(UN)CONSCIOUS CAPITALISM

ERIC C. CHAFFEE*

I. INTRODUCTION

Currently, society is demanding that for-profit businesses "awaken" to environmental, social, and governance ("ESG") issues.[1] Stakeholderism has taken root with the idea that businesses must serve a much broader range of constituencies than just shareholders.[2] This creates questions as to what responsibilities corporations owe to society and how corporations ought to be regulated to ensure that these entities act in a socially responsible manner.

In pursuit of answering these questions, this Essay offers three interrelated points. First, for-profit corporate managers are ill-suited to intentionally pursue socially conscious behavior because of the incentives within for-profit corporations, the nature of corporate managers' training, the creation of unresolvable conflicts, and concerns about producing a lack of accountability for corporate managers' actions. Second, the essential nature of the corporation does provide some guidance as to when corporate social responsibility is due by corporate managers. Third, to best achieve "conscious capitalism," for-profit businesses must be regulated in ways that achieve socially responsibility behavior through unconscious behavior that aligns

* Professor of Law, Peter M. Gerhart Distinguished Research Scholar, Associate Director of the Center for Business Law, Case Western Reserve University School of Law; J.D., University of Pennsylvania Law School; B.A., The Ohio State University. I would like to thank Professor Paul Rose and the editorial boards of the *Ohio State Business Law Journal* and the *Ohio State Technology Law Journal* for inviting me to participate at their symposium and to contribute to this symposium issue. This Article benefited from discussions with scholars too numerous to mention. I would like to offer my appreciation to Jurgita Ashley, Christopher M. Hammond, Doron Narotzki, Alan Palmiter, Paul Rose, and Cynthia A. Williams. for providing feedback and advice that contributed to this Essay. I would also like to thank Christine Gall, Esq. for her encouragement while drafting this work. The views set forth in this essay are completely my own and do not necessarily reflect the views of any employer or client either past or present.

[1] *See* Lisa M. Fairfax, *Dynamic Disclosure: An Exposé on the Mythical Divide Between Voluntary and Mandatory ESG Disclosure*, 101 TEX. L. REV. 273, 331 n.325 (2022) ("The public has demanded that corporations focus on ESG matters. That demand has translated into increased corporate attention on ESG matters.").

[2] *See* Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 91 (2020) ("To address growing concerns about the negative effects of corporations on their stakeholders, supporters of stakeholder governance ('stakeholderism') advocate a governance model that encourages and relies on corporate leaders to serve the interests of stakeholders and not only those of shareholders."); Kevin V. Tu, *Socially Conscious Corporations and Shareholder Profit*, 84 GEO. WASH. L. REV. 121, 123 (2016) (providing that stakeholderism as a governance model suggests that "directors should consider the interests of non-shareholder stakeholders such as employees, customers, creditors, the environment, and the community, and balance those interests with profit goals").

with these managers' duties to seek profit and meet legal obligations. Each of these points will be examined in turn.

II. THE DISSONANCE BETWEEN CONSCIOUS CAPITALISM AND FOR-PROFIT CORPORATE MANAGERS

Managers of for-profit corporations are uniquely unsuited to intentionally engage in broadly-focused conscious capitalism. This unsuitability is the result of the incentives within for-profit businesses, the nature of business managers' training, the creation of unresolvable conflicts, and concerns about generating a lack of accountability.

The incentives within for-profit businesses hinder and interfere with business managers intentionally engaging in conscious capitalism. For-profit businesses unsurprisingly exist to make a profit.[3] Business managers are rewarded in circumstances in which for-profit businesses perform well financially and are punished if the opposite occurs.[4] This creates strong incentive for business managers to pursue this goal and to focus on short-term profitability, rather than the long-term well-being of the corporation.[5] To put it differently, in *The Wealth of Nations*, Adam Smith famously wrote, "It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest."[6] Expecting business managers to intentionally pursue socially conscious behavior at the expense of profit runs afoul of the incentives that exist within for-profit business entities because socially conscious undertakings can reduce profitability.[7]

Moreover, with limited exception, most business managers are not trained to pursue socially conscious behavior or engage in complex decision-making regarding intentionally pursuing ESG goals. While business schools

---

[3] *See* Daniel J. Morrissey, *The Riddle of Shareholder Rights and Corporate Social Responsibility*, 80 BROOK. L. REV. 353, 353 (2015) ("Corporations exist primarily to make profit for their shareholders. This has been the black letter rule of law and the reigning orthodoxy of American business for a century.").

[4] *See* Elliot J. Weiss, *Economic Analysis, Corporate Law, and the ALI Corporate Governance Project*, 70 CORNELL L. REV. 1, 16 (1984) ("Both the market for corporate control and the market for corporate managers tend to reward managers who increase corporate profits and to penalize managers who do not.").

