

DISCOURSE NORMS AS DEFAULT RULES: STRUCTURING CORPORATE SPEECH TO MULTIPLE STAKEHOLDERS

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ABSTRACT

This Article analyzes corporate speech problems through the framework of corporate law. The focus here is on the “discourse norms” that regulate corporate speech to various corporate stakeholders, including shareholders, workers, and consumers. I argue that these “discourse norms” should be understood as default terms in the “nexus-of-contracts” that comprises the corporation. Having reviewed the failure of corporate law as it bears on the interests of non-shareholding stakeholders such as workers and consumers, I urge the adoption of prescriptive discourse norms as an approach to reforming corporate governance in a socially useful manner.

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“Truth is mighty and will prevail. There is nothing the matter with this, except that it ain’t so.”¹

-- Mark Twain

“I have heard it broached that orders should be given in great new ships by electric telegraph. I admire machinery as much as any man, and am as thankful to it as any man can be for what it does for us. But it will never be a substitute for the face of a man, with his soul in it, encouraging another man to be brave and true. Never try it for that. It will break down like a straw.”²

-- Charles Dickens

“It is only the Board that this in the end can come from.”³

-- Michael Jensen

¹ MARK TWAIN, MARK TWAIN’S NOTEBOOK 345 (Harper & Brothers 1935).

² Charles Dickens, *The Wreck of the Golden Mary*, HOUSEHOLD WORDS, Dec. 25, 1856 at 10 (1856).

³ Michael C. Jensen, Professor of Bus. Admin., Harvard Bus. Sch., Presentation at the Stanford Law School: Beyond Agency Theory: The Hidden and Heretofore Inaccessible Power of Integrity (Feb. 11, 2010), <http://rockcenter.stanford.edu/2010/02/11/beyond-agency-theory-the-hidden-and-heretofore-inaccessible-power-of-integrity/>.

INTRODUCTION

The destructive influence of corporate speech can be seen in many public policy problems. Examples abound, but are highly salient in the area of public health. The tobacco epidemic of the twentieth century, the obesity epidemic's ravages so far this century, massive environmental degradation—these problems and more have been catalyzed by the combination of corporate political speech in the regulatory arena, and corporate commercial speech in the marketplace.⁴ Solutions to the problem of corporate speech have long been wanting. Recently, the United States Supreme Court held in *Citizens United v. Federal Election Commission* that corporate political speech cannot be muzzled by government regulation.⁵ Since the 1970s the Supreme Court has also given substantial constitutional protection to commercial speech, and there is little reason to expect a reversal of this orientation on the Court.⁶

Of course, in addition to its destructive power, corporate speech has also contributed to human flourishing. For example, commercial speech was instrumental in circulating information about the availability and use of birth control, which many scholars argue has been an important part of the struggle for freedom and equality in our society.⁷ Nevertheless, there is widespread concern that corporate speech routinely impedes the development of sound public policy. Here I pursue the theoretical case that we do indeed have a corporate speech problem,⁸ and I explore a possible solution to the problem which does not

⁴ See David Yosifon, *The Consumer Interest in Corporate Law*, 43 U.C. DAVIS. L. REV. 253, 270-81 (2009) [hereinafter *The Consumer Interest in Corporate Law*] (reviewing case studies of social problems relating to corporate activity in consumer markets, including tobacco, junk food, and dietary supplements); see also David M. Uhlmann, *After the Spill is Gone: The Gulf of Mexico, Environmental Crime and the Criminal Law*, MICH. L. REV. (forthcoming 2011) (reviewing lapse of environmental safeguards that contributed to the severity of the 2010 Deepwater Horizon oil disaster in the Gulf of Mexico), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1740567.

⁵ 130 S. Ct. 876 (2010).

⁶ See, e.g., Arlen W. Langvardt, *The Incremental Strengthening of First Amendment Protection for Commercial Speech: Lessons from Greater New Orleans Broadcasting*, 37 AM. BUS. L.J. 587 (2000) (arguing that the Court has trended towards ever greater protection for commercial speech and that an intensification of that trend should be expected).

⁷ See, e.g., Owen Fiss, *What is Feminism?*, 26 ARIZ. ST. L.J. 413, 422 (1994); Lorraine Schmall, *Birth Control as a Labor Law Issue*, 13 DUKE J. GENDER L. & POL'Y 139, 142-152 (2006).

⁸ See David Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social Responsibility After Citizens United*, 89 N.C. L. REV. (forthcoming 2011) [hereinafter *The Public Choice Problem in Corporate Law*] (on file with au-

require the kind of corporate censorship that the Supreme Court has disallowed on First Amendment grounds.

Specifically, I argue that corporate speech can be usefully reformed by altering corporate law. I argue for the institutionalization of firm governance dynamics which will change the way that corporations speak to and about their shareholders, workers, consumers, the community at large, and government. This approach seeks to solve the corporate speech problem by generating more socially useful corporate speech, rather than constraining or silencing it through external governmental regulation.

I. THE PROBLEM OF CORPORATE SPEECH

A. The Source of Corporate Power

While many organisms communicate, the human ability to deploy elaborate expressive and representational systems in a community of similarly capable individuals is among the defining attributes of our species.⁹ In the *longue duree* of human history speech has played a crucial part in our ability to achieve the coordination necessary to build and maintain civilization. This is not to say that speech explains it all—sheer force, inexpressible love, the tides, the winds, the will, all of these are also essential components of the human condition. But speech is an important category in any conception of the important elements of human life. In contemporary society, the corporation is among the most significant institutions that organizes, produces, circulates and *listens to* speech acts.

Corporations are powerful institutions because they can efficiently coordinate the activity of many individuals and groups, including holders of capital, workers, and consumers.¹⁰ This capacity for coordination is generated by the corporation's centralized, authoritative decision-making structure.¹¹ The corporation's board of directors makes all decisions about how the resources brought by each group will be deployed. Various stakeholders all accede to the boards' deci-

thor) (arguing that the public choice problems caused by corporate political speech undermines the social utility of the shareholder primacy norm in corporate governance).

⁹ See P. Lieberman, *On Human Speech, Syntax, and Language*, 3 HUMAN EVOLUTION 3 (1988) (providing overview of importance of speech to the development of human societies).

¹⁰ See Ronald Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937) (arguing that firms develop when the costs of organizing production by fiat are less than the costs of discovering prices and coordinating transactions in spot markets).

¹¹ See generally STEPHEN BAINBRIDGE, *THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE* (2008) (explicating director primacy theory).

sions, or else they do no business with the firm. The coordinating power of the board is a beautiful thing. The consumer who wakes in the morning desiring an internet-ready cell phone need not drive down the street looking for electronic engineers, designers, and programmers with whom she might set up a meeting to talk about producing the item in exchange for her cash. The coal miner need not say each morning to some holder of capital that she is skilled in the hefting of the pick and knows a good place for digging, the two then writing a contract over breakfast regarding what land should be purchased for digging on that afternoon. Instead labor and capital both submit their particular assets to the centralized decision-making structure of the firm, which deploys the labor and capital in the most beneficial way, returning wages and profits to labor and capital far greater than either could have generated on their own. The consumer is offered a pre-designed, internet-ready phone on a take-it-or-leave-it basis at a specified price, undoubtedly cheaper than she could have come up with on her own.¹²

The authoritative decision-making advantage of the firm, brilliant as it is, also constitutes one of the corporation's greatest design flaws. Having turned over control of their assets to the board of directors, the firm's stakeholders are beset with the problem of holding the board of directors accountable. This is the agency problem: how do you ensure that corporate directors (agents) operate faithfully on behalf of their stakeholders, rather than in directors' own interests through general malingering or outright stealing of corporate assets?¹³

The prevailing view is that different stakeholders should get different solutions to the agency problem. Shareholders require the exclusive fiduciary attention of directors inside the corporate boardroom because of their (the shareholders) distance from firm operations. Workers, in comparison, are physically present on the shop floor and can therefore monitor and negotiate the terms of their labor themselves, individually or collectively. Consumers are present at the cash-register and can monitor their interest in corporate activity by inspecting the goods, services, and prices offered. In sum, the agency problem is managed for shareholders by imposing fiduciary obligations to shareholders on the board of directors, while the agency problem for workers and consumers is managed primarily by particula-

¹² Thus, it should be seen that the corporation is a nexus-of-contracts—a set of relationships—it is not an “entity,” and it is not a single of piece of property that is “owned” by shareholders. *See id.* at 32-35.

¹³ *See generally* ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATE AND PRIVATE PROPERTY* (1932) (providing the seminal statement of the agency problem in corporate law).

rized terms in specific contracts on a negotiated or take-it-or-leave-it basis. Where workers and consumers are vulnerable and cannot protect their interests through contract, corporate theory calls for such vulnerabilities to be solved through external governmental regulation such as labor laws and consumer protection statutes, rather than through any departure from shareholder primacy in firm governance.¹⁴

Corporate law theorists contend that this organizational design is in the best interest of capital, labor, and consumers. It is therefore the regime that these stakeholders would voluntarily agree to if they sat down and negotiated the matter (or at least it is the regime they would all agree to after hearing a lecture on shareholder primacy theory).¹⁵ But these groups do not actually negotiate and plan the design themselves. To do so would be as transactionally-burdensome as driving down the street looking for a designer to build an internet phone. Instead, the basic organizational design is incorporated by law into corporate charters as an “off-the-rack” ready-made system. Users of corporate charters are free to delete default corporate governance provisions and replace them with some other schema, perhaps one in

¹⁴ Space considerations preclude me from providing a comprehensive rehearsal of shareholder primacy theory. Nevertheless, the basic version recounted here should suffice as an introduction to the problem of corporate speech, which is the subject of this Article. The agency problem for shareholders is actually solved through three basic mechanisms: the law of fiduciary obligation, administrative regulation of securities trading, and the invisible, disciplining hand of the market. Many would argue that the market is the most crucial mechanism that solves the shareholders’ agency problem. If a firm’s stock price is low investors will sell or be loath to purchase new issues, thus threatening the job or status security of incumbent directors and officers. The shares of underperforming firms will be undervalued in the securities markets, creating opportunities for raiders (or “liberators,” depending on your perspective) to purchase a controlling interest in the firm, install new management, and reap the rewards of superior performance. The threat of such raiding (or liberating) keeps incumbent directors working hard, which solves the agency problem for shareholders. Nevertheless, because corporate law allows directors to establish structural defenses against hostile takeovers, even to the extent that such efforts forestall the disciplining power of the market for control, the fiduciary obligation of directors to shareholders remains a pivotal element of shareholder protections. See BAINBRIDGE, *supra* note 11, at 105-53. For a fuller version, and more general critique, of shareholder primacy theory, see *The Consumer Interest in Corporate Law*, *supra* note 4, at 255-83 and *The Public Choice Problem in Corporate Law*, *supra* note 8.

¹⁵ In his recent monograph on director primacy, Stephen Bainbridge invites us to imagine corporate law coming out of a meeting between the parties to the corporate contract around a hypothetical “conference table.” BAINBRIDGE, *supra* note 11, at 31. But urging us to think of corporate law as coming out of a conference room invites us to forget one of the most important elements of the nexus of contracts conception, and that is that these are *not* negotiated terms. The “poetic” nature of the “conference table” abstraction should be highlighted rather than obscured when we talk about corporate law in theory and practice.

which important corporate decisions are submitted directly to a vote by all stakeholders. In practice this does not happen. Corporate stakeholders stick with the default rules of directorial authority and shareholder primacy for one of two reasons. First, maybe it really is the rule that stakeholders would settle on if they designed the corporate governance structure themselves, so there is no impetus to change it. Second, stakeholders may stick with the default rule because they find it prohibitively costly, in terms of time, intelligence, and logistics, to negotiate an alternative arrangement. Thus, they stick with the default because they are stuck with it.¹⁶

For reasons I explore below, corporate law's purported solutions to the agency problem leave non-shareholding stakeholders vulnerable to manipulation and exploitation by corporations acting on behalf of shareholders. Here I will focus in particular on non-shareholder's susceptibility to the adverse influence of corporate speech. To track this influence, I explore the distinct discourse norms that attend corporate speech to different corporate stakeholders, including shareholders, workers, and consumers. I contend that these discourse norms should themselves be regarded as default rules of corporate law, and I argue that the discourse norm defaults should be altered in order to improve corporate operation for non-shareholding stakeholders. My focus on discourse norms provides a heretofore unexcavated foothold in the quest for a post-shareholder-primacy model of corporate governance.

