, *Shifting Public Opinion on Climate Change: An Empirical Assessment of Factors Influencing Concern Over Climate Change in the U.S., 2002–2010*, 114 CLIMATIC CHANGE 169 (2012) (finding that political mobilization by elites and advocacy groups had a larger effect on public opinion on climate change than dissemination of scientific information and extreme weather events).

the other side. Stockholder politics specialists are able to perform this role thanks to specialization, coalitional networking, horizontal filings, and economies of scope, and they have strong incentives to do so as they aggregate and represent extra-corporate interests affected by the company's socially relevant decisions. Part V will discuss how this theory of stockholder politics illuminates the potential benefits and costs of this phenomenon.

V. THE BENEFITS AND COSTS OF STOCKHOLDER POLITICS

This Part will apply the analytical framework presented so far to examine the potential benefits and costs of stockholder politics for corporate governance, as well as its policy implications.

A. THE BENEFITS OF STOCKHOLDER POLITICS

The shareholder proposal process is costly for companies and, therefore, for shareholders. The company must review the proposal, engage with the proponent, in many cases present its case to the SEC, and eventually (if the proposal is included in the ballot) print and distribute the proposal to all shareholders.¹⁸⁸ Furthermore, each additional item of discussion and deliberation absorbs an additional fraction of the limited time and attention of management and shareholders. Shareholders ultimately pay for all these costs. Why should all shareholders pay for the social proposals of a few of them?

The framework presented in this Article so far provides a convincing answer. Companies face an agency problem with respect to socially relevant issues, and social proposals mitigate this problem by producing information and voting opportunities for uninformed and inattentive shareholders. Traditionally, corporate governance theory focuses on agency problems in the financial domain.¹⁸⁹ Since shareholders are rationally apathetic or reticent,¹⁹⁰ managers have the opportunity to make decisions that serve their own private interests at the expense of profits and shareholder value.

However, agency problems may also occur with respect to political, social, environmental, or moral issues. Shareholders have political and social beliefs and values, and managers may make corporate decisions that deviate from shareholder preferences in those domains.¹⁹¹ Stockholder politics is a tool to mitigate this type of problem.

188. See Exchange Act Release No. 89964, *supra* note 5, at 49–50.

189. See, e.g., Andrei Shleifer & Robert W. Vishny, *A Survey of Corporate Governance*, 52 J. FIN. 737, 737 (1997) (“Corporate governance deals with the ways in which the suppliers of finance to corporations assure themselves of getting a return on their investment.”).

190. See *supra* note 19 and accompanying text.

191. A recent empirical study has found that the divergence in political preferences between shareholders and management is strongly associated with the number of social proposals. See generally Geeyoung Min & Hye Young You, *Active Firms and Active Shareholders: Corporate Political Activity and Shareholder Proposals*, 48 J. L. STUD. 80 (2019).

Therefore, rational shareholders should be willing to bear a cost in exchange for the beneficial function performed by stockholder politics specialists. Even if not all proposals prove interesting or valuable to shareholders, those that do might justify the entire cost of the mechanism. Thus, companies have a compelling reason to subsidize stockholder politics.¹⁹²

In theory, lawmakers, regulators, and courts (in short, policymakers) face the normative problem of finding the optimal level of subsidy—the one for which the marginal dollar spent for social proposals produces one dollar of benefits for shareholders, in terms of financial, prosocial, and expressive value. In practice, real world policymakers must experiment with tentative or partial solutions, which can then be revised as the underlying phenomenon evolves and the policymakers' understanding of it improves.

In this pragmatic vein, the regulator should start with the observation that many social proposals have been proving increasingly valuable to shareholders.¹⁹³ Judging from the dramatic increase in shareholder support, there is a reasonable argument to be made that social proposals create some value for shareholders.