[5] *See* John A. Sautter, James Landis & Michael H. Dworkin, *The Energy Trilemma in the Green Mountain State: An Analysis of Vermont's Energy Challenges and Policy Options*, 10 VT. J. ENV'T L. 477, 503 (2009) ("The economic incentive structure holds corporate managers accountable through quarterly profit reports, which rewards 'short-term planning' behavior.").

[6] ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 14 (Edwin Cannan ed., The Modern Library 1937) (1776).

[7] *See* Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1409–10 (2020) ("[T]here are many ESG initiatives that do not readily fit within the confines of profit maximization, such as large-scale workplace efforts to eliminate the gender pay gap.").

commonly offer courses in business ethics, ESG has come to embody a vast web of issues.[8] The standard program of study within business schools focuses on the foundational idea of maximizing profits while externalizing harms.[9] Business managers also naturally gravitate toward this mindset.[10] As a consequence, most business managers are not prepared to make complex decisions regarding ESG matters, especially because the issues contained within the "ESG" title are complex, numerous, evolving, and expanding.[11] Even the meaning of the term remains ambiguous and has not been clarified.[12]

In addition, business managers are also unsuited to intentionally pursuing ESG goals because it often generates unresolvable conflicts. For-profit businesses, by definition, exist to make a profit.[13] When business managers attempt to intentionally engage in broadly-focused conscious capitalism, they regularly run into intractable and unresolvable conflicts regarding achieving both goals. For example, elsewhere, I have written about the hypocrisy of index fund managers attempting to pursue ESG goals.[14] Index funds are

---

[8] *See* Amanda M. Rose, *A Response to Calls for SEC-Mandated ESG Disclosure*, 98 WASH. U. L. REV. 1821, 1822 (2021) ("The acronym 'ESG' is used as shorthand for a dizzyingly broad array of 'environmental,' 'social,' and 'governance' topics affecting businesses. The topics spanned include climate change, human capital management, supply chain management, human rights, cybersecurity, diversity and inclusion, corporate tax policy, corporate political spending, executive compensation practices, and more.").

[9] *See* James Fanto, *The Continuing Need for Broker-Dealer Professionalism in IPOs*, 2 ENTREPRENEURIAL BUS. L.J. 679, 681 (2008) (reporting that there is "concerted training in business, business schools, law schools, and in society generally [that focuses on] the acceptance of self-interested profit maximization as the goal for business and financial activities); Daniel J.H. Greenwood, *Corporate Governance and Bankruptcy*, 13 BROOK. J. CORP. FIN. & COM. L. 99, 103 (2018) ("[C]onventional wisdom, routinely repeated by the business press, business schools, opinion makers and courts, is that corporations are obliged to maximize profits and boards ought to place shareholder profit above other goals.").

[10] *See* Frank J. Garcia, *Three Takes on Global Justice*, 31 U. LA VERNE L. REV. 323, 360 (2010) ("It is no surprise that human beings in economic relationships should seek to advance their own interests, trying to shift risk and costs to others . . . . In corporate matters, we expect that corporate actors will seek to maximize profit, transfer risk, and externalize cost . . . .").

[11] *See* Gadinis & Miazad, *supra* note 7, at 1415 ("ESG's scope expands by the day with new concerns vying for corporate attention . . . .").

[12] *See* Hester M. Peirce, Commissioner, Sec. Exch. Comm'n, Scarlet Letters: Remarks Before the American Enterprise Institute, SEC Speech (June 18, 2019), https://www.sec.gov/news/speech/speech-peirce-061819 [https://perma.cc/V9GY-GU2R] ("Not only is it difficult to define what should be included in ESG, but, once you do, it is difficult to figure out how to measure success or failure.").

[13] *See* Carol Goforth, *A Corporation Has No Soul, and Doesn't Go to Church: Relating the Doctrine of Piercing the Veil to* Burwell v. Hobby Lobby, 67 S.C. L. REV. 73, 78 (2015) ("The purpose of a for-profit corporation is to run a business and make a profit . . . .").

[14] Eric C. Chaffee, *Index Funds and ESG Hypocrisy*, 71 CASE W. RSRV. L. REV. 1295, 1299–1300 (2021) ("This Essay takes the position that the importation of ESG voting into index funds by the dominate players in the index fund industry is unacceptable because it creates an unresolvable conflict of interests, is misleading to those purchasing shares in mutual funds, and is undemocratic.").

mutual funds that track the components of financial markets.[15] The purpose of an index fund is to create diversification, and as a result, reap the benefits recognized within Modern Portfolio Theory.[16] Developed by Harry Markowitz,[17] Modern Portfolio Theory generally posits that investment diversification creates the greatest likelihood of consistent returns while minimizing risk.[18] Based on marketing and social pressure, the three entities that have become dominant players in marketing and selling index funds—BlackRock, Vanguard, and State Street—have promised to use their power created by their management of these funds to push forward ESG goals.[19] Although these index fund managers claim that they are pushing these goals to increase profitability, this still creates an unresolvable conflict because they are promising the safe returns of diversified investment while attempting to create uniformity within those investments at the same time.[20] Because of the frequent conflict between seeking profits and seeking ESG goals, these types of conflicts are common and unresolvable in the absence of a mechanism for choosing between the two management paths.[21]

Additionally, business managers are also unsuited to intentionally pursue

---

[15] *See* Jay B. Kesten, *Shareholder Political Primacy*, 10 VA. L. & BUS. REV. 161, 197 (2016) ("Index funds invest in a portfolio of securities intended to track a particular market index, such as the S&P 500 or Russell 3000.").

