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Is Corporate Patriotism a Virtue?

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Abstract:

American social and political discourse attests to widespread concern about whether domestic corporations can be counted on to serve the national interest. This issue is especially pressing in an era of international corporate operations, in which firms can send jobs and tax revenues overseas, devastating local communities even as they boost the prospects of workers in a foreign land, and the interests of capital spread across the globe. Firms founded in America can also disperse across the border productive resources that could be nationalized or otherwise made available to the homeland in times of crisis or war. Indeed, the shareholder primacy norm at the heart of American corporate governance law may compel directors to do these things, or at least consider doing them. This Article assesses the legal status and normative desirability of corporate patriotism.

I. Introduction

In July 2014, President Barack Obama condemned corporations that re-charter from the United States to foreign jurisdictions in order to avoid American tax liability as “economic deserters.”¹ Obama’s scorching epithet echoed and perhaps amplified longstanding social and political concerns about whether domestic corporations can be expected to serve the national interest. This question is especially pressing in an era in which many American corporations have global operations. Such firms can send both tax revenues and jobs overseas, devastating local communities even as they boost the prospects of workers in a foreign land, and the interests of capital spread across the globe.² American firms can also disperse across borders productive resources that could otherwise be nationalized or made available to the homeland in times of crisis or war. Indeed, the shareholder primacy in corporate governance law may compel directors to do these things, or at least consider doing them. This Article assesses the legal status and normative desirability of corporate patriotism.

Patriotism is love for one’s country. Like other kinds of love, patriotism motivates voluntary action. Quintessentially, a patriotic conscience spurs a willingness to

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1. See Jeff Mason, *Obama Rails Against Corporate Maneuver to Evade U.S. Taxes*, REUTERS (July 25, 2014), <http://www.reuters.com/article/2014/07/25/us-usa-tax-obama-inversions-idUSKBN0FT13K20140725>.
 2. There have been international businesses as long as there have been nations. See Linda A. Mabry, *Multinational Corporations and U.S. Technology Policy: Rethinking the Concept of Corporate Nationality*, 87 GEO. L.J. 563, 569 (1999). Nevertheless, before the second-half of the 20th-century, even large corporations typically were chartered, produced, and sold goods in only one country. *Id.* Corporate operations went global in every sense after World War II. By the 1990s, multinational corporations controlled one-third of all private-sector assets. *Id.* In the early 21st-century, multinational corporations have become dominant social, economic, political and cultural forces.

sacrifice in service to one's nation. This is often conceived as putting the nation before one's self-interest. But because people's lives are interconnected, patriotic self-sacrifice may also inevitably involve sacrifice