But is the value that they produce enough to justify their cost? According to a recent SEC survey, each shareholder proposal costs a company between \$20,000 and \$150,000.¹⁹⁴ Considering that the fifty most frequent target companies in my sample received on average only 2.4 social proposals per year, the maximum total annual cost of social proposals would be an average of \$360,000 per company. To put things in perspective, this means that a frequent target company spends on social proposals less than one-fifth of the compensation paid to the general counsel of the smallest of those target companies.¹⁹⁵ Whether this cost is too high depends on the benefits that shareholders obtain from the filing of social proposals. The exact calculation is impossible, but the aforesaid estimate, which is conservatively based on the highest cost estimates collected by the SEC, suggests that the current cost of social proposals is not unreasonable on its face.

Nonetheless, in 2020, the SEC approved a systematic revision of Rule 14a-8 that substantially restricts access to the shareholder proposal mechanism and specifically targets certain distinctive features of stockholder politics examined in this Article, such as the professional representation of shareholders and coalitions of co-filers.¹⁹⁶ For example, the new rule raises the minimum

192. A related but different theory, recently proposed by James Cox and Randall Thomas, argues that the shareholder proposal system should be thought of as a “corporate public square,” in which shareholders share their view on a broad range of issues, not only to provide information to the directors of that individual company, but also to provide information to corporate directors generally. *See generally* Cox & Thomas, *supra* note 4.

193. *See supra* Part III.A.2.

194. Exchange Act Release No. 89964, *supra* note 5, at 49–50.

195. *See* Ameren Corp., 2020 Proxy Statement (Form 14A) 63, 65 (Mar. 26, 2020).

196. Exchange Act Release No. 89964, *supra* note 5. In its cost-benefit analysis, the SEC considered other costs in addition to the cost for the company to examine, challenge, print, and distribute shareholder proposals, such as the cost for non-proponent shareholders to review the proposals that are included in the proxy statement.

ownership requirements to file a proposal, bars co-filers from aggregating their shares to meet those requirements, and requires shareholder-proponents to offer their availability to discuss the proposal with the company (even if they are represented by shareholder advocates).¹⁹⁷

An analysis of Rule 14a-8 and its recent amendments is beyond the scope of this Article. However, it is worth noting that these restrictions seem misguided. The SEC analysis behind the proposed amendments and the final rule does not seem to acknowledge the positive function of stockholder politics specialists, as examined in this Article. In fact, these restrictions seem specifically aimed at limiting the role of specialists and strengthening the role of retail shareholders, who have weaker incentives and lower expertise than specialists and are therefore less likely to produce quality proposals for other shareholders.

Another difficult normative question concerns the content of social proposals. Stockholder politics plays a desirable role so long as it produces proposals that are largely in line with shareholder preferences.¹⁹⁸ But stockholder politics specialists might be driven by motivations and goals that do not necessarily correspond to those of other shareholders.¹⁹⁹ As the “conflict theory” points out, specialists might be motivated by idiosyncratic preferences.²⁰⁰ Should policymakers regulate the content of social proposals in order to filter out proposals that are not valuable for shareholders, and if so, how?

For decades the SEC has been trying to police the content of social proposals through Rule 14a-8(i)(7), which allows companies to exclude proposals that deal “with a matter relating to the company’s ordinary business operations.”²⁰¹ In a nutshell, the “ordinary business” exclusion provides that shareholder proposals can be excluded if they instruct management on how to run the company. The rationale of the rule is the traditional separation of powers between shareholders and management. The conventional governance structure of a public company is such that business decisions are made by management,

This cost is not inherent in the shareholder proposals mechanism—shareholders can ignore the proposals in which they are not interested—but is mainly due to the fact that many institutional investors are under an obligation to vote on all proposals and therefore spend money on acquiring and processing information about them, often retaining an external advisor for that purpose. Therefore, I do not address this problem in this Article.

197. *Id.*

198. Social proposals that conflict with shareholder preferences would nonetheless be socially desirable if their net effect on general welfare were positive. Some proposals, for example, even if supported by only a small minority of shareholders, could affect public opinion and, indirectly, policymaking, in a way that might increase social welfare. The discussion of this alternative normative criterion, however, is beyond the scope of this Article.