B. Discourse Norms and Corporate Law

1. Discourse Norms and Speech Generally

By "discourse norms," I am referring to the practical and moral expectations that give semantic value to speech acts. I also mean the phrase "discourse norms" to refer to people's conscious or subconscious expectations about how they should be talking in particular circumstances.¹⁷ Discourse norms, like norms generally, are associated

¹⁶ Social psychologists refer to the sticky default phenomena as the "endowment effect." See Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 41-42 (2004) [hereinafter *The Situational Character*] (reviewing endowment effect); see also KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* 16-18 (2006) (recognizing the stickiness of defaults in corporate law).

¹⁷ Donald Langevoort describes part of what I have in mind when I refer to "discourse norms," when he speaks of the "regulati[on] [of] human and organization discourse: who determines what meaning can properly be drawn from what someone says or does not say, and with what sort of guidance for making hard judgments about

with behavioral expectations that can be regulated both legally and extra-legally, both formally and informally.¹⁸

Discourse norms can be identified and distinguished by examining the significance of speech acts in different contexts. Consider for example a hypothetical circumstance in which President Bill Clinton, in the private family quarters of the White House, tells his wife Hillary that there “is no sexual relationship” with a particular intern in the Office of the President.¹⁹ Suppose it was the case that Bill had in fact engaged in extensive sexual activity with the intern over a period of many months, but that there had been no such encounter for several months before he said “there is no sexual relationship” to his wife. Norms refer to shared expectations about what the use of particular words, phrases, and sentences in particular contexts mean. Under the discourse norms of family discussion, Bill’s statement pretty clearly counts as a lie. It at least counts as “misleading” in a way that invites condemnation and reform, if Bill and his wife are to remain in the relationship of marriage. The discourse norms of romance, family, and

what was meant.” Donald C. Langevoort, *Half-Truths: Protecting Mistaken Inferences by Investors and Others*, 52 STAN. L. REV. 87, 124 (1999).

¹⁸ See generally ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (analyzing the power of norms in the extra-legal regulation of conduct); see also Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697 (1995) (critiquing norm-based regulation).

¹⁹ This example is drawn from Stephen Gillers’ discussion of the lawyer’s ethical obligation of candor to the tribunal in his excellent casebook. STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 401-06 (8th ed., 2009). Neither Gillers nor I intend to be characterizing Clinton’s actual statements to his wife in that most personal of conversations. Indeed, the statement “there is no sexual relationship” was really made not by Clinton, but in an affidavit by former Office of the President intern Monica Lewinsky, and later by Clinton’s lawyer, William Bennett, when characterizing Lewinsky’s affidavit. When Clinton said that “it depends on what the meaning of the word ‘is’ is” he was responding to a question asking whether Bennett was lying when he said it. *Id.* at 404. Arguably, Clinton was trying to protect his lawyer as much as himself. In her memoir Hillary Clinton states that when reports of Bill’s affair broke in January of 1998, “I questioned Bill over and over . . . [h]e continued to deny any improper behavior. . . .” HILLARY RODHAM CLINTON, *LIVING HISTORY* 441 (2003). Later that year, she writes,

[h]e told me for the first time that the situation was much more serious than he had previously acknowledged. He now realized that he would testify that there had been inappropriate intimacy. He told me that what had happened between them had been brief and sporadic. He couldn’t tell me seven months ago, he said, because he was too ashamed to admit it and he knew how angry and hurt I would be.

Id. at 466. In his memoir, Clinton writes that when he acknowledged the affair to his wife, “I still didn’t understand why I had done something so wrong and stupid; that understanding would come slowly, in the months of working on our relationship that lay ahead.” BILL CLINTON, *MY LIFE* 800 (2004).

friendship generally occasion an expectation of co-operation with respect to the meaning of what is said. There is an assumption that the speech of the lover, the parent, the child, the friend, will be useful to the relationship of the interlocutors, and not solely to the individual speaking. These assumptions are a part of and lend meaning to the speech acts within such relationships.

If, however, Bill spoke the words “there is no sexual relationship” in a different context, governed by different discourse norms, his words might have a very different import. For example, if he spoke them under cross-examination before a grand jury or a special-prosecutor’s investigation, and if when he spoke them there had been no sexual encounter with the intern for several months, then the statement would probably not count as a lie. It would probably not even be considered “misleading” in a sense which would trigger condemnation or response. The accused’s relationship to the prosecutor is adversarial, and the discourse norms in such a relationship presume a less forthcoming, more self-interested mode of expression.²⁰ The point is that especially with respect to hard questions about the meaning and significance of speech, the discourse norms are often decisive.

2. Discourse Norms and Corporate Law

a. Different Speech for Different Stakeholders

Under prevailing law, different discourse norms attend corporate speech depending on the category of corporate stakeholder addressed.

i. Shareholders

The principal way that corporate law enforces the fiduciary duties that directors owe to shareholders is through the imposition of discourse norms. In order to satisfy their duty of care, directors *must* speak with each other about what kind of corporate conduct is in the shareholders’ best interest. Indeed, the requirement to speak and deliberate in an informed and good faith fashion more or less describes both the necessary *and* the sufficient condition for satisfying directors’ obligations to shareholders. Directors are completely insulated from liability to shareholders for bad, non-self-interested business decisions so long as they comply with the requirement of forthcoming, honest, good faith deliberation in the shareholder interest. In or-

²⁰ *Bronston v. United States*, 409 U.S. 352, 358-59 (1973) (“If a witness evades, it is the lawyer’s responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination.”).

der to satisfy that fiduciary duty of good faith, the director's speech acts must also be sincere—she must honestly believe the things she says are in the shareholder's best interest are in fact in their best interest.²¹

ii. Non-shareholders

Workers and consumers, like shareholders, are part of the nexus-of-contracts over which the corporate board of directors presides. Instead of fiduciary-based attention at the level of firm governance, however, consumers must monitor their interests in corporate operations by themselves, in the market.

Unlike shareholders, consumers are not as a matter of corporate law entitled to any internal corporate speech or deliberations about their interests. Corporations, however, are entitled under the First

²¹ See *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 967-68 (Del. Ch. 1996) (quoted in *In re Citigroup Inc. Shareholder Derivative Litigation*, 964 A.2d 106, 122 (Del. Ch. 2009)). The court states:

What should be understood, but may not widely be understood by courts or commentators who are not often required to face such questions, is that compliance with a director's duty of care can never appropriately be judicially determined by reference to *the content of the board decision* that leads to a corporate loss, apart from consideration of the good faith *or* rationality of the process employed. That is, whether a judge or jury considering the matter after the fact, believes a decision substantively wrong, or degrees of wrong extending through "stupid" to "egregious" or "irrational", provides no ground for director liability, so long as the court determines that the process employed was either rational or employed in a *good faith* effort to advance corporate interests. To employ a different rule—one that permitted an "objective" evaluation of the decision—would expose directors to substantive second guessing by ill-equipped judges or juries, which would, in the long-run, be injurious to investor interests. Thus, the business judgment rule is process oriented and informed by a deep respect for all *good faith* board decisions.

Id.; see also *Ivanhoe Partners v. Newmont Min. Corp.*, 535 A.2d 1334 (Del. 1987) ("[T]he duty of care requires a director, when making a business decision, to proceed with a 'critical eye' by acting in an informed and deliberate manner respecting the corporate merits of an issue before the board." (citing *Smith v. Van Gorkom*, 488 A.2d 858, 872-73 (Del. 1985); *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)). Fiduciary standards also govern corporate speech to their shareholders, whether such speech is voluntary or required under the federal securities laws. See Faith Stovelman Kahn, *Transparency and Accountability: Rethinking Corporate Fiduciary Law's Relevance to Corporate Disclosure*, 34 GA. L. REV. 505, 524 (2000) ("[B]ecause shareholders' best interests include being accurately informed about corporate affairs so that they are afforded a basis for their rational decisionmaking, managers' fiduciary duties must be understood to apply to the full panoply of official corporate disclosures routinely made by public corporations.").

Amendment to speak *to* consumers through commercial advertising.²² When corporations choose to speak to consumers, the discourse norms that accompany the speech are far less co-operative in nature than are the norms governing corporate discourse with its fiduciaries. Instead, the firm's speech to its consumers reflects "the morals of the marketplace;" it is the kind of speech, in Cardozo's words, "trodden by the crowd."²³

While corporations have a First Amendment right to advertise legal products, it is permissible for government to restrict false or misleading commercial speech.²⁴ But the categories "false" and/or "misleading" are of limited utility in analyzing contemporary corporate speech problems. A ubiquitous advertising campaign associating happiness, health, and vitality with the consumption of junk food is not so much false or misleading in its failure to with similar zeal describe the

²² In the 1970s, the Court extended First Amendment protection to commercial speech because it was convinced that commercial speech served the same or similar functions in a free society as does political speech—it helps to inform people about the existence, availability, and price of goods and services that might be useful to the well ordering of their lives. Nevertheless there are a few important distinctions in the First Amendment's application to commercial speech. The Court has said that the First Amendment provides no protection to commercial speech that is false or misleading. This is distinct from the political speech context, wherein the Court has made clear that government cannot restrict or punish negligently false (or misleading) speech. The Court gives two justifications for these differences. First, the Court believes that commercial speakers have greater access to the truth or falsity of claims they may make about their goods or services than non-commercial speakers have about the truth or falsity of the political, social, theocratic, metaphysical, or moral claims they make. Second, the Court has stated that the profit motive behind corporate speech assuages the Court's traditional concern that liability for false speech will over-deter the production and proliferation of socially useful speech. Thus, the government may forbid false or misleading commercial speech altogether. Where commercial speech is not false or misleading, government may still regulate it provided the government is doing so to advance a substantial government interest and the speech regulation is no broader than necessary to vindicate the interest. However, the Court has definitively held that the government has no legitimate interest in keeping people from receiving truthful, non-misleading information about goods and services that are legal. For example, government has no substantial interest, the Court has held, in limiting advertising for legal goods and services in order to reduce the consumption of such things. Therefore, the Court almost never upholds restrictions on truthful, non-misleading speech. See David Yosifon, *Resisting Deep Capture: The Commercial Speech Doctrine and Junk Food Advertising to Children*, 39 LOY. L.A. L. REV. 507, 543-551 (2006) [hereinafter *Resisting Deep Capture*] (reviewing commercial speech doctrine).

²³ *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928).

²⁴ See *Resisting Deep Capture*, *supra* note 22.

health risks associated with frequent junk food consumption as it is, perhaps, incomplete and exploitative.²⁵

We might describe the discourse norm of the marketplace as one in which “rhetoric,” in the sense of “insincere speech,”²⁶ is expected. That is, ordinary consumers generally know that rhetoric reigns in the market. But knowledge of its operation does not, unfortunately, rid rhetoric of its power and influence. Speech in such an idiom can much more easily manipulate consumers’ perception of the personal or social consequences of consumption than would fiduciary-based speech. Such consequences can be highly acute and personal, such as the development of lung cancer or heart disease. Or, they may be farther-reaching and more dispersed, such as the destruction of the environment.

The manipulative power of insincere speech is buttressed by the common law doctrine of “puffery,” which has been incorporated into modern consumer protection regimes such as the FTC and cognate state regulatory regimes. The puffery doctrine holds that facially lighthearted boasting, whimsy, exaggeration, and “bluster” are, as a matter of law, not misleading, because reasonable people do not take such speech seriously. The problem is that human beings are in fact often influenced by discourse that the law calls “mere” puffery.²⁷ There are two lines of evidence for this. The first is social scientific inquiry, which has demonstrated in controlled experimental settings the influence of puffery.²⁸ The second line of evidence is the market practice

²⁵ See *id.* at 520-25 (examining the power of junk food advertising to mislead consumers with respect to the adverse health consequences associated with habitual consumption of such products); see also Adam Benforado, Jon Hanson & David Yosifon, *Broken Scales: Obesity and Justice in America*, 53 EMORY L. J. 1645, 1691-1711 (2004) [hereinafter *Broken Scales*] (reviewing junk food marketing).