[16] *See* Charles R. Korsmo, *The Audience for Corporate Disclosure*, 102 IOWA L. REV. 1581, 1604 (2017) ("Part of the reason for this explosion of diversified index and mutual funds is that the central lesson of Modern Portfolio Theory—which has come to dominate the academic understanding of securities markets over the past half century—is that holding a well-diversified portfolio will be optimal for most ordinary investors, offering them the best possible combination of low risk and high return.").

[17] *See generally* Harry Markowitz, *Portfolio Selection*, 7 J. FIN. 77 (1952) (introducing Modern Portfolio Theory).

[18] *See* Tom C.W. Lin, *The New Market Manipulation*, 66 EMORY L.J. 1253, 1312–13 (2017) ("Modern portfolio theory suggests that market-wide diversification along with low transaction fees would permit investors to reduce their risk exposure and maximize the benefits of compounding returns over the long term.").

[19] *See* Alexander T. Kraik, *Environmental, Social, and Governance Issues: An Altered Shareholder Activist Paradigm*, 44 VT. L. REV. 493, 526 (2020) ("BlackRock, Vanguard, State Street, and other asset managers have elevated ESG and use it as an important benchmark for their investment decisions and governance priorities.").

[20] *See* Cyrus Taraporevala, *Index Funds Must Be Activists to Serve Investors*, FIN. TIMES, July 24, 2018 ("Efforts by large index fund managers to engage with public companies have recently come under attack from some business leaders. They complain that we are misusing our rights as shareholders to enforce arbitrary political or social 'values' because we raise environmental, social and governance concerns with the boards of the companies in which we invest. This completely misrepresents the mission of State Street Global Advisors and other large index fund managers. We seek long-term value for millions of ordinary investors in a world that has become increasingly obsessed with short-term results.").

[21] *See* Judd F. Sneirson, *Green Is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance*, 94 IOWA L. REV. 987, 989 (2009) ("The problem is that 'green' or 'sustainable' business practices can sometimes entail profit sacrifices, particularly in the short term. A conflict thus arises with the commonly held view that corporate directors and officers must strive to maximize shareholder wealth and affirmatively neglect other corporate constituencies like labor, creditors, suppliers, customers, the public, and the environment.").

ESG goals because it creates reduced accountability in their roles as managers. The behavior of business managers is governed by a complex web of regulation.[22] Prominent among this regulation are various fiduciary duties that dictate the ways in which individuals should behave in managing the business.[23] To prevent overregulation and as acknowledgement of the complex decisions that business managers need to make, the business judgment rule has emerged under which courts will not second guess the decisions of business managers except in a small number of instances.[24] In essence, the business judgment rule reduces the accountability of business managers to allow them to manage the firm effectively in the pursuit of profit.[25] The accountability of business managers would need to be reduced even further to allow them the freedom to intentionally pursue ESG goals on behalf of stakeholders that are not aligned with seeking profit through business activities.[26] This reduced accountability is worrisome because it creates the prospect of opportunistic behavior on the part of business managers as they are given broad discretion to pursue the myriad of different issues that fall under the ambiguous and expanding umbrella term "ESG."[27]

III. CORPORATE SOCIAL RESPONSIBILITY AND THE ESSENTIAL NATURE

[22] *See* Geoffrey C. Hazard, Jr., *The Morality of Law Practice*, 66 HASTINGS L.J. 359, 374–75 (2015) ("Business managers are regulated directly through the concept of fiduciary duties and indirectly through the network of regulations imposed on the enterprises they manage, for example, accuracy in company financial statements, fairness to employees, environmental compliance, and so on.").
[23] *See* David Rosenberg, *Delaware's "Expanding Duty of Loyalty" and Illegal Conduct: A Step Towards Corporate Social Responsibility*, 52 SANTA CLARA L. REV. 81, 82 (2012) ("To the extent that corporate law successfully regulates the behavior of directors and managers, it does so largely by imposing fiduciary duties that prevent them from putting their own interests before those of the shareholders.").
[24] *See* Barry E. Adler & Marcel Kahan, *The Technology of Creditor Protection*, 161 U. PA. L. REV. 1773, 1782 (2013) ("[U]nder the business judgment rule, a court will not second-guess a board judgment if the board was informed, independent, disinterested, and acted in good faith.").
[25] Julie Andersen Hill & Douglas K. Moll, *The Duty of Care of Bank Directors and Officers*, 68 ALA. L. REV. 965, 978 (2017) ("The business judgment rule is an especially deferential standard of review that insulates directors and officers from liability for a poor decision so long as the decision can be attributed to a rational business purpose.").
[26] *See* Bebchuk & Tallarita, *supra* note 2, at 164 ("Stakeholderism would increase the insulation of corporate leaders from shareholders and make them less accountable to them.").
[27] *See* Yaron Nili & Megan Wischmeier Shaner, *Virtual Annual Meetings: A Path Toward Shareholder Democracy and Stakeholder Engagement*, 63 B.C. L. REV. 123, 125 n.3 (2022) ("[M]any scholars point out that ESG concerns are constantly evolving and expanding such that it is difficult to articulate a consistent definition.").