199. See generally, e.g., John G. Matsusaka, Oguzhan Ozbas & Irene Yi, *Opportunistic Proposals by Union Shareholders*, 32 REV. FIN. STUD. 3215 (2019) (finding that unions use shareholder proposals on executive compensation and other corporate governance matters to influence contract negotiation with management).

200. See *supra* Part III.A.

201. 17 C.F.R. § 240.14a-8(i)(7) (2020).

not shareholders.²⁰² Shareholders can replace directors who underperform but cannot directly take on the role of main decision-makers.²⁰³

An important aspect of the interpretation of the “ordinary business” exclusion is that the exclusion does not apply when the proposal “raises a policy issue that transcends the particular company’s ordinary business operations,” as determined by the SEC staff based on a company-specific evaluation.²⁰⁴ This approach gives the SEC staff considerable discretion in deciding whether a given proposal can be included in the proxy. As a result, the “ordinary business” exclusion has been the subject of repeated and inconsistent interpretive guidance, in the attempt to clarify a standard that is inherently arbitrary.²⁰⁵ Unsurprisingly, over the years the SEC has erratically changed its approach to the admissibility of proposals regarding tobacco manufacturing, plant closings, charitable contributions, affirmative action, and other socially salient topics.²⁰⁶

As reported in Table 13, in the SEC Record Subsample the “ordinary business” exclusion is the most frequent basis for the granting of no-action letters by the SEC.

202. Technically, the certificate of incorporation might provide that the company is managed directly by shareholders. *See* DEL. CODE ANN. tit. 8, § 141(a) (2021) (“The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.”). In practice, however, public corporations are run by professional managers under the supervision of a board of directors. *See* JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 9.1 (3d ed. 2019).

203. *Id.* § 9.12 (“Each shareholder has a right to have the corporation’s affairs managed by its board of directors. This right is derived from the statute under which the corporation is organized and from the corporation’s charter and bylaws. Statutory, charter, and bylaw provisions for management by the directors are viewed as part of a control among the shareholders. Consequently, a majority of the shareholders cannot deprive the minority of their right to the directors’ judgment and discretion.”).

204. SEC Staff Legal Bulletin No. 14K, *supra* note 71, § B2.

205. *See, e.g.*, Exchange Act Release No. 40018, 1998 WL 254809 (May 21, 1998) (discussing “a consistent topic of widespread public debate” as an important factor to conclude that the proposal could not be excluded); SEC Staff Legal Bulletin No. 14C, 2005 WL 6283646 (June 28, 2005) (on when proposals concerning equity compensation plans “transcend” ordinary business decisions); SEC Staff Legal Bulletin No. 14E, 2009 WL 4363205 (Oct. 27, 2009) (revising the staff on proposals concerning “the evaluation of risk” connected to significant policy issues); SEC Staff Legal Bulletin No. 14H, 2015 WL 7796498 (Oct. 22, 2015) (commenting on the distinction between “significance and transcendence” of the social policy issue, in light of the Third Circuit decision in *Trinity Wall Street v. Wal-Mart Stores*, 792 F.3d 323, 332 (3d Cir. 2015)); SEC Staff Legal Bulletin No. 14I, 2017 WL 5127243 (Nov. 1, 2017) (acknowledging that the “significant policy exception” requires determinations that “often raise difficult judgment calls” and requesting the board of directors to provide a well-developed analysis to assist the staff with its assessment).

206. *See, e.g.*, Alan R. Palmiter, *The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation*, 45 ALA. L. REV. 879, 906–07 (1994) (examining the many policy shifts in the SEC jurisprudence on what constitutes an excludable “ordinary business” issue and what is instead a “significant public policy issue”).