²⁶ Lisa M. Fairfax, *Easier Said than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric*, 59 FLA. L. REV. 771, 775 (2007).

²⁷ I have previously argued that one practical, constitutionally permissible, and normatively estimable way of constraining the adverse influence of corporate advertising is to focus on the extent to which commercial speech is misleading, and develop a more psychologically informed conception of how human beings can be misled through manipulation of unseen cognitive and motivational biases and vulnerabilities. See *Resisting Deep Capture*, *supra* note 22, at 542-83. But enforcement of any consumer protection standards by external government administration suffers from regulatory inefficiencies that are well documented. See *The Public Choice Problem in Corporate Law*, *supra* note 8.

²⁸ See, e.g., Gregory S. Carpenter et al., *Meaningful Brands from Meaningless Differentiation: The Dependence on Irrelevant Attributes*, 31 J. OF MARKETING RES. 339 (1994). Carpenter and his colleagues designed an experimental setting in which they asked subjects to rank their preferences for products said to have various attributes. The experiment deliberately included objectively meaningless bluster in its description of some product attributes. *Id.* at 342. For example, in one version of the

experiment, the researchers presented subjects with hypothetical down jackets, most of which were said to contain “regular down filling,” but one of which was said to contain “alpine class down fill.” The latter attribute was wholly meaningless (the researchers just made up the term and the attribute “alpine class down fill.”). *Id.* When asked to evaluate the products the subjects consistently ranked the “alpine class down fill” jackets as being superior to those described as having regular down fill, thus “demonstrating that buyers positively value the differentiated brand if the true value of the irrelevant attribute is not revealed to them.” *Id.* at 343.

The experimenters explained this outcome by reference to the fact that their subjects were engaged in a decision-making process characterized by limited cognitive resources and limited time. (This is true of all subjects, all consumers, and all humans—our brains and our time on Earth are finite, and thus our ability to take in and process information about the world around us is limited. *See generally The Situational Character, supra* note 16 (reviewing social science of human decision-making and its relevance for legal analysis)). Carpenter et al.’s subjects relied on a host of cognitive heuristics, short-cuts, and rules-of-thumb, to aid them in their decision-making. These decision-making processes can be relatively easily manipulated, as Carpenter et al.’s study helps to demonstrate. For example, one heuristic that humans regularly employ, according to social scientists, is a general theory of communication which holds that “the purpose of communication is to inform, to communicate something not already known.” Carpenter et al., *supra* note 28, at 341 (citation omitted). Thus, consumers are cognitively biased towards believing that information communicated to them will be meaningful. *Id.* Additionally, because our limited cognitive powers preclude us from assessing every element of circumstances in which we find ourselves, we tend to focus our evaluative efforts on those elements in a given environment which are most highly salient. This cognitive tendency can be highly useful, as for example when walking through the woods we might ignore the pallid dynamics of the bugs or worms in our path and focus instead on the rather vivid Mountain Lion in front of us. Carpenter et al. argue that these dynamics were at work in their down jacket study: “[T]he irrelevant attribute makes the differentiated brand distinctive in consumers’ minds—not only different but more salient, perhaps perceptually dominant, and therefore preferred.” *Id.* at 341 (citation omitted).

Our cognitive frailties thus leave us vulnerable to manipulation by discursive methods that the law calls “mere” puffery. Unfortunately, the social science also suggests that the manipulative power of advertising irrelevant product attributes is not easily cured by simply pointing out the source of the manipulation. After their basic design, Carpenter et al. took their inquiry a step further. They revealed to their subjects that the term “alpine class down fill” was meaningless, and that the down in jackets containing it was no different than regular down fill. Even after being informed that the “alpine class down fill” bluster was meaningless, subjects persisted in evaluating the “alpine class down fill” jackets more favorably than the regular jackets. *Id.* at 341-43. “Subjects preferred the differentiated brand regardless of the information revealed to them, suggesting that the primary impact of the irrelevant attribute was to increase the competitive salience of its brand.” *Id.* at 344.

Carpenter and his co-authors rightly conclude that findings such as these cast doubt on the conventional models of consumer behavior that inform many areas of law and social policy:

Our results are somewhat disquieting for the model of rational choice. Central to this view is the notion that preferences are fixed, exogenous, and revealed by choice. In this context, more information improves decision making—better informed consumers make better judgments. Irrelevant in-

of profit-maximizing corporations which spend billions of dollars per year on advertising and promotional campaigns which often contain nothing but puffery.²⁹ Where firms are operating in competitive markets, corporations that engage in puffery would be quickly subsumed by those who did not waste precious resources on such efforts, if it were as inconsequential as the law takes it to be.³⁰

Corporate law scholars at times appear to believe that loose discursive standards for corporate speech directed at consumers is a necessary correlate to the command that firms pursue profits for shareholders. In a remarkable article on the problem of “half-truths” in corporate speech, Donald Langevoort argues that whether a “half-truth” should give rise to a shareholder cause of action for securities fraud depends on to whom the “half-truth” was directed.³¹ If a firm tells a “half-truth” about the quality of its products, but directs the statement to consumers rather than shareholders, then shareholders should not have a cause of action. The reason for this, according to Langevoort, is that shareholders stand to gain from such half-truths being spoken to consumers, and therefore the shareholders should have no complaint about them. It is expected that directors will exaggerate the firm’s strengths when dealing with non-shareholders

formation in such a framework is immaterial and should not affect decisions. We show that irrelevant information does indeed have an impact. A brand attribute may not have objective value. Rather, preferences for it may be constructed in response to the context in which valuation is made. This suggests that, contrary to the model of rational choice, preferences are endogenous, that is, constructed rather than revealed, and more information can bias decisions systematically.

Id. at 348 (citation omitted). Findings such as these cast doubt in particular, I argue, on the shareholder primacy theory of corporate law, which presumes that the profit-motive serves not just shareholder interests but also consumer interests, by forcing firms to discern consumer interests and serve them. If it is true, as the social science suggests, that corporations can often pursue profits for shareholders by manipulating or misleading consumers, rather than discerning and serving consumer desires, then we may have reason to doubt the social utility of shareholder primacy in firm governance. *See also Resisting Deep Capture, supra* note 22, at 525-38 (reviewing contradictions between the law’s assumptions and social science’s conclusions about the power of puffery).

²⁹ *See Resisting Deep Capture, supra* note 22, at 521.

³⁰ This may be overstated, for it may not be that puffery is not wholly meaningless or that it has no effect, but merely that it does not mislead or confuse. Perhaps puffery creates a sense of whimsy and excitement, and provides opportunity for identity formation and expression which is desirable and fun. So even if it is a little destructive in some ways, it is not *unduly* so, given its utility in other ways. In either event, it remains true that discourse norms in the marketplace are far less demanding than are the explicitly co-operative norms regulating corporate speech to shareholders.

³¹ Langevoort, *supra* note 17.

because this will make it easier for them to get better deals for shareholders: “[C]ompany executives have a strong incentive to style general corporate publicity to conform to a desirable image . . . that image-making is said to be necessary to capture desired resources for the firm from among a broad array of constituents, both internal and external.”³² And therefore, “[e]xpressions of optimism should not be actionable in those settings where hype is most commonplace: the kinds of statements made with customer and employee audiences largely in mind.”³³ If I understand Langevoort correctly, his point is that “half-truths” should not be actionable precisely *because* they can influence non-shareholders in a manner beneficial to shareholders. It thus appears that what is part of the solution for shareholders is part of the problem for non-shareholders.

b. Pushing Past the Pareto Fallacy of Corporate Profitability

Conversations about corporate governance and the relationship between various stakeholders in corporate enterprise sometimes degenerate into what I call “the Pareto fallacy of corporate profitability.”³⁴ The fallacy is the view that, in the end, boards of directors will always maximize profits for shareholders if they make decisions that are also in the best interest of workers, consumers, and the community at large. The fallacy assumes that worker-friendly decisions will attract and retain the best workers, and consumer friendly decisions will attract and retain the most loyal consumers, thereby ensuring maximum returns to shareholders. Under this view, there is no conflict between shareholder interests and stakeholder interests, so long as corporate boards sufficiently seize the synergies available to them.³⁵

³² *Id.* at 107.

³³ *Id.* at 122.

³⁴ Economists usefully distinguish between two kinds of efficiency. The first and best kind is called “Pareto” efficiency. A Pareto efficient rule or proposed alteration to a rule is one which makes at least one person better-off, and which makes nobody worse off. Pareto efficiency is so comely a thing that it probably deserves a better name. A second kind of efficiency, also good but not great, is “Kaldor-Hicks” efficiency, which refers to a rule or proposal which would improve the lot of one person more than it would harm the lot of another, but it makes no promises as to distributional consequences. Kaldor-Hicks efficiency is only potentially beautiful. It requires either some justification for the distributional burdens occasioned by its operation, or else it requires some additional rule or program to ensure that the efficiency gains realized from the rule are somehow transferred to compensate the parties harmed on the way to increasing the overall social pie. *See* RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 12-17 (7th ed. 2007).

³⁵ Such assumptions about the reconcilability of corporate social responsibility and profitability were already widespread enough for E. Merrick Dodd, Jr. to

To be sure, there is plenty of evidence that some corporations sometimes can do best for their shareholders by doing good for all corporate stakeholders.³⁶ There are some investment funds which in-

reference, and critique them, in his famous 1932 essay, *For Whom Are Corporate Managers Trustees?*:

No doubt it is to a large extent true that an attempt by business managers to take into consideration the welfare of employees and consumers . . . will in the long run increase the profits of stockholders. As Dean Donham and others have demonstrated, it is the lack of a feeling of security on the part of those who are dependent on employment for their livelihood which is largely responsible for the present under-consumption which has so disastrous an effect upon business profits. . . . And yet one need not be unduly credulous to feel that there is more to this talk of social responsibility on the part of corporation managers than merely a more intelligent appreciation of what tends to the ultimate benefit of their stockholders.

45 HARV. L. REV. 1145, 1156-1157. The reconcilability of responsibility and profits continues to be a theme in contemporary scholarship and public policy debate. *See, e.g.*, STEVEN ROCHLIN ET AL., STATE OF CORPORATE CITIZENSHIP IN THE U.S.: A VIEW FROM INSIDE 2003-2004 4 (2004) (“[B]usiness executives see corporate citizenship as a fundamental part of business. . . . 82 percent of executives surveyed say that good corporate citizenship helps the bottom line.”), available at <http://bclcl.uschamber.com/sites/default/files/files/04stateccreport.pdf>; Cherie Metcalf, *Corporate Social Responsibility as Global Public Law: Third Party Rankings as Regulation by Information*, 28 PACE ENVTL. L. REV. 145, 158-59 (2010) (“[C]orporate social responsibility may enhance profitability through increased employee productivity or reduced labor costs. . . . The adoption of corporate social responsibility commitments can serve as a way to screen employees and allow firms to pay reduced wages or gain loyalty and productivity thereby enhancing profitability.”); Robert Sprague, *Beyond Shareholder Value: Normative Standards for Sustainable Corporate Governance*, 1 WM. & MARY BUS. L. REV. 47, 77 (2010) (“[Scholars have] found that ‘consumers are willing to pay substantially more for ethically produced goods, suggesting that there is a financial reward for socially responsible behavior.’”) (citation omitted); Reena De Asis, *Corporate Giving and the Social Economy*, HUFFINGTON POST (Mar. 13, 2011, 12:56 PM), http://www.huffingtonpost.com/reena-de-asis/corporate-giving-and-the_b_833626.html (“Corporate giving can be strategic while also being a valuable investment in the community. One major strategic benefit is an increase in brand awareness that can result in a competitive edge.”).