OF THE CORPORATE FORM

Even though for-profit corporate managers are ill-suited to intentionally pursue socially conscious behavior, the essential nature of the corporation does provide some guidance as to when corporate social responsibility is due by business managers. It also provides some hope that business managers generally will pursue socially responsible goals.

The metaphysical inquiry into the essential nature of the corporate form has been subject to extensive academic debate. From this debate, three prevailing theories of the corporation have emerged. The concession theory, which is also commonly referred to as the artificial entity theory, posits that corporations are creatures of state law that owe their existence entirely to the state.[28] This theory of the corporate form is the original theory of the corporation and dates back to a time when corporations could only be created through express acts of the government.[29]

As general incorporation statutes that allowed individuals to create corporations by complying with statutes came into being, corporate law scholars began to search for new ways of thinking about the corporate form, and as a result, the real entity theory, which is also sometimes known as the natural entity theory of the corporation, came into vogue.[30] This theory posits that are corporations are real entities with a separate and independent identity from the individuals organizing, owning, and operating them.[31] This theory owes existence to German legal theorist Otto von Gierke, who argued that groups have a "collective spirit" that gives them an identity separate and apart from the individuals composing them,[32] and as a result, a real entity with a separate identity is created when individuals organize, own, and operate

---

[28] *See* Stefan J. Padfield, *Rehabilitating Concession Theory*, 66 OKLA. L. REV. 327, 332 (2014) ("[T]he concession theory of the corporation . . . views the corporation as a tremendous capital accumulation device that was only made possible by the state conveying certain privileges to incorporators for which they could not otherwise privately contract.").
[29] *See* Ronald J. Colombo, *The Corporation as a Tocquevillian Association*, 85 TEMP. L. REV. 1, 15 (2012) ("'[C]oncession theory' describes the original understanding of the corporation on American soil—an understanding that reigned supreme from colonial times through the middle of the nineteenth century.").
[30] *See* Marjorie E. Kornhauser, *Corporate Regulation and the Origins of the Corporate Income Tax*, 66 IND. L.J. 53, 135 (1990) ("As corporations evolved from specially chartered creatures of the state with limited powers into entities with broad powers established under general incorporation laws, the theory of legal personality evolved from an artificial entity theory into a natural entity theory.").
[31] *See* Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1641–42 ("Also known as the natural entity or person theory, [the real entity theory of the corporate form] regarded the corporation as a real entity with a separate existence from its shareholders and from the state.").
[32] *See* Nathan Oman, *Corporations and Autonomy Theories of Contract: A Critique of the New Lex Mercatoria*, 83 DENV. U. L. REV. 101, 117 (2005) ("Corporations, [Otto von Gierke] argued, are the legal manifestation of communities possessed of a collective spirit.").

corporations.[33]

Finally, the aggregate theory posits that the corporate form is just the collection of individuals organizing, operating, and owning it and the obligations among them.[34] This theory has been refined and branded as the nexus-of-contract theory.[35] It owes its prominence at least in part to Ronald Coase in regard to his work during the earlier half of the twentieth century.[36] This theory, however, did not reach its widest acceptance until the rise of the law and economics movement during the latter half of last century.[37]

Even though proponents of all three essentialist theories of the corporation exist today, each of the theories are problematic for at least two reasons. First, each of the theories offers very little normative insights as to how the individuals organizing, owning, and operating the corporation ought to behave. Famously, this led John Dewey to argue during the first half of last century for the embracing of the indeterminacy of the corporation and for society just to make choices as needed to regulate these entities.[38] Second, although each of the theories attempt to answer *how* the corporate form exists, they each fail to answer *why* the corporate form exists.