TABLE 13: GROUNDS FOR SEC NO-ACTION LETTERS

Regulatory Exclusion	Granted NALs
Ordinary Business	55.2%
Substantially Implemented	14.5%
Minimum Ownership	12.4%
Duplicative Proposal	7.6%
Resubmission Threshold	5.5%
Missed Deadline	2.1%
Personal Grievance	1.4%
Intention to Hold the Stock	0.7%
Violation of Law	0.7%

More than half of the no-action requests granted by the SEC are based on the “ordinary business” exclusion. This means that most proposals are excluded from the ballot on the basis of an ambiguous and discretionary standard, which, by the SEC’s own admission, often requires “difficult judgment calls,”²⁰⁷ and which needs constant clarifications and fine-tuning on the part of the Commission and the staff. Furthermore, the existence of such standard encourages drafters of social proposals to disguise the real subject of the proposed resolution and make it vaguer and duller in order to avoid rejection for being “overly prescriptive.”²⁰⁸

This state of affairs is in need of systematic reform.²⁰⁹ To begin with, the separation of powers between shareholders and managers does not justify limiting shareholder power in a way that harms shareholder interests. Even the staunchest defenders of director primacy²¹⁰ and the theorists of shareholders’ high “competence costs”²¹¹ treat the separation of powers between shareholders and managers as a mere means in the interest of shareholders. If stockholder politics’ normative justification is predicated on the existence of an agency problem, as proposed in this Article, agents cannot be allowed to restrict the functioning of this mechanism, except in cases that are easily verifiable by a third party (whether a court or the SEC staff). Intricate questions on whether a

207. SEC Staff Legal Bulletin No. 14I, *supra* note 205.

208. See SEC Staff Legal Bulletin No. 14K, *supra* note 71.

209. See Thomas Lee Hazen, *Corporate and Securities Law Impact on Social Responsibility and Corporate Purpose*, 62 B.C. L. REV. 851, 900–03 (2021) (discussing recommendations for corporate and securities laws on social responsibility).

210. See Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 550 (2003) (“[D]irector primacy claims that shareholders are the appropriate beneficiaries of director fiduciary duties. Hence, director accountability for maximizing shareholder wealth remains an important component of director primacy.”).

211. See Zohar Goshen & Richard Squire, *Principal Costs: A New Theory for Corporate Law and Governance*, 117 COLUM. L. REV. 767, 771 (2017) (arguing that the decision on “how to divide control between managers and investors,” which in its standard version takes the form described in the text, is essential “to maximize total returns”).

certain policy issue “transcends” ordinary business operations leave too much room for unbridled discretion.

Moreover, the SEC is not well equipped to decide which socially relevant issues are significant enough to warrant shareholder considerations. The question is currently treated as a mere technical problem when it is, instead, a discretionary review on the merits. Therefore, the current system combines the worst of both worlds: it limits shareholders’ opportunities to express their preferences, but it does so in a way that escapes public scrutiny, as the imposition of limits is presented as a neutral technical problem.

By contrast, shareholders are best positioned to indicate whether a given topic is of interest to them. Recall that shareholder proposals are typically precatory; that is, they only recommend, and do not obligate, directors to take the proposed action, even if approved by a majority of shareholders.²¹² Therefore, whenever some shareholders make a precatory proposal and the other shareholders vote on it, directors learn something about shareholder preferences but maintain their power to make the decision that they consider best for the company.

In November 2021, the SEC staff issued new guidance on the use of the “ordinary business” exception.²¹³ The new guidance explicitly takes a more favorable view of social proposals and indicates that the SEC staff “is no longer taking a company-specific approach to evaluating the significance of a policy issue under Rule 14a-8(i)(7),” and that “proposals seeking detail or seeking to promote timeframes or methods do not per se constitute micromanagement.”²¹⁴ In practice, the 2021 guidance announces the intention of the SEC to allow more “prescriptive” social proposals and, more generally, to side more frequently with the proponent in no-action letter proceedings.

This development is a step in the right direction. However, it is only the temporary posture of the current SEC staff, rather than an actual regulatory innovation. A rule amendment would be a more appropriate way to deal with such an important issue.