³⁶ The urtext of this fallacy is the example of Johnson & Johnson Inc.’s reaction to the cyanide-in-the-Tylenol scandal of 1982. After a still-unknown malefactor laced several bottles of Tylenol in the Chicago area with cyanide, the company was quickly and fully forthcoming about the risk, pulled all of its products off store shelves at substantial short-term cost to the company, and came back to the market with substantially improved safety mechanisms. Such forthright conduct was widely credited with helping the firm to quickly regain its market share after the crisis. *See* Lisa Hope Nicholson, *Culture is the Key to Employee Adherence to Corporate Codes of Ethics*, 3 J. BUS. & TECH. L. 449, 453 n.27 (2008). Johnson & Johnson had made good on its much ballyhooed credo of putting the health of its customers first among its corporate priorities. This credo, which was crafted by company founders before the firm went public in 1943, explicitly puts the interest of consumers ahead of those of shareholders: “We believe our first responsibility is to the doctors, nurses and patients, to mothers and fathers and all others who use our products and services. In

vest only in firms that are “socially responsible.” Some of these funds have outperformed investment funds without “social responsibility” restrictions or purposes.³⁷ It is not at all surprising that corporate operations that actually serve the interests of all stakeholders would be among the best performing firms in the market. But this success in no way casts doubt on the fact that there are other profit opportunities that are available in more exploitative arrangements that lie beyond the parameters of the social responsibility investment funds, but well within the parameters of the law. There is plenty of evidence that there are times when the profitable thing is for a corporation to act sharp with one of its stakeholders. Just because the forty dollars lying on the ground at the top of the sunny hill will be seen and gathered does not mean that the twenty dollars buried under the ground in the dark valley will be left alone.³⁸

meeting their needs everything we do must be of high quality. We must constantly strive to reduce our costs in order to maintain reasonable prices.” *Our Credo*, JOHNSON & JOHNSON INC., <http://www.jnj.com/wps/wcm/connect/c7933f004f5563df9e22be1bb31559c7/our-credo.pdf?MOD=AJPERES>. Only after reviewing the firm’s obligations to other stakeholders, including “employees” and “communities,” does the credo in its concluding paragraph state, “Our final responsibility is to our stockholders. Business must make a sound profit. . . . When we operate according to these principles [of the credo], the stockholders should realize a fair return.” *Id.*

Nevertheless, the cyanide-in-the-Tylenol case notwithstanding, there is plenty of other evidence that manipulation and exploitation has *also* been an important part of the firm’s overall pursuit of profits. For example, Johnson & Johnson recently agreed to an \$81 million settlement with the federal government in connection with alleged civil and criminal violations of statutory prohibitions against the marketing of prescription drugs for treatments not approved by the Food and Drug Administration. This off-label marketing practice was purportedly undertaken through corporate subsidiaries of Johnson & Johnson, Inc. The firms allegedly marketed drugs that were approved only for the treatment of epilepsy as also useful in the treatment of obesity, a use which may have put patients at risk for serious health problems. See Press Release, Department of Justice, Two Johnson & Johnson Subsidiaries to Pay Over \$81 Million to Resolve Allegations of Off-Label Promotion of Topomax (Apr. 29, 2010) available at <http://www.justice.gov/opa/pr/2010/April/10-civ-500.html>.

³⁷ See Olaf Weber, Marco Mansfeld, & Eric Schirrmann, *The Financial Performance of SRI Funds Between 2002 and 2009* (June 25, 2010) (unpublished) (on file with HEALTH MATRIX), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1630502. Then again, “sin stock” funds—comprised of firms trading in alcohol, tobacco, weapons, and pornography—also have outperformed the S&P 500. See Charles Sizemore, *Why Good Investors Like “Bad” Stocks*, MINYAVILLE MEDIA, INC. (Aug. 31, 2010, 3:15 PM), <http://www.minyanville.com/investing/articles/sin-stock-vice-fund-playboy-stock/8/31/2010/id/29891>.

³⁸ See Claire A. Hill, *Why Financial Appearances Might Matter: An Explanation for “Dirty Pooling” and Some Other Types of Financial Cosmetics*, 22 DEL. J. CORP. L. 141, 186 n.156 (1997):

It is therefore important to emphasize that the problems that corporate law presents for non-shareholders cannot be remedied by hoping for better corporate governance *within* the shareholder primacy paradigm. The Pareto fallacy of corporate profitability debilitates honest discussion and communication about hard choices that need to be made in social policy.

In its most complete articulation, shareholder primacy theory is *not* committed to the claim that shareholder primacy in firm governance will always serve all stakeholder interests. Instead, the dominant view is *dependent* upon the idea that government regulation can protect non-shareholders from corporate misconduct where contract proves an inadequate mechanism to protect non-shareholders from the exploitative power of the shareholder primacy firm.³⁹ The trouble is that shareholder primacy itself compels firms to work within the political realm to undermine the development of such profit-stifling regulations. In other work I have analyzed the broad public choice dynamics which inhibit the proper functioning of the political systems on which shareholder primacy theory relies for its coherence.⁴⁰ Here I am concerned with analyzing in particular the irreconcilability of the discourse norms that govern corporate political speech, on the one hand,

[A]ccording to a famous, but perhaps apocryphal, story, a University of Chicago economist and a student were walking together. The student saw \$20 on the floor, and pointed it out to the economist, remarking 'Look! There's \$20 on the floor. Aren't you going to pick it up?' The economist's response, purportedly, was to say 'Naah; there can't be a \$20 bill on the floor. *Somebody would have picked it up,*' and continue walking, without even glancing down.

Lisa Fairfax argues that corporations in the last ten years have engaged in historically unprecedented levels of "rhetoric" regarding corporate social responsibility. The impressive empirical investigation she undertook seems largely to show that there is little connection between such rhetoric and socially responsible corporate conduct. Fairfax, *supra* note 26, at 789-92. Fairfax states:

62% of Fortune 100 companies are not included in the Domini 400 Social Index . . . only seventeen companies in the *Fortune* 100 appear on the list of the top 100 Best Corporate Citizens, a list which comprises the public companies that best serve stakeholders, including stockholders, employees, customers, the community, and the environment. . . . The fact that only 17% of *Fortune* 100 companies appear on this list while 98% of such companies embrace rhetoric suggesting a responsibility towards stakeholders reflects a seeming divergence between corporate rhetoric and reality.

Id.

³⁹ See *The Public Choice Problem in Corporate Law*, *supra* note 8.

⁴⁰ Because of their size, narrow interests, technical skills, and wealth, corporations enjoy collective action advantages over workers and consumers in the competition for regulatory favor. Thus, corporations can regularly stymie the development of external regulations on which shareholder primacy theory relies for its coherence. See *The Public Choice Problem in Corporate Law*, *supra* note 8.

and those that are expected in the arena of political speech, on the other.

c. Corporate Political Speech and the Norm of Public Reason

Modern liberal political theory considers speech to be an essential element of legitimacy in social organization.⁴¹ Political theorists argue that people have a fundamental moral obligation to speak with each other about proposed solutions to hard and contested problems.⁴² Speaking with each other provides us a non-violent, orderly, reasonable way of getting along with each other even though we may strongly disagree about important matters.⁴³

It is not just any speech, but rather a particular kind of restrained speech which is needed if society is to successfully evade the destructive threat of other forms of dispute resolution, such as fighting. The liberal political tradition has developed a discourse norm of “public reason” which purports to fit the bill. The norm of public reason differs from the discourse norms evident in family, fiduciary, contractual, or legal-adversarial relationships. The purpose of the norm of public reason is “to identify normative premises all political participants find reasonable (or at least, not unreasonable).”⁴⁴ The norm of

⁴¹ See Bruce Ackerman, *Why Dialogue?*, 86 J. PHIL. 5, 6 (1989).

⁴² Ackerman calls this obligation to speak “the supreme pragmatic imperative.” *Id.* at 10.

⁴³ See *id.* at 9. An economically oriented theorist might argue that a far better way through which social arrangements receive legitimacy is through voluntary exchange in free markets. Prices—more particularly, the willingness to pay a price and the willingness to accept payment in exchange for a certain outcome—provides a far better basis of legitimacy than the minutes of any meeting ever could. But this kind of market legitimacy is only fully reliable when the distributional status-quo is legitimate. See *id.* at 10-11 (“Of course, once I agree that those bricks over there are rightfully called ‘yours,’ and you agree that this beer over here is rightfully ‘mine,’ we may then side-step our [other] moral disagreements by trading away to our hearts’ content.”). In *Capitalism and Freedom*, Milton Friedman argues that the legitimacy problems of the distributional status quo can only be shown with reference to the adverse consequences of altering them. MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 161-77 (1982). Friedman emphasizes the power of the “payment in accordance with product” principle in facilitating voluntary, private coordination of enterprise. *Id.* at 162. According to Friedman, radical redistribution of wealth, even intergenerationally, would rob society of the utility of the “payment in accordance with product” principle. Of course, it does not seem that Friedman’s principle would be upended if wealth accumulated through violence, exploitation, or sham was redistributed. *Id.* Whatever one thinks of Friedman’s argument, notice that it is perfectly in keeping with Ackerman’s primary injunction to explain in words why we should go along with a social design. Friedman’s essay is an exercise in legitimation, and a vindication of the view that only speech can give full legitimacy to market exchange.

⁴⁴ Ackerman, *supra* note 41, at 17.

public reason thus requires individuals to discuss and resolve conflicts in a manner which does not require either party to “lose” in the deep sense of being put in a position where they have to renounce their particular moral commitments in favor of their opponent’s. To comply with the norm of public reason, speakers must therefore justify their public policy preferences in a manner that does not appeal to any distinct world-view. Instead of appealing to the authority of a totalizing (religious or secular) conception of the meaning and purpose of life, the norm of public reason enjoins us to articulate and defend our public policy positions with reference only to social values that are common to all world-views.

But this is not mere acting. An important element in the discourse norm of public reason is that political interlocutors must be (justifiably) disposed to believe each other’s speech. The norm of public reason thus requires speakers to believe in good faith that their preferred public policy advances an overlapping conception of a socially desirable outcome. To conform to the norm of public reason, you must really believe what you say, and not secretly prefer a policy simply because it advances one’s privately valued world view. The discourse norm of public reason therefore requires sincerity.⁴⁵

One big problem with the norm of public reason, as Dan Kahan argues, is that as a cognitive matter we humans cannot really pull it off.⁴⁶ Social psychologists have demonstrated that most people quite easily, and sincerely, believe that they themselves routinely conform their public-oriented thoughts and expression to the requirements of public reason, but they are doubtful that other people do the same. Social psychologists tell us that in these assessments we are usually right about other people and wrong about ourselves. Human thinking and decision-making is profoundly influenced by cognitive biases and self-serving motivations.⁴⁷ While people genuinely believe that they analyze public policy problems “objectively,” we in fact tend to assess

⁴⁵ It is important to emphasize that I am concerned here with exploring the contradictions between the kind of speech prescribed by canonical accounts of corporate theory, on the one hand, and liberal political theory on the other. I am not attempting to characterize extant patterns of political speech. Nevertheless, other scholars have made the claim that participants in mainstream political discourse do endeavor to conform to the norm of public reason. *See, e.g.,* Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 118 (2007).

⁴⁶ *See id.*

⁴⁷ *See id.* at 129-131; *see also The Situational Character*, *supra* note 16, at 90-120 (reviewing social psychological studies regarding both the ubiquity of motivated reasoning in human thinking and the tendency of people to be blind to the influence of such motivations on their own thinking even as they readily diagnose motivated reasoning in others).

policy debates through the biased frameworks of our own personal “world-views” (i.e., our private “preferences about how society should be organized.”).⁴⁸ We accurately diagnose this dynamic in our interlocutors, even as we are blind to it in ourselves. The term that social psychologists have settled on for this ironic epistemological dynamic is “naïve realism”—we are naïve about ourselves, realistic about others. We thus tend to view our interlocutors, especially those whose world views we do not share, as only pretending to conform to the norm of public reason. And they think the same of us.⁴⁹

Kahan argues that since we are cognitively incapable of truly conforming to the norm of public reason, even people’s good-faith efforts to conform to it are likely only to antagonize their opponents, who must now contend not only with an adversary whose world view they oppose, but an adversary who is lying about the relationship between

⁴⁸ See Kahan, *supra* note 45, 122. Drawing on psychological and anthropological research, Kahan identifies four basic world-view types which subconsciously inform people’s thinking about public policy problems: “communitarians” who “favor a . . . social order in which the needs and interests of individuals are subordinated to the collective”; “individualists” who desire a “society . . . in which individuals are responsible for securing their own well-being without collective assistance or interference”; “hierarchicalists” who support a social order “in which . . . opportunities . . . and obligations are distributed on the basis of largely fixed social attributes, such as gender, ethnicity, lineage, and class”; and “egalitarians” who favor a society in which such fixed attributes “play no role in the . . . distribution of . . . opportunities . . . [and] obligations.” *Id.* at 122-23. The accuracy of this particular categorization scheme is less important for present purposes than is the general claim that our “world-views” subconsciously influence our public policy assessments even as we view ourselves as thinking through such problems an objective, unbiased fashion.