The search for an essentialist theory of the corporation is at heart a quest for the definition of the corporate form. Each of the essentialist theories above fails to provide a full definition of what is a corporation. To use an example that I have discussed elsewhere in my scholarship, imagine attempting to define what is a bridge. One could define a bridge as an artificial structure constructed by a builder. This would be the artificial entity theory of a bridge. One could also define a bridge as a structure that exists in space. This would be the real entity theory of a bridge. Finally, one could define a bridge as the sum of various materials arranged in a certain order. This would be the nexus-

---

[33] Martin Gelter & Genviève Helleringer, *Lift Not the Painted Veil! To Whom Are Directors' Duties Really Owed?*, 2015 U. ILL. L. REV. 1069, 1089 n.112 ("In German law, the name of Otto von Gierke is typically associated with the 'entity' theory of the corporation. Gierke understood legal personality as the reflection of social reality and argued that individuals would form fellowships that developed an autonomous existence necessary for their social fulfillment.").

[34] *See* Catherine A. Hardee, *Who's Causing the Harm?*, 106 KY. L.J. 751, 766 (2018) ("Under the aggregate entity theory, the corporation is viewed as a collective of individuals and the corporation derives its power and rights from them.").

[35] *See* Sloan G. Speck, *The Social Boundaries of Corporate Taxation*, 84 FORDHAM L. REV. 2583, 2591 (2016) ("In the 1970s, the law and economics movement drew on the aggregate theory to describe the corporation as a 'nexus of contracts' that coordinates production using many independent actors.").

[36] *See* R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

[37] *See* Edward L. Rubin, *Images of Organizations and Consequences of Regulation*, 6 THEORETICAL INQUIRIES L. 347, 349 (2005) ("The dominant image of the corporation, in modern economics and law and economics scholarship, is that it represents a nexus of contracts.").

[38] John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 669 (1926) ("As far as the historical survey implies a plea for anything, it is a plea for disengaging specific issues and disputes which arise from entanglement with any concept of personality which is other than a restatement that such and such rights and duties, benefits and burdens, accrue and are to be maintained and distributed in such and such ways, and in such and such situations.").

of-materials theory of a bridge. The problem is that none of these definitions of a bridge fully define what a bridge is. A better definition of a bridge is a "[a] structure spanning and providing passage over an obstacle."[39] The reason why this definition is better is that—rather than just explaining *how* the bridge exists, i.e., as a structure—it also *why* the bridge exists, i.e., to span and provide passage over an obstacle.[40] A theory of the corporation should provide insight into how and why a corporation exists as well.

Elsewhere in my scholarship, I have developed a theory of the corporation that I refer to as "collaboration theory."[41] Collaboration theory posits that a corporation is a collaborative effort among the government and the individuals organizing, owning, and operating the entity. For purposes of this theory, collaboration is defined as a common effort between or among multiple entities to accomplish a task or a project. For for-profit corporations, the common project is economic development and gain of the parties involved in the collaboration. Collaboration theory is a superior theory of the corporation because it explains how the for-profit corporation exists, i.e., as a collaboration, and why the corporation exists, i.e., for purposes of economic development and gain of the parties involved in the collaboration. Also, unlike the prevailing theories of the corporation, it affords normative insights as to how the individuals organizing, owning, and operating the corporation ought to behave within the collaboration.[42]

In regard to this Essay, collaboration theory provides insights as to when socially responsible behavior is due from those managing a corporation.[43] It also provides insights as to why and how corporate managers ought to unconsciously engage in conscious capitalism. Because the essential nature of the for-profit corporation is a collaboration for purposes of economic development and gain, corporate managers must regularly conduct cost-benefit analyses for purposes of determining whether they are promoting the financial well-being of the corporation. Put more bluntly, for-profit corporations exist to make a profit and should be managed to achieve this

---

[39] WEBSTER'S II NEW COLLEGE DICTIONARY 138 (1999) (providing a definition of the term "bridge").
[40] *Id.*
[41] *See generally* Eric C. Chaffee, *Collaboration Theory and Corporate Tax Avoidance*, 76 WASH. & LEE L. REV. 93 (2019) [hereinafter Chaffee, *Collaboration Theory and Corporate Tax Avoidance*]; Eric C. Chaffee, *The Origins of Corporate Social Responsibility*, 85 U. CIN. L. REV. 353 (2017) [hereinafter Chaffee, *Origins of Corporate Social Responsibility*]; Eric C. Chaffee, *Collaboration Theory: A Theory of the Charitable Tax-Exempt Nonprofit Corporation*, 49 U.C. DAVIS L. REV. 1719 (2016) [hereinafter Chaffee, *A Theory of the Nonprofit Corporation*].
[42] *See generally* Chaffee, *Collaboration Theory and Corporate Tax Avoidance*, *supra* note 41 (discussing the normative implications relating to collaboration theory on decision-making regarding corporate tax avoidance strategies); Chaffee, *Origins of Corporate Social Responsibility*, *supra* note 41 (exploring the normative implications relating to collaboration theory on decision-making regarding whether to engage in corporate social responsibility activities).
[43] I have also explored this topic in my other scholarship. *See generally* Chaffee, *Origins of Corporate Social Responsibility*, *supra* note 41.

end.[44] Importantly, although sometimes errors occur, corporate managers are relatively good at undertaking cost-benefit analyses and well-positioned within the corporate form to conduct such analyses.[45] These cost-benefit analyses within the context of the understanding of the corporation afforded by collaboration theory should lead corporate managers to pursue socially conscious goals in the vast majority of instances.