B. THE COSTS OF STOCKHOLDER POLITICS

Despite its potential benefits, the promise of stockholder politics should not be overstated. To begin with, its social benefits depend on the actual degree of prosocial motivations among shareholders. If shareholders are only willing to bear a very small cost to improve the welfare of employees or reduce carbon emissions, social proposals are not going to make a difference. More importantly for the scope of this Article, stockholder politics raises some difficult corporate governance problems.

212. *See supra* Part II.D.

213. *SEC Staff Legal Bulletin No. 14L*, *supra* note 6.

214. *Id.*

First of all, collective decision-making is costly, and its cost increases as the dimensions of the decision problems increase. Traditional corporate decisions have the typical goal of maximizing profits, and most shareholders arguably agree that, other things being equal, more profits are better than less profits. Different shareholders will have different views on what strategy is the most profitable; but directors and managers can be judged on financial results, and financial results can be measured on a single dimension, that of shareholder value.

Expanding the space of corporate deliberation to include issues of climate change, toxic products, employee diversity, gender and race discrimination, employee rights, political lobbying, and other socially relevant issues inevitably creates a multidimensionality problem. Shareholder preferences are unlikely to be measurable on a single dimension, and therefore a decision-making equilibrium is less likely to occur. The social choice literature has shown that heterogeneity of voter preferences significantly increases the probability of “cycles” (that is, inconsistent voting outcomes), whereas “the probability of cycles declines with the proportion of the population having the same preferences.”²¹⁵ According to a political economist, one way to interpret the multidimensionality literature is “as a prediction of chaos.”²¹⁶

The multidimensionality problem is often used by critics of social proposals and stakeholder capitalism to argue that complex decision making on a variety of social and environmental issues is practically impossible.²¹⁷ In fact, an established view in corporate governance is that shareholders are well positioned to vote precisely because their (financial) preferences are highly homogeneous.²¹⁸

However, the current shareholder proposal system is *not* a decision-making mechanism. As discussed in Part II.B, shareholder proposals are typically precatory and do not bind the company. Their main function is to elicit shareholder preferences and make them known to management. Therefore, the dangers of a conflicted vote are relatively small: managers can ignore proposals insofar as they do not represent a sufficiently clear indication of shareholder preferences.

By contrast, the mechanism can reveal when shareholders seem to agree on some specific issues. In fact, it would be consistent with the above analysis to amend the shareholder proposal rule to require management to issue a report on

215. MUELLER, *supra* note 140, at 99.

216. Joseph C. McMurray, Why the Political World Is Flat: An Endogenous “Left” and “Right” in Multidimensional Elections (unpublished working paper) (August 2019), <https://www.aeaweb.org/conference/2019/preliminary/paper/nk5sB4sK> (manuscript at 2).

217. See, e.g., John G. Matsusaka, *A Challenge for Stakeholder Capitalism: Solving the Paradox of Voting*, in MILTON FRIEDMAN 50 YEARS LATER 88, 88–90 (Luigi Zingales, Jana Kasperkevic & Asher Schechter eds., 2020) (ebook).

218. See HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE 39–44 (1996).

their assessment and response to all shareholder proposals that obtain shareholder support above a given threshold.

A more problematic aspect of stockholder politics concerns the role of asset managers in shareholder voting. Retail shareholders vote their shares much less frequently than institutional shareholders.²¹⁹ More importantly, retail shareholders tend to show less support for social proposals than institutional shareholders.²²⁰ Since institutional investors are fiduciaries of the individual investors, whose savings they manage, this misalignment of voting decisions is potentially problematic. The crucial question is whether the voting decisions of asset managers reflect the underlying preferences of their clients.²²¹

In Subpart A, I argued that the main benefit of stockholder politics, from a corporate governance perspective, is the mitigation of a managerial agency problem with respect to socially relevant decisions. But if voting decisions on social proposals do not reflect the preferences of the ultimate beneficiaries, stockholder politics is unable to perform such function.