⁴⁹ Consider the public-health related example of tobacco regulation. Proponents of smoking regulations endeavor to conform to the norm of public reason and “invoke secular rationales: reducing the public health costs of treating lung cancer victims, and abating the risk of disease or the simple annoyance associated with ingesting ‘second-hand smoke.’” *Id.* at 136 (citations omitted). Smokers and other opponents of tobacco regulation are suspicious of these justifications and “detect the unmistakable signature of animus toward the cultural values that smoking expresses.” *Id.* at 137. Opponents of smoking regulation, meanwhile, also publicly conform their arguments to the norm of public reason, pointing to studies which show that smoking actually reduces public health care expenditures (because smokers die much younger than non-smokers), or by arguing that because drinking and driving causes far more harm than does second-hand smoke, public health advocates should turn their attention to restricting drinking in bars rather than forbidding smoking in bars. *Id.* at 138-39. Advocates of tobacco regulation look past such secular arguments and see instead opponents motivated by “a constellation of negative values, such as weakness, crudeness, and irrationality, along with a culpable heedlessness of social obligation.” *Id.* at 137.

their world view and the polices they support. This antagonizes social strife.⁵⁰

If we analyze the norm of public reason in connection with corporate social and political speech this problem is particularly evident.⁵¹ Firms endeavor to comply with the norm of public reason in their political speech.⁵² But they do not succeed. We know that there are profound institutional biases and motivations behind the speech; in particular biases and motivations favoring the narrow interests of directors and shareholders, rather than the public good generally. Corporate speakers may believe in good faith that they fully conform to the norm of public reason. After all, corporate lobbyists are not corporate law scholars or psychologists. They are fully immersed within the norm of public reason and the Pareto fallacy of corporate profitability,

⁵⁰ *But see* Ackerman, *supra* note 41, at 20-21. Ackerman argues that the norm of public reason is not all that difficult for humans, as is evidenced by our continual compliance with the myriad discourse norms that govern different aspects of our lives:

To be a competent social actor, I must constantly engage in a process of selective repression—restraining the impulse to speak the truth on a vast number of role-irrelevant matters so as to get on with the particular form of life in which I am presently engaged. . . . Rather than assault the very idea of role playing, it seems wiser to seek relief in the marvelous human capacity to shift role engagements over time. I can be a lawyer, teacher, construction worker, father, baseball coach—as well as a liberal citizen.

Id. The difference between Ackerman and Kahan is the difference between intuition and social science. Ackerman's common sense leaves him confident in our capacities for objectivity; Kahan relies on experimental evidence demonstrating that in important ways that confidence is misplaced.

⁵¹ As with advertising, corporations are as a matter of constitutional law entitled to engage in this political speech. *See The Public Choice Problem in Corporate Law, supra* note 8.

⁵² For example, junk food corporations have spent millions of dollars to fund a substantial amount of political speech organized through issue advocacy groups, political advertising, and local, state, and federal lobbying efforts. *See generally* MARION NESTLE, *FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION, AND HEALTH* (Darra Goldstein ed., 2002) (reviewing food industry efforts to influence food regulation); MICHELE SIMON, *APPETITE FOR PROFIT* (2006) (reviewing food industry influence on political process). In these arenas the industry has *not* argued against restrictions on the sale and advertising of junk food on the grounds that such regulations would diminish profits and would be bad for their shareholders. Instead, the industry has in its political speech adopted a public interest idiom that has focused on the idea that restrictions on junk food regulations should not be adopted because they would undermine individual responsibility and diminish consumer choice. *See Broken Scales, supra* note 25, at 1769-1802. Among other accomplishments, these efforts have resulted in the adoption of laws forbidding lawsuits against food corporations for obesity-related harms in at least twenty-three states. David Burnett, *Fast-Food Lawsuits and the Cheeseburger Bill: Critiquing Congress's Response to the Obesity Epidemic*, 14 VA. J. SOC. POL'Y & L. 357, 365 (2007).

contentedly telling their political interlocutors that corporate profitability makes all stakeholders better off.⁵³ So the agents of corporate social and political speech may believe they have conformed to the norm of public reason just as sincerely as do regular people. But they are no more successful at it.

The incompatibility between the norm of public reason and the dynamics of corporate speech has two iniquitous effects. The first is that while corporations often succeed in achieving the policies they promote, such policies are not reliably in the public interest, but are instead reflective of corporate bias and motivation, which is shareholder primacy. The second consequence is that, for reasons Kahan makes clear, the public and policymakers are largely suspicious and resentful of corporate political speech. It may be that the “merely” sincere adherence to the norm of public reason by firms operating in the political realm is what helps give rise to the abiding skepticism and animosity that Americans have towards corporations.⁵⁴ The juxtaposition of professed objectivity or public spirit with the bias that we otherwise know they have is particularly galling. One survey from 2002 found that 70 percent of Americans “did not trust what . . . corporations told them and 60 percent called corporate wrongdoing ‘a widespread problem.’”⁵⁵

The discourse norms that animate corporate speech inevitably clash with the norm of public reason, deepening our cynicism about the legitimacy of both corporations and government. Corporate political speech advances the firm’s mission of corporate profitability, but it inhibits the mission of political speech in a free society. In particular, it precludes the full development of consumer, worker, and envi-

⁵³ See, e.g., Steven Brill, *On Sale: Your Government. Why Lobbying is Washington’s Best Bargain*, TIME, July 12, 2010, at 28. Brill quotes Dave Wenhold, President of the American League of Lobbyists:

If you banned all lobbying tomorrow, the legislative process would grind to a halt. You can call us special interests, but the ones who are especially interested are the ones who can explain the consequences of writing a bill this way or that way. We make the system work.

Id. at 28. Another trade-association executive interviewed by Brill argued:

Most members [of Congress] may know one or two issues well, if that. Then you have a 26-year old kid, maybe he’s [sic] even 30 and went to a good law school, who’s on the staff working 10 hours a day and is supposed to tell his [sic] boss how to do derivatives regulation or credit-card reform. Are you kidding?

Id. at 32.

⁵⁴ Many studies describe a widespread “distrust” of corporations. See, e.g., Fairfax, *supra* note 26, at 787.

⁵⁵ JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA* 152 (2003).

ronmental protection regimes that are needed before shareholder primacy in corporate governance can be sanctified.⁵⁶

II. REFORMING CORPORATE LAW THROUGH PRESCRIPTIVE DISCOURSE NORMS

I assert that the discourse norms attending corporations' relationships with their various stakeholders are themselves part of the default terms that comprise corporate law's enabling regime. The discourse norms provide rules of construction for the express speech (or silence) of the corporation to or about its stakeholders. Like corporate law itself, these norms are neither necessary nor inevitable—they are prescribed as part of a social construction project enabled by positive law. The default discourse norms that we find in corporate law get their justification from shareholder primacy theory, which I have argued is wanting. Corporate law might thus consider an alteration in the discourse norms that govern the firm's relationship with different stakeholders.

A. The Utility of Multi-Fiduciary Discourse

Progressive corporate law scholars have suggested that an alternative to shareholder primacy might be a corporate governance regime that requires directors to actively attend to the interests of multiple stakeholders at the level of firm governance.⁵⁷ In a multi-stakeholder regime directors would be charged with attending to the interests of all of the firm's stakeholders with care and loyalty. Such a regime could be enforced the same way that fiduciary obligations are presently enforced by corporate law: by imposing discourse obligations on directors. Under a multi-stakeholder regime directors would be required to become informed about and discuss—in the honest, complete, good-faith fashion of fiduciary discourse—the impact of corporate plans on multiple stakeholders' interests. Under a multi-fiduciary regime, workers and consumers would be *entitled* to such corporate speech, just as shareholders are entitled to it now. In this section, I examine the possibility of using prescriptive discourse norms as a means of institutionalizing multiple-stakeholder corporate governance.

Fiduciary discourse is not an end in itself; it is a mechanism through which “trust” can be developed and managed. Trust is valua-

⁵⁶ See *supra* text accompanying notes 13-14.

⁵⁷ See *The Consumer Interest in Corporate Law*, *supra* note 4 at 295-311 (examining the possibility of multi-stakeholder corporate governance).

ble in the corporate context because it can serve as a highly efficient solution to the “agency problem” that corporate stakeholders face when turning control of firm resources over to the board of directors.⁵⁸ While we may reserve the highest forms of trust for our most intimate associations, it is very clear that trust does not require “thick” relationships.⁵⁹ Trust is an important component in our personal, professional, and consumer lives.⁶⁰ To greater or lesser degrees, we may trust that individuals within an organization or institution will “take our interests into account when determining what course of action to pursue.”⁶¹

Before corporate stakeholders can trust a firm’s board of directors, however, the board must behave in a trustworthy fashion. The difficulty of obtaining trustworthy conduct by boards is, again, the fundamental problem that corporate law scholars have traditionally assessed from the shareholder perspective. An important part of the solution that corporate law uses to engender this fidelity involves the imposition of discourse norms on board operations. That is, one of the ways that corporate law gets directors to behave in a trustworthy fashion is by requiring directors to engage in speech acts expressing and analyzing the interests they are charged with pursuing.⁶² This mechanism can also be deployed to deepen directors’ ties to multiple stakeholders. The active expression of commitment introduces a crucial psychological dynamic. Human beings are deeply motivated to see themselves, and to be seen by others, as consistent and coherent across different behavioral and decision-making contexts.⁶³ Expressions of commitment can thus lay the tracks for future conduct that will be consistent with the commitment, as we are loath to view ourselves as hypocritical or contradictory.⁶⁴ Social psychologists have

⁵⁸ See *supra* text accompanying notes 12-13.

⁵⁹ Michael R. Siebecker, *Trust & Transparency: Promoting Efficient Corporate Disclosure Through Fiduciary-Based Discourse*, 87 WASH. U. L. REV. 115, 152 (2009).

⁶⁰ “Trust” is an important component to relationships that lie between being, on the one hand “determinate,” as where incentives and enforcement are very strong and aligned, and those on the other hand that are fully “indeterminate,” as when we have no reason to expect a particular course of behavior. RUSSEL HARDIN, *TRUST AND TRUSTWORTHINESS* 12 (2002); see also Claire A. Hill & Erin Ann O’Hara, *A Cognitive Theory of Trust*, 84 WASH. U. L. REV. 1717, 1724 (2006).

⁶¹ Siebecker, *supra* note 59, at 146.

⁶² See *supra* note 21 and accompanying text.

⁶³ See *The Situational Character*, *supra* note 16, at 91-100, 107-14.

⁶⁴ Fairfax, *supra* note 26, at 776. There is evidence that putting one’s commitments in writing, and signing them, has a particularly powerful impact in terms of internalization and identifying with a commitment, perhaps also with the group with whom one is signing the oath or statement. *Id.*

shown that articulating a particular perspective can change the underlying attitude of the person speaking even where the speech act is in the first instance prescribed by a “role” rather than the private, subjective feelings or thoughts.⁶⁵ This relationship between speech, commitment, and behavior happens automatically in our subconscious cognitive processing.⁶⁶

In addition to being motivated to view ourselves as consistent and coherent, we human beings are also motivated to be viewed positively by the groups with which we associate ourselves.⁶⁷ Corporate law also harnesses this fundamental psychological drive to help spur trustworthy behavior by corporate directors. A corporate board is a collegial body that can induce the desire for group affirmation in the hearts and minds of its members. Again, the director’s obligation to *speak* her commitments stokes this powerful commitment mechanism. When a director promises to attend to the interests of multiple stakeholders before a group of other directors, who are making the same promise, she will tend to keep her commitment more consistently than if she just says it to herself, or thinks it to herself. The director knows that others will be watching and will hold her accountable if she malingers or cheats—by shunning her, refusing to support her reappointment the board, or refusing to invite her to serve on other corporate or civic boards with which they are associated. Professor Bainbridge considers this power of the “reputational” community to be an important reason why corporate law requires firms to be managed by a “board” and not by the fiat of a single individual.⁶⁸ Bainbridge wants this power to be deployed in advance of shareholder primacy,⁶⁹ but it can also help enable a loyal, capable multi-stakeholder corporate governance regime.