Analyzing when corporate social responsibility is due based on collaboration theory should be considered in four contexts. First, when the cost-benefit analysis regarding corporate socially responsible behavior suggests that it is financially beneficial to the corporation, corporate managers should undertake the behavior. For-profit corporations exist to make a profit, and as a result, this is the easy case.[46] Second, when the cost-benefit analysis regarding the corporate socially responsible behavior suggests that it is cost-neutral or equal in cost to other behavior, corporate managers should undertake the behavior. The reason for this is that although the corporate form is collaborative in nature, it is also contractual in nature. All contracts have an implied duty of good faith, and as a result, the corporation should err on the side of uplifting the society that the government in the collaboration represents.[47] Third, when the cost-benefit analysis regarding the corporate socially responsible behavior is uncertain, corporate managers should undertake the behavior. Similar to the reasons for undertaking the behavior in the previous context, when the cost-benefit analysis is uncertain, corporate managers should engage in the behavior because of the duty of good faith. Fourth, when the cost-benefit analysis regarding the corporate socially responsible behavior suggests that it should not occur or socially undesirable behavior should be undertaken, corporate managers should undertake the undesirable, but legal, behavior. The *raison d'etre* for the existence of a for-profit corporation is to seek profit, and as a result, this at times must restrict

---

[44] *See* Christyne J. Vachon, *Playing in the Sandbox: Moral Development and the Duty of Care in Collaborations Between For-Profit and Nonprofit Corporate Persons*, 33 PACE L. REV. 1045, 1067 (2013) ("[T]he underlying constraint on the for-profit is that law restricts its goal as a cooperative enterprise to . . . profit maximization for the benefit of the corporation and its owners.").

[45] *See* Ilan Benshalom, *Who Should Decide Whether the Apple Is Rotten? Tax Disclosure and Corporate (Political) Agency*, 6 COLUM. TAX J. 86, 100 (2014) ("[M]anagers are better placed than many other stakeholders in identifying the various costs and benefits of corporate conduct to third parties and society in general.").

[46] *See* Morrissey, *supra* note 3, at 353 ("Corporations exist primarily to make profit for their shareholders. This has been the black letter rule of law and the reigning orthodoxy of American business for a century.").

[47] *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. LAW. INST. 1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and in its enforcement."); U.C.C. § 1-304 (AM. LAW INST. & UNIF. L. COMM'N 2015) ("Every contract . . . imposes an obligation of good faith in its performance or enforcement.").

and prevent socially responsible activities.[48]

For some, the fact that the essential nature of the for-profit corporation mandates that corporate managers do not engage in socially responsible behavior, or that they actually engage in socially undesirable, but legal, behavior will be disturbing. These concerns should not be that great for at least two reasons. First, as evidenced by the ESG movement, society is becoming more socially conscious, and as a consequence, the instances in which society will tolerate bad corporate behavior are becoming more limited.[49] Society is much more willing and able to punish financially corporations that behave in socially undesirable ways than it has been in the past.[50] Second, because of the uncertainties of human existence, the vast majority of circumstances are going to fall within the first three contexts above, rather than instances in which the cost-benefit analysis requires pursuing socially undesirable behavior. As the discussion of context three notes, when the cost-benefit analysis regarding the corporate socially responsible behavior is uncertain, corporate managers should undertake the behavior. Concerns about this fourth category, however, do linger.

IV. ACHIEVING (UN)CONSCIOUS CAPITALISM

This Essay presents a model for decision-making for corporate managers regarding ESG matters that acknowledges their capabilities and limitations and places them within the context of an understanding of the essential nature of the corporation as a collaboration among the government and the individuals organizing, owning, and operating the entity for purposes of economic development and gain for the parties involved in the collaboration. Corporate managers are ill-suited to intentionally pursue socially conscious behavior because of the incentives within for-profit businesses, the nature of business managers' training, the creation of unresolvable conflicts, and concerns about producing a lack of accountability for business managers' actions. Yet, unconsciously through cost-benefit analyses, corporate

---

[48] *See* Caroline Mala Corbin, *Corporate Religious Liberty*, 30 CONST. COMMENT. 277, 293 (2015) ("By definition, for-profit corporations exist to make money; otherwise they would be non-profit.").

[49] *See* Colleen Baker, *Derivatives and ESG*, 59 AM. BUS. L.J. 725, 737 (2022) ("A variety of stakeholders are increasingly demanding that companies and investments produce not only positive financial returns, but also make positive, nonfinancial social contributions. The concept of ESG—an acronym for environmental, social, and governance—has arisen to support this demand.").