One way to mitigate this problem would be to require asset managers to periodically report on their votes and to transparently discuss their views on social and environmental proposals so that individual investors can make their investment decisions in a more informed way. Some of the largest asset managers already publish stewardship reports and voting guidelines;²²² however, their discussion of social and environmental topics is often clothed in the rhetoric of shareholder value maximization, and their views often seem too vague and generic to create an actual sorting of social and policy preferences.²²³ A more innovative way to address this problem would be to require asset managers to periodically poll their clients on social and environmental issues that are frequently voted upon in companies' annual meetings. In any event, any

219. See Alon Brav, Matthew D. Cain & Jonathon Zytznick, *Retail Shareholder Participation in the Proxy Process: Monitoring, Engagement, and Voting*, Eur. Corp. Gov. Inst. Fin. Working Paper No. 637/20219 (June 2021), <https://ssrn.com/abstract=3387659> (finding that retail shareholders cast 32% of their shares on average, compared to 80% rate of participation of the entire shareholder base).

220. *Id.* at 5.

221. For a discussion of this problem, see Christie, *supra* note 4, at 907–11; see also Scott Hirst, *Social Responsibility Resolutions*, 43 J. CORP. L. 217, 217 (2018).

222. See generally e.g., BLACKROCK INVESTMENT STEWARDSHIP, ENGAGEMENT PRIORITIES (2022), <https://www.blackrock.com/corporate/literature/publication/blk-stewardship-priorities-final.pdf>; BLACKROCK INVESTMENT STEWARDSHIP, GLOBAL PRINCIPLES (2022), <https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-engprinciples-global.pdf>; BLACKROCK, INC., OUR APPROACH TO ENGAGEMENT WITH COMPANIES ON THEIR HUMAN RIGHTS IMPACTS (2022), <https://www.blackrock.com/corporate/literature/publication/blk-commentary-engagement-on-human-rights.pdf>; BLACKROCK, INC., CLIMATE RISK AND THE GLOBAL ENERGY TRANSITION (2022), <https://www.blackrock.com/corporate/literature/publication/blk-commentary-climate-risk-and-energy-transition.pdf>.

223. For a discussion of the profit-maximizing rhetoric of large asset managers, see Roberto Tallarita, *Fiduciary Deadlock*, 170 U. PA. L. REV. ONLINE (forthcoming 2022), Part I (on file with the author).

reassessment of the shareholder proposal rule must grapple with the agency problems of institutional investors and must find ways to mitigate it.²²⁴

CONCLUSION

Shareholder proposals on political, social, environmental, and ethical issues are a growing phenomenon that raise fundamental and timely questions about corporate governance and shareholder democracy. This Article has presented a comprehensive empirical account of this phenomenon and has proposed an analytical framework that seeks to illuminate the mechanisms behind it and their normative implications.

This Article has argued that stockholder politics cannot be entirely explained by financial motives or by special interest capture, as the conventional theories hold. Rather, it should be understood as a matchmaking enterprise in which a relatively small number of specialized actors connect shareholders with prosocial and expressive motives on one side with corporate stakeholders, citizens, and social and policy activists on the other side. These specialists “sell” information, monitoring, and voting opportunities to shareholders interested in socially relevant issues, and they “sell” corporate voice to outside actors, including employees, consumers, and citizens concerned about corporate externalities.

This complex phenomenon has both potential benefits and costs for corporate governance. On the one hand, it constrains managerial discretion and reduces agency problems on socially relevant issues by monitoring corporate activities and eliciting shareholder preferences. On the other hand, it can engulf corporate decision-making with multidimensional decisions with no clear equilibrium, and it can exacerbate the agency problems of institutional investors. Reasonable policy proposals to regulate stockholder politics should consider both the potential benefits and costs of this phenomenon, by strengthening its role as “check and balance” of managerial power and limiting its potential distortions.

224. For a discussion of possible regulatory remedies to mitigate index fund agency problems, see John C. Coates IV, John F. Cogan, Jr. Professor of Law and Economics, Harvard Law School, Testimony of Professor John C. Coates IV Before the Committee on Banking, Housing, and Urban Affairs, United States Senate: “Considering the Index Fund Voting Process” (June 14, 2022), <https://ssrn.com/abstract=4142492>.