Another important member of the corporate reputational community is the Delaware Court of Chancery. A number of scholars have emphasized the role that the Chancery Court plays in exposing, condemning, and shaming directorial misconduct, even where the court restrains itself from imposing actual liability or damages for the mis-

⁶⁵ *Id.* at 777; see also Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 169 (2003).

⁶⁶ See Fairfax, *supra* note 26, at 801; see generally Hanson & Yosifon, *supra* note 65 (emphasizing important part played by unseen cognitive and motivational processes on conscious thinking and action).

⁶⁷ See *The Situational Character*, *supra* note 16, at 100-15.

⁶⁸ See BAINBRIDGE, *supra* note 11, at 100-05.

⁶⁹ See *id.* at 104.

conduct it identifies.⁷⁰ The world of corporate directors is a fairly small one. In it, reputation and honor often matter more than pecuniary rewards, which most directors of large publicly traded corporations already have before joining the world of corporate directorships. In this culture what Delaware judges say matters as much or more than what judges do. Formally expanding the fiduciary relationship to multiple stakeholders would provide judges the occasion to celebrate or condemn corporate conduct as it relates to workers, consumers and other stakeholders, even where the Chancery Court is reluctant to formally find directors liable for damages in connection with unworthy conduct.

The canonical account of corporate law is already committed to the view that reputational dynamics can serve an important part in bonding corporate directors to their principals. In fact, in the canonical account the competence of board members to police each other and keep each other true (enough) to the corporate mission serves as a crucial justification for corporate law's *embrace* of near total directorial discretion over the corporation's affairs, even to the extent that it allows directors to stymie the market for corporate control with structural defenses (e.g., "poison pills," etc.) that essentially allow the board to "just say no" to hostile takeovers.⁷¹ The acid bath of the market is kept lidded, while corporate law puts its faith in the fidelity of the board. This faith and this power, driven by speech acts operating under fiduciary discourse norms, can be put to use in service of a broader set of directorial commitments.

Of course, people's ability to fulfill commitments degenerates when multiple commitments present conflicts. Lisa Fairfax argues that corporations actively concerned with multiple stakeholders may need to resolve this problem by limiting the number of groups to which they make commitments, or else to be clear about their hierarchy of commitments.⁷² Yet to respond to this conundrum as Fairfax suggests

⁷⁰ See, e.g., Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work*, 44 UCLA L. REV. 1009, 1013-1016 (1997) (arguing that "Delaware opinions can be understood as providing a set of parables—instructive tales—of good managers and bad managers"; these tales then "provide a supplemental source of gossip, criticism, and sanction for this set of actors [i.e., directors and officers]"); see also Lyman Johnson, *Counter-Narrative in Corporate Law: Saints and Sinners, Apostles and Epistles*, 2009 MICH. STATE L. REV. 847 (2009) (extending Rock's thesis with special reference to the role of the business press).

⁷¹ See BAINBRIDGE, *supra* note 11, at 134-53.

⁷² Fairfax, *supra* note 26, at 816 n.223 ("Indeed, the consistency principle suggests that the multiplicity problem may undermine achievement of all the goals encompassed by the stakeholder rhetoric, including goals associated with shareholder concerns."). This is precisely the problem, and the reason why behavioral insights about trust discourse must not be used to try to deepen shareholder primacy.

would leave us again with shareholder primacy in firm governance, an approach which leaves non-shareholding stakeholders vulnerable to corporate overreaching.

The inevitable conflict involved in multiple commitments has been one of the main arguments that advocates of shareholder primacy have used to reject the plausibility of multi-stakeholder corporate governance. This is sometimes referred to as the “two masters” problem: “[A] manager told to serve two masters (a little for the equity holders, a little for the community) has been freed from both and is answerable to neither.”⁷³ But the “two masters” argument proves too much. Under the prevailing shareholder-primacy model of corporate governance, directors are already charged with managing conflicts between many different masters. For example, shareholders with a large portion of their wealth invested in one firm would prefer the firm to adopt a risk-averse business strategy, but diversified shareholders would prefer their firms to be more risk-preferring. Older, infirm, or impatient shareholders want short-term profits, while younger, healthier or more patient shareholders want to wait on steady growth. Preferred stockholders prefer certain-short term gains but common stockholders prefer riskier long-term strategies. Some shareholders want profits without regard to ethical consequences, other investors are willing to ease up on the profit throttle if it means doing less harm to others. Proponents of shareholder primacy in firm governance have not considered the inevitable conflicts in simultaneous commitments to these different groups of shareholders to be an insurmountable problem. Instead, the inevitability of conflicts between different groups of shareholders is advanced as one of the key reasons why corporations *must* be run by an independent, authoritative board of directors which can manage such conflicts in a way that best serves the interests of all competing parties.⁷⁴ Directors presently do this with almost no guidance from courts or statutory law as to whose interests are to be privileged in what circumstances when conflicts inevitably arise. The confidence that corporate law already evinces in directors’ ability to overcome the two-masters problem across different groups of shareholders should also serve to assuage doubts that directors can effectively manage conflicts across different groups of stakeholders.

⁷³ FRANK EASTERBROOK & DANIEL FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 38 (1991). The “two masters” formulation is an allusion to the Gospel of Matthew. *Matthew* 6:24 (Revised Standard Version) (“No one can serve two masters; for either he will either hate the one and love the other, he will or be devoted to one and despise the other. You cannot serve God and mammon.”).

⁷⁴ See BAINBRIDGE, *supra* note 11, at 45-50, 60-65.

Nevertheless, the reality of conflicts between different stakeholders should be reflected in the discursive practices of multi-stakeholder corporate governance. Directorial speech about stakeholders need not always be concerned with maximizing trust. Indeed, once trust has been established in a relationship, our motive for coherence and the threat of dissonance sometimes keeps us trusting too much, which can leave us vulnerable to manipulation.⁷⁵ We tend in our explanations of our behavior (to ourselves and others) to minimize the inconsistency in competing obligations in order to reduce the cognitive dissonance we would otherwise suffer.⁷⁶ As Claire Hill and Erin Ann O'Hara recently pointed out, social policy should be concerned not with "maximizing" trust, but with optimizing it.⁷⁷ The discursive goal of corporate speech must then be clarity and honesty, rather than necessarily trust-inducing in every case. Directors should be encouraged to recognize conflicts between stakeholders and to communicate openly and honestly about them.

B. Prescriptive Discourse Norms

Corporate law scholarship must help boards of directors to develop effective ways of engaging in multi-stakeholder discourse. In this section I briefly examine two different "prescriptive" discourse norms authored by two leading scholars for use in other areas, but which I think might usefully be deployed to help develop a new default discourse norm for use in multi-stakeholder corporate governance.

1. Expressive Overdetermination in Firm Governance

Earlier, I reviewed Dan Kahan's critique of the norm of public reason, and showed the ways in which his critique is relevant to the problems of corporate political speech.⁷⁸ Kahan follows his critique with the offer of an alternative discourse norm that he argues is psychologically realistic and more instrumentally promising than the norm of public reason. He urges the adoption of "expressive overdetermination"—a norm with a somewhat cumbersome name, but one which is nevertheless well worth considering. Expressive overdetermination has two basic elements. First, it requires political speakers to recognize and articulate the ways in which a policy they support advances their personal conception of what is good and meaningful in life. That is, where the norm of public reason requires speakers to

⁷⁵ See Hill & O'Hara, *supra* note 60, at 1720, 1745.

⁷⁶ Fairfax, *supra* note 26, at 803.

⁷⁷ Hill & O'Hara, *supra* note 60, at 1720.

⁷⁸ See *supra* text accompanying notes 41-56.

keep quiet about their overarching “world-view” when talking about social policy, the norm of expressive over-determination demands that speakers explicitly acknowledge the connection between their policy choices and their world-view.⁷⁹ Second, Kahan would require people to speak about a preferred policy in ways that allow other people to see the policy as “expressing meanings distinctive of their worldviews as well.”⁸⁰ In order to ensure that policy proposals can be determined or justified through multiple world-views (i.e., that proposals can be “expressively overdetermined”), political speakers would be “strictly forbidden to engage in forms of advocacy calculated to render laws and policies univocal in their meanings.”⁸¹

It may be optimistic, and perhaps patronizing, to think that controversial policy proposals can always “admit of multiple cultural interpretations.”⁸² It seems inevitable that some kinds of proposals will inevitably resonate more with an “individualist” rather than an “egalitarian,” or vice-versa. It may be sufficient instead to tweak the second step of Kahan’s prescription and say that speakers should be required to explicitly and sincerely address the ways in which their preferred policy advances their own world-view and the ways in which it at least does not unduly threaten the world views of others. Such an approach still achieves the dual benefits that Kahan seeks of first, alerting the speaker to the biased nature of her own positions, and, second, disarming her interlocutors’ reasonable fears that their world view may be threatened by a policy advocated by someone with a world-view different from their own.⁸³

⁷⁹ Kahan refers to this as the requirement of “expressive candor.” Kahan, *supra* note 45, at 145.

⁸⁰ *Id.*

⁸¹ *Id.* Kahan provides several examples of the utility of “expressive over-determination” in public health regulation. For example, he argues that world-view conflicts had inhibited the development of sound anti-pollution policies in the 1970s and 1980s. To critics of the anti-nuclear power movement of those decades, “it became obvious . . . that the perception of nuclear risks was a product of ‘cultural bias’ on the part of egalitarian collectivists whose ‘sectarian’ worldview would be affirmed by the gutting of the nuclear industry.” But similar biases were easily seen to be animating any given proponent of nuclear power since “risk dismissiveness suited the needs of the ‘market individualist,’ whose reverence for private orderings predisposed him [or her] to a belief in the resilience of nature and the evolutionary wisdom of markets.” *Id.* at 140. However, widespread support for emissions regulation was finally engendered in the 1990s because of the “expressive overdetermination” of innovative reforms like tradable emissions legislation. Such laws “simultaneously affirmed egalitarians’ commitment to environmental protection and individualists’ commitment to markets as a means of attaining societal ends.” *Id.* at 146.

⁸² Douglas Kysar, *The Consultants’ Republic*, 121 HARV. L. REV. 2041, 2073 (2008) (book review) (interpreting Kahan).

⁸³ Kahan, *supra* note 45, at 145.

Kahan intends for “expressive over-determination” to be deployed in political discourse, where it will replace the norm of public reason. But his framework might be usefully installed, with alteration, as a discourse norm for corporate speech on behalf of multiple stakeholders.⁸⁴ Instead of urging directors to appeal to world-view categories, we might insist that they speak in a manner that explicitly makes clear the ways in which a proposed course of corporate action is likely to advance shareholder interests as well as making clear the ways in which the proposal would affect other groups of stakeholders. Directors would be obliged to speak with candor in terms that resonate with the particular interests of each of the groups. For example, they might speak of risks of loss and chances of profits when expressing the shareholders stake in corporate action, wages, working conditions, and job security when speaking of the consequences of a corporate choice for workers, and cost, quality and consumption consequences when expressing the intended or likely effect of a corporate decision on the firm’s consumers.⁸⁵

Firms with fiduciary obligations to multiple stakeholders might also be expected to speak in an expressively over-determined fashion when they speak *to* their different constituencies through advertising, disclosures, or public statements. To comply with the norm, for example, firms would be forbidden from making a statement to share-

⁸⁴ I have previously critiqued “expressive overdetermination” for its “unwarranted agnosticism” regarding the content of world-views and have urged policymakers to focus instead on repudiating cognitive frameworks, such as “dispositionism,” that we know to be false, even if they are intuitively appealing. See David G. Yosifon, *Legal Theoretic Inadequacy and Obesity Epidemic Analysis*, 15 GEO. MASON L. REV. 681, 724-33 (2008). Here I am concerned with pursuing the ways in which Kahan’s model might usefully be employed by corporations in their external and internal speech.