[50] *See* Kishanthi Parella, *Reputational Regulation*, 67 DUKE L.J. 907, 930 (2018) ("The information conveyed by both media and legal intermediaries are processed by different stakeholder groups, including consumers, investors, communities, and employees. These stakeholders translate the information from media and legal intermediaries into reputational consequences for an organization--consequences that incentivize these organizations to change.").

managers are brought to partake in socially conscious behavior because of the essential nature of the firm. Assuming that one believes that corporations ought to engage in better behavior, the question then becomes how to tweak the model to encourage even greater socially responsible activities. Options include positive law, altering market forces, and the choice and structuring of business entities.

Notably, before discussing ways of tweaking the environment in which corporate managers operate, this implicitly suggests that these managers already understand that the corporation is a collaboration, how to effectively conduct cost-benefit analyses, and how to implement the results from these analyses. This is almost certainly not the case. As a result, part of the work of creating conscious capitalism is educating corporate managers to these realities. With that said, even if corporate managers understand the environment in which they function and their role within it, opportunities exist to tweak the model to encourage greater socially conscious behavior.

One way to encourage conscious capitalism and prevent socially undesirable behavior is to alter cost-benefit analyses by adopting positive law. For example, during the 1930s, the United States adopted federal securities regulation as a way of ensuring socially responsible behavior in regard to business investments.[51] As Justice Arthur Goldberg famously wrote for the majority in *SEC v. Capital Gains Research Bureau, Inc.*, "[a] fundamental purpose . . . [of adopting federal securities law] was to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry."[52] A similar altering of incentives and cost-benefit analyses also occurred when the federal government enacted a large amount of antidiscrimination law, consumer protection law, employment law, and environmental law during the latter half of last century.[53] Numerous other examples of this type of use of positive law could be offered as well.

An additional way to encourage conscious capitalism and prevent socially undesirable behavior is through market forces. Cost-benefit analyses can be altered dramatically through the will of investors, customers, and other market

---

[51] *See* Elaine A. Welle, *Freedom of Contract and the Securities Laws: Opting Out of Securities Regulation by Private Agreement*, 56 WASH. & LEE L. REV. 519, 575–76 (1999) ("The securities laws were enacted to restore order, to foster fair play, and to insure the integrity of the financial markets. The widespread fraud, manipulation, and victimization of investors during the 1930s demonstrated that some form of market regulation was needed to protect investors from the predatory behavior of securities-industry professionals.").

[52] SEC v. Cap. Gains Rsch. Bureau, Inc., 375 U.S. 180, 186 (1963).

[53] *See* Adam Winkler, *Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History*, 67 L. & CONTEMP. PROBS. 109, 133 (2004) ("In the 1960s, a great blossoming of legislative reform was enacted to restrain corporate management and serve the interests of stakeholders: consumer protection laws, environmental laws, antidiscrimination laws, and occupational safety laws. These areas of law continue to thrive—despite their details varying with shifts in the prevailing political winds—and remain non-trivial constraints on corporate management.").

participants.[54] The Austrian economic tradition, especially the work of F.A. Hayek, recognizes that when attempting to engage in planning, knowledge is often widely dispersed.[55] Hayek realized that markets and the competition within them create a spontaneous order system that communicates knowledge about proper ordering.[56] In short, investors, customers, and other market participants can communicate their opinions on ESG matters relating to specific corporations through how they invest, what products and services they use, and how they otherwise interact with these entities. One person's choice might not be significant, but when people make similar choices regarding ESG matters, markets coordinate that information and communicate it to corporations in ways such as the value of their securities and the demand for their products and services. Because investors are increasingly interested in ESG matters, financial pressure is currently being placed on corporate managers to be behave in a more socially responsible manner. Conscious choices to pursue ESG goals by society will be translated into the unconscious choices to pursue ESG goals that are mandated by the cost-benefit analyses that are dictated through the essential nature of the firm.

The undertaking of conscious capitalism and prevention of socially undesirable behavior can also be achieved through the structuring and choice of business entities. In regard to the structure of the corporation, the corporate form operates using certain default rules that are found within the law of the state of incorporation.[57] In regard to collaboration theory, these default rules help to define the essential nature of the corporation, and they help define the normative obligations of the corporation, including the obligation of the corporation to engage in socially responsible behavior.[58] With that said,

---

[54] *See* David K. Millon, *Enlightened Shareholder Value, Social Responsibility, and the Redefinition of Corporate Purpose Without Law*, *in* CORPORATE GOVERNANCE AFTER THE FINANCIAL CRISIS 68, 93 (P.M. Vasudev & Susan Watson eds., 2012) ("Instead of legal mandate, extra-legal pressures reshape management attitudes and behavior. Importantly, these pressures come from private actors, whose influence over corporate behavior causes it to change, in the process in effect redefining corporate purpose.").