⁸⁵ Professor Lyman Johnson’s call to authorize religious language in the boardroom might provide a practical adjunct to the project of expressive-overdetermination in board governance. Lyman Johnson, *Faith and Faithfulness in Corporate Theory*, 56 CATH. U. L. REV. 1 (2007). Johnson laments what he sees as the impoverished quality of discourse in the corporate boardroom. Pursuing a richer conception of what constitutes “good faith” conduct on the part of corporate directors, Johnson argues that the hyper-secular nature of boardroom discourse norms precludes directors from drawing on the rich reservoirs of “good faith”-like language from their spiritual or religious traditions when they talk about what is required of themselves and their fellow board members. Because language abhors a vacuum, this prohibition leads to board-room discussions that are denuded of all the qualities of language that make grappling with hard questions manageable in other areas of life. Licensing a wider range of “good faith” vocabulary might be of practical benefit to a board deliberating on multiple stakeholder interests in an expressively over-deterministic fashion. Johnson has in mind mostly the stories, metaphors, psalms, epigrams, and proverbs that are part of the world’s various religious traditions. *Id.* at 31-34.

holders about the profitability of a particular course of action without also expressing to consumers how their interest is implicated in the proposed action, and also speaking to workers about how the plans would affect them. The form of such speech need not be prescribed with nuance or particularity. Certainly a prospectus sent to shareholders need not have a section directed at consumers, and general advertising to consumers need not also contain information about cost-of-living increases for workers in the next year. But taken as a whole, to comply with this prescriptive norm, the firm's statements to its various stakeholders would have to express in over-determined fashion how each of the firm's stakeholders stand to benefit or are exposed to risk by corporate decisions.

Courts could enforce this standard only in the limited ways that they presently enforce fiduciary discourse standards owed to shareholders. While courts could not enforce substantive standards or impose liability for "bad" decisions for fear of undermining the authority and discretion of the board of directors, the overarching obligation of candor, completeness and good-faith is one that courts can and do undertake to enforce on behalf of shareholders through the mechanisms of shareholder derivative suits under state law. The fiduciary discourse obligation could similarly be enforced on behalf of other stakeholders through "stakeholder derivative" suits to enforce directors' obligations to them.⁸⁶ Or the standard might be enforced by ex-

⁸⁶ I do not suggest that so dramatic an expansion of fiduciary obligations could be accomplished through judicial innovation alone. Legislative action at the state or federal level would be required. The detailed specification of what statutory language would be necessary to institutionalize multi-stakeholder corporate governance is beyond the scope of this article. My primary concern here has been with demonstrating, first, that such a standard is necessary, and second, that such a standard can be accomplished by altering the discourse norms that underlie corporate speech to and about its various stakeholders. Nevertheless, something as straightforward as the following would suffice to begin to shift corporate law dynamics in the desired direction if it were incorporated into state corporate law: "The board of directors shall manage the firm in the best interests of the corporation's shareholders, workers, and consumers." This kind of broad legislative innovation could then be fleshed out through corporate law's traditional reliance on the courts to develop workable rules for particular circumstances and recurring problems, perhaps in ways suggested by this Article. Because states compete against each other for corporate chartering fees, and because shareholders benefit from the presently dominant shareholder primacy regime, legislative reform in any one state (e.g., Delaware) calling for multiple-stakeholder governance is unlikely to be effective, as firms would simply reincorporate in a different state that seeks to benefit from chartering fees by continuing to offer shareholder primacy in its corporate law. Such a "race to the bottom" (from the perspective of non-shareholding stakeholders) may require a move towards federal chartering of corporations. The federalization of corporate law has already been underway in piecemeal fashion, though departure from shareholder primacy has

tending the reach of the federal securities laws to non-shareholding stakeholders.⁸⁷

2. Integrity in Firm Governance

As noted above, since the 1930s corporate law scholars have for the most part been pre-occupied with the “agency problem” in corporate law.⁸⁸ One of the most prominent contemporary analysts of the agency problem, Michael Jensen, has late in his career come to the conclusion that the traditional agency problem has been well-enough solved.⁸⁹ Jensen, working with co-authors Werner H. Erhard and Steve Zaffron, asserts that the more pressing contemporary problem of unrealized corporate value relates not to failures in the principal-agent relationship, but rather failures in the more intimate relationship between the agent and herself. Jensen refers to this as the problem of “integrity”—or the lack of integrity, in the life of the agent. What is of particular interest to the present inquiry is Jensen’s conclusion that the “integrity” of corporate agents can be improved through the adoption

not yet been on the menu. *See generally* Stephen Bainbridge, *The Creeping Federalization of Corporate Law*, 26 REG. 26 (2003) (arguing that the Sarbanes-Oxley legislation was the most dramatic expansion of federal regulatory power).

⁸⁷ Interestingly, the seminal laws creating and empowering the Securities and Exchange Commission actually seem to authorize the SEC to make rules in connection with the purchase and sale of securities that are generally in the public interest, even where “the public interest” is distinct from shareholder interests. For example, Section 10(b) of the Securities Exchange Act of 1933 makes it unlawful

(b) [t]o use . . . in connection with the purchase or sale of any security . . . any manipulative or deceptive device . . . in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate *in the public interest or* for the protection of investors.

15 U.S.C. § 78j(b) (2006) (both emphases added). Nevertheless, the securities regulation apparatus has not yet been put to use directly in the service of most non-shareholding workers and consumers.

⁸⁸ *See supra* text accompanying notes 12-15.

⁸⁹ *See* Werner H. Erhard, Michael C. Jensen, & Steve Zaffron, *Integrity: A Positive Model that Incorporates the Normative Phenomena of Morality, Ethics, and Legality* (Harvard Business School NOM Unit Working Paper No. 10-061, 2010) [hereinafter *Integrity: A Positive Model*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542759; *see also* Jensen, *supra* note 3 (explicating the integrity project). For ease of reference and because his work is of abiding interest to corporate law scholars, I attribute this work in the text to “Jensen,” while reiterating the collaborative nature of his project by reference here and in subsequent footnotes. Regarding the view that the traditional agency problem has been more or less well contained, *see* Jensen, *supra* note 3 (emphasizing the overlapping power of several modern solutions to the shareholder’s monitoring problem, including most importantly the capital markets, the law of fiduciary obligation, and modern compensation structures for upper-management).

of a different kind of discourse norm than presently prevails in corporate speech.⁹⁰

By integrity, Jensen means wholeness, completeness, and coherence.⁹¹ People or systems that lack integrity always underperform, sometimes catastrophically.⁹² He argues that things, processes, individuals, and relationships all have more “workability” when they operate with integrity. Critics may argue that Jensen’s new project differs little from familiar concepts of efficiency and that all that is new here is a proposal to pursue a presently underappreciated approach to efficiency gains. This critique is almost inevitable given Jensen’s insistence that his program of integrity is not a normative guidepost but an agnostic map of “workability.”⁹³ Others might reasonably think that while it is nice to have Jensen in the conversation, work on the relationship between integrity and productivity has been a long-standing theme in progressive—especially feminist—corporate theory.⁹⁴ I nevertheless think Jensen’s work is valuable as an illustration of this Article’s claim that discourse norms can be instrumentally deployed to achieve desired results in corporate operations.

Jensen argues that the best way that individuals and relationships can operate with integrity is through people living by their “word.” To be a person of integrity a person must honor their word. Now, for Jensen, honoring one’s word is not the same as *keeping* one’s word. To keep one’s word means to do or not do exactly what you say you will. But only a person with a very small life, and very few responsibilities, could possibly *keep* their word all of the time. For most people serv-

⁹⁰ Any prescriptive tool promising greater efficiency must meet the question of why the churning market, filled with greedy individuals, has not already implemented it. Jensen explains the market’s failure to achieve integrity gains as a function of cognitive, motivational, and behavioral biases—he relies on the same literature that I rely on to demonstrate the futility of the shareholder primacy norm as it relates to non-shareholder interests. *See supra* text accompanying notes 15-21. The economist in Jensen cannot keep from associating a number with his project—he argues that organizations that operate with integrity in the manner he defines it will increase productivity by 100–500% over their non-integrity levels. Jensen also claims that in corporate operations 25% of unrealized productivity is attributable to the agency problem, 25% to the problem of co-locating information and decision-rights, 25% to the problem of integrity, and 25% to as-yet unknown causes. *See Jensen, supra* note 3. The implausibility of this kind of quantification strikes me as unnecessarily distracting from the overall cogency and utility of his general claims.

⁹¹ *Integrity: A Positive Model, supra* note 89, at 18.

⁹² *Id.* at 31-41. Jensen provides examples of the adverse consequences of “out of integrity” behavior in numerous contexts including academics, business, and religious organizations. *Id.* at 72 & n.47, 74.

⁹³ *See id.* at 44.

⁹⁴ *See, e.g., The Public Choice Problem in Corporate Law, supra* note 8, at 285-93.

ing in complex roles, things come up, delays happen, priorities shift, and it is not always possible or desirable to keep the very letter of your word. The person who *honors* her word may sometimes not keep her word, but she will always take responsibility for remedying any problems caused by her failure to keep her word.⁹⁵

To improve workability, Jensen argues that we should adopt a discourse norm in which your “word” automatically encompasses not only everything you explicitly promise to do, but *also* everything that other people expect of you.⁹⁶ You do not have to do exactly what others expect of you, this is merely a default rule. You can opt out of this default by making clear to others that you will not be doing what they expect you to be doing. Going further, in Jensen’s system your “word” also by default includes what society’s ethical, moral and legal codes expect of you. To be a person of integrity you must either honor what other people and society expects of you, or you must “publicly announce” that such expectations do not, after all, constitute your word.⁹⁷

Under this system, your word runs to all of the people or groups with whom you want to have a workable relationship. Jensen is in particular concerned with the set of relationships that comprise corporate activity. Deploying his discourse norm to advance multi-fiduciary corporate governance would involve requiring organizational integrity towards shareholders, creditors, workers, and consumers. Jensen believes that directors are presently involved in a tremendous amount of

⁹⁵ *Integrity: A Positive Model*, *supra* note 89, at 22. Jensen insists that his project is “ontological,” that he and his collaborators have discovered something fundamental about how the universe works, and how people work within it. Jensen is a businessman, in the end, not a philosopher or social scientist, and so at least for him it seems little more important to know precisely why “integrity” is powerful than it is to know the physics or chemistry that makes coal burnable for fuel. *See id.* at 19-20.

⁹⁶ *Id.* at 52.

⁹⁷ To ratchet up “workability” one more level, Jensen and his co-authors introduce an asymmetry into their integrity discourse norm. While your word encompasses everything that is expected of you, when you are thinking about someone else’s word your expectations regarding that other person do not, for you, count as their word. For you, other people’s word only includes what they explicitly say or agree to do. Thus, within the integrity norm you cannot assume others will honor your expectations of them, because your expectations do not, for you, constitute their word. This is so even though you must consider their expectations of you to be your word. *See id.* at 52. In the corporate context, this element of Jensen’s program should perhaps be limited to the firm’s internal discourse on the board of directors between directors and officers, and between officers and employees. With respect to the firm’s speech to its stakeholders we may not want people to rely only on what the firm actually says it will do. Indeed, the power of fiduciary obligation in corporate governance is that it allows corporate stakeholders to put their faith in the firm without having to say anything or listen very much to corporate managers.

destructive out-of-integrity behavior in their relationships to their shareholders and the capital markets generally.⁹⁸ This problem of out of integrity behavior can also be seen with respect to other stakeholders. That is, in their market discourse with non-shareholding stakeholders, corporations adhere to a far narrower conception of what counts as honoring their “word” than would prevail under an integrity regime. For a corporation to be in integrity, the firm’s directors and managers must internally honor their word, and must honor their word externally in what the firm says to, or what is expected of it by, multiple stakeholders.⁹⁹

Jensen argues that an important cause of out-of-integrity behavior is that people mistakenly use cost-benefit analysis to decide if they are going to honor their word or not. While individuals and organizations should certainly do a cost-benefit analysis when determining what they will give their word to, once a word is given it should be honored without any further analysis of the costs of doing so. If you do a cost-benefit analysis when it comes to honoring your word it makes you untrustworthy and undermines the workability of your relationships. I think that one of the reasons that corporate actors engage in cost-benefit analysis at every turn is because of the lack of any other salient framework through which to analyze what they ought to do. Jensen’s integrity discourse norm provides corporate actors with a fresh and rich language that they can use to give shape to their sense of their own commitments, and how they talk about those commitments to themselves and to others.

It is worth noting the impressive “expressive over-determination” in Jensen’s invocation of the “word” in his integrity project. When I heard him present his idea at Stanford University in February 2010 Jensen had the full crowd rapt as he kept invoking “your word,” “my word,” “living by our word.”¹⁰⁰ For many listeners there must have been an inescapable religious connotation. “In the beginning, was the word, and the word was with God, and the word was God.”¹⁰¹ Christians often refer to Jesus as the embodied “Word” of God.¹⁰² To philo-

⁹⁸ Jensen and his co-authors emphasize in particular the problem of corporate boards managing earnings in order to give the impression that the firm has comported with their own prior projections or analyst expectations. *See id.* at 75 n.54.

⁹⁹ One source of the gains that Jensen and his co-authors expect from their integrity system is through the power that it has to generate trust in relationships. But the integrity norm is well calibrated for optimization, rather than maximization of trust.

¹⁰⁰ *See Jensen, supra* note 3.

¹⁰¹ *John* 1:1 (Revised Standard Version).

¹⁰² *See John* 1:14 (Revised Standard Version) (“And the Word became flesh and dwelt among us . . .”).

sophers, invocation of the term “word” invites reflection on its ancient etymology in the term *logos*, which is also a synonym for “reason.”¹⁰³ When attesting to the credibility, skillfulness, or character of another, we put in “a word” for them (if we are delivering a negative report about someone, we do not call it putting in a “word”).¹⁰⁴ “Word” is used in urban slang to express agreement, concurrence, and affirmation.¹⁰⁵ Because it is infused with so much meaning to so many different constituents, Jensen’s integrity discourse norm can help corporate boards develop governance dynamics which are responsive to the wide-ranging interests of multiple constituents.¹⁰⁶

C. The Constitutionality of Prescriptive Discourse Norms in Corporate Governance Law

This prescriptive discourse norms project attempts to grapple with the problems of corporate speech without resorting to the blunt instruments of censorship that the Supreme Court has forbidden.¹⁰⁷ Instead of imposing external restrictions on corporate commercial or political speech, this approach instead focuses on altering internal corporate governance dynamics in a way that is likely to generate more socially useful corporate speech.

Moving from shareholder primacy to multi-stakeholder corporate governance attempts to change the way that corporations speak internally *about* and externally *to* corporate stakeholders. Regarding internal corporate dynamics, changing the fiduciary obligations of direc-

¹⁰³ See 8 THE OXFORD ENGLISH DICTIONARY 1113 (2d ed. 1989).

¹⁰⁴ See 20 THE OXFORD ENGLISH DICTIONARY 527 (2d ed. 1989).

¹⁰⁵ *Word, n. and int.*, OXFORD ENGLISH DICTIONARY ONLINE (Dft. Rev. Mar. 2011), [http://www.oed.com/view/Entry/230192?rskey=DGSER5&result=1&isAdvanced=false# \(defining and providing the etymology of “word”\).](http://www.oed.com/view/Entry/230192?rskey=DGSER5&result=1&isAdvanced=false# (defining and providing the etymology of “word”).)

¹⁰⁶ Jensen demonstrates the power of the integrity discourse norm by embodying it in the public delivery of his work. When he spoke at Stanford University, *supra* note 3, he promised in a confident staccato to deliver something new that would change every aspect of all of our lives. He said the integrity norm has revolutionized the operation of companies with which he is involved, including SSRN, which he founded and helps run as a private for-profit enterprise. Acknowledging that his audience—comprised of business scholars, lawyers, directors and officers of publicly traded firms—was likely not used to “such blunt talk,” he confessed to us that he had cheated on his wife, had affairs that ruined his marriage and hurt his family—his daughter was in the room, he said she would corroborate it. He said he would have been a better man, a greater scholar, if he had lived his life with integrity (this is one of the most important business scholars of the last fifty years). He noted happily that it is not just SSRN which is thriving, but also his romantic relationship with a new partner, with whom he is in integrity. The talk is available in its entirety on the website of Stanford University Law School’s Rock Center for Corporate Governance. *Id.*

¹⁰⁷ See *supra* notes 4-5 and accompanying text.

tors of publicly traded corporations, and altering corporate discourse norms as a way of enforcing those obligations, does not run afoul of any First Amendment restrictions. Nobody has suggested that *Smith v. Van Gorkom*,¹⁰⁸ which requires directors of Delaware corporations to engage in informed, good-faith discourse about what kind of corporate conduct is in the *shareholder's* best interests, is an unconstitutional standard on First Amendment grounds. Nor has it been suggested that *Van Gorkom*, and nothing else, is a constitutionally required standard for corporate speech. If prescriptive discourse would be unconstitutional, then the current regime, which is highly prescriptive on its own terms, is unconstitutional.

From the perspective developed by this Article, enforcing a fiduciary standard on external corporate speech *to* multiple stakeholders should not necessarily present First Amendment problems either. Presently corporations must adhere to fiduciary norms when speaking to shareholders.¹⁰⁹ This standard has not been criticized on First Amendment grounds because it has been assumed that the fiduciary discourse standard is part of the private contractual obligation between shareholders and their firms, rather than an externally imposed government regulation.¹¹⁰ I have argued that the relatively more lax discourse standards that presently govern corporate speech to non-shareholders should also be seen as an implicit term in the corporate “nexus-of-contracts.” Altering that default term to provide for a fidu-

¹⁰⁸ 488 A.2d 858 (Del. 1985). In the *Van Gorkom* case several directors of Trans-Union, Inc., a large publicly traded corporation, were found to have violated their fiduciary obligations to the shareholders when they sold the company for too low of a price. *Id.* at 864-70, 888. The directors were held liable not because of the substance of their decision, but because of their failure to become informed and to deliberate as a board about the value of the company and the proposed transaction. *Id.* at 893. (The company was actually sold at a substantial premium over market price, but the sale was pulled off in a very short amount of time, without substantial process). *Id.* at 864-70. *Van Gorkom* establishes the modern standard of directorial liability—there is no liability for substantively bad decisions, but there is liability for failing to deliberate about decisions in an informed, good faith-fashion.

¹⁰⁹ Corporate speech *to* shareholders is presently heavily regulated both by state corporate law and federal securities laws which impose substantial disclosure requirements in connection with the sale of securities; such regulations have so far not been struck down on First Amendment grounds. *See generally* Aleta G. Estreicher, *Securities Regulation and the First Amendment*, 24 GA. L. REV. 223 (1990) (analyzing application of First Amendment to the federal securities laws); Nicholas Wolfson, *The First Amendment and the SEC*, 20 CONN. L. REV. 265, 265-266 (1988) (“examin[ing] the impact of the first amendment on the principal areas of SEC regulation” and arguing that corporate proxy statements, prospectuses, accounting statements, and the like are all methods of expression that should be fully protected by the First Amendment.).

¹¹⁰ *See supra* text accompanying notes 10-14.

ciary discourse standard for corporate speech to workers and consumers should thus present no more daunting a First Amendment problem than does corporate law's present embrace of such a standard for corporate speech to shareholders. This article does not advocate *banning* shareholder primacy corporations or the non-fiduciary speech that such firms might speak to workers or consumers. Instead, it advocates setting the off-the-rack default terms for corporate charters in such a manner that would require directors of publicly traded firms to act as fiduciaries to multiple stakeholders, and conform their discourse to fiduciary standards in all corporate speech about or to such constituents. Shareholders are not entitled to the default terms of shareholder primacy in corporate charters. We should give the support of our public institutions, including our corporate law, securities laws, tax laws, and other public advantage, to such stakeholder equality corporations.

Nevertheless, even if one were to take the view that the First Amendment would forbid the imposition of fiduciary discourse standards on corporate speech *to* multiple stakeholders, given the latitude that the Supreme Court has required for corporate commercial and political speech,¹¹¹ it would seem much more difficult to argue that government cannot prescribe corporate default terms that call for multi-stakeholder governance and concomitant fiduciary-based internal corporate speech *about* shareholders, employers and consumers. These permissible changes to internal corporate discourse would likely be sufficient to spur significant changes over present patterns in the way that corporations speak to non-shareholders, without requiring formal, heavy-hand government enforcement of external corporate speech.

CONCLUSION

Corporate speech contributes to many public policy problems, perhaps most obviously in the area of public health. Through advertising and other commercial speech, firms manipulate consumer perceptions of the risks or other consequences associated with the consumption of their products. Through lobbying and other political speech corporations undermine the development of government regulations which might otherwise curb exploitative corporate conduct in the commercial arena. The shareholder primacy norm in corporate governance is the real culprit behind this dynamic. Corporate law tells directors to run their firms in the interests of shareholders alone, while other stakeholders are left to fend for themselves or else rely on ineffectual external governmental regulation.

¹¹¹ See *supra* text accompanying notes 5-6 and 22.

These corporate speech problems can be solved through the reform of corporate law. In particular, this Article has argued that the pernicious effects of corporate speech can be ameliorated by extending the fiduciary obligations of corporate directors to include non-shareholding stakeholders that are otherwise targets of corporate misconduct, including employees and consumers. A multi-stakeholder corporate governance regime could be institutionalized by altering the discourse norms that underlie and give shape to corporate speech. Such a reform would change the way that corporate directors speak about various stakeholders in their internal deliberations and decision-making, and it would change the way that firms speak to their various stakeholders through advertising and other externally directed speech. This Article has also examined a sampling of discourse norms which scholars, policymakers, and businesspeople might look to when institutionalizing multi-stakeholder corporate governance, including familiar norms that govern personal or fiduciary engagements, as well as fully artificial ones, such as “expressive overdetermination,”¹¹² or “integrity.”¹¹³ Future work in this area may reveal other discourse norms that could improve the social utility of corporate speech by getting corporations to speak about and for the interests of all of their stakeholders, rather than for shareholders alone.

The reforms explored in this Article involve corporation-based, process-oriented solutions to the problems associated with contemporary corporate speech. These prescriptions are anchored in an abiding faith in the fundamental process-orientation of corporate law and a belief that specific solutions to specific corporate problems must come from within our firms, rather than be imposed from the outside by external regulators, or law professors. As the Jensen quote at the start of this Article asserts, “it is only the Board that this in the end can come from.”¹¹⁴ It would be incongruous, therefore, to assert with any specificity what specific policies or innovations should or would emerge from multi-stakeholder corporate governance. Nevertheless, without violating the substantive abstention which both corporate law and corporate law scholarship must always embrace, it might plausibly be imagined that corporate boards charged with the obligation to speak openly, honestly and sincerely about the interests of multiple stakeholders might manage their firms in such a manner as to, for example, forego from artificially increasing the levels of addictive nicotine in the tobacco they grow for use in cigarettes, or they might better alert consumers of junk-food to the adverse health

¹¹² See *supra* text accompanying notes 80-89.

¹¹³ See *supra* text accompanying notes 90-109.

¹¹⁴ *Supra* note 3 and accompanying text.

consequences associated with substantial weight gain, or perhaps they would include more state-of-the-art environmental safeguards when drilling for oil in fragile ecosystems.¹¹⁵ What more to be said can only be said by specific corporate boards, addressing particular circumstances, on behalf of multiple stakeholders.

¹¹⁵ *See supra* note 4 (citing literature on corporate complicity in public health problems including the tobacco epidemic, the obesity problem, and environmental degradation).