[55] F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 519 (1945) ("The peculiar character of the problem of a rational economic order is determined precisely by the fact that the knowledge of the circumstances of which we must make use never exists in concentrated or integrated form, but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess.").

[56] *See id.* at 526 ("The whole acts as one market, not because any of its members survey the whole field, but because their limited individual fields of vision sufficiently overlap so that through many intermediaries the relevant information is communicated to all.").

[57] *See* T. Leigh Anenson & Donald O. Mayer, *"Clean Hands" and the CEO: Equity as an Antidote for Excessive Compensation*, 12 U. PA. J. BUS. L. 947, 969–70 (2010) ("Corporations are not only created under state law, but their internal affairs are also governed by state statutory default rules. Moreover, a well-developed body of state case law regulates the relationship between shareholders and management.").

[58] *See supra* notes 46–48 and accompanying text (explaining when collaboration theory makes that corporations engage in socially responsible behavior).

articles of incorporation can be altered to eschew profit-seeking behavior and to pursue ESG goals in its stead.[59]

Additionally, choice of entity matters as a means to encourage conscious capitalism and prevent socially undesirable behavior from business entities. Put simply, the for-profit corporation is not the only organizational form that exists in the world. Obviously, the non-profit corporation is one form that allows for the pursuit of socially beneficial behavior.[60] Elsewhere in my scholarship, I have developed a theory of the charitable tax-exempt nonprofit corporation that defines those entities as collaborations among state governments, the federal government, and individuals to promote the public good.[61] Pursuit of ESG goals certainly can fall within the scope of these non-profit corporations. Among profit seeking entities, new business entities have begun to emerge that allow for a focus on seeking profit, while pursuing ESG goals as well. Benefit corporations, for example, are for-profit entities that can be organized in dozens of states to pursue profits while also pursuing ESG goals.[62]

VI. CONCLUSION

Corporate managers should be unconsciously guided to engage in conscious capitalism. For-profit corporate managers are ill-suited to intentionally pursue socially conscious behavior because of the incentives within for-profit corporations, the nature of corporate managers' training, the creation of unresolvable conflicts, and concerns about producing a lack of accountability for corporate managers' actions.[63] Even with those realities, the essential nature of the corporation provides guidance to corporate managers as to when corporate social responsible behavior is due based upon

---

[59] *See* Stephen M. Bainbridge & M. Todd Henderson, *Boards-R-Us: Reconceptualizing Corporate Boards*, 66 STAN. L. REV. 1051, 1101 (2014) ("State law . . . provides an off-the-rack set of default rules regarding basic corporation law, but generally allows firms to vary widely in their approach, so long as the divergences are set forth in the corporate charter and are effectuated in ways consistent with law (for example, done with shareholder consent).").

[60] *See* Dana Thompson, *L3CS: An Innovative Choice for Urban Entrepreneurs and Urban Revitalization*, 2 AM. U. BUS. L. REV. 115, 144 (2012) ("One of the benefits of the nonprofit, tax-exempt organization form over the for-profit form for those engaged in socially beneficial activities is the recognition of the nonprofit brand's dedication to the public good and helping the disadvantaged.").

[61] *See generally* Chaffee, *A Theory of the Nonprofit Corporation*, *supra* note 41.

[62] *See* Brent J. Horton, *Terra Incognita: Applying the Entire Fairness Standard of Review to Benefit Corporations*, 22 U. PA. J. BUS. L. 842, 850 (2020) ("State benefit corporation legislation is a reaction to the requirement that directors of traditional corporations pursue profit maximization. Benefit corporations are designed for social entrepreneurs who have an idea for improving society . . . . This is sometimes characterized by commentators as doing well (financially), while doing good (socially).").

[63] *See supra* Section II (discussing why for-profit corporate managers are ill-suited to engage in conscious capitalism).

the cost-benefit analyses that corporate managers should be conducting in running the firm.[64] Notably, this is the vast majority of circumstances because of the uncertainties of human existence.[65] When these cost-benefit analyses suggest that corporate managers not engage in socially responsible behavior, or that they actually engage in socially undesirable, but legal, behavior, corporate managers can still be guided to engage in conscious capitalism through positive law, altering market forces, and choice and structuring of business entities.[66] When behaving within their roles, for-profit corporate managers should unconsciously guide the entities that they oversee to engage in socially conscious behavior in the vast majority of circumstances. When they do not, society must consciously hold corporations accountable.

---

[64] *See supra* Section III (explaining when and why the essential nature of the corporate form mandates that corporate managers engage in socially responsible behavior).

[65] *See supra* notes 46–48 (explaining that for-profit managers ought to regularly pursue socially responsible behavior, including when the cost-benefit analysis of undertaking the behavior is uncertain).

[66] *See supra* Section IV (exploring how for-profit corporate managers can be guided to socially conscious behavior in instances in which they might otherwise fail to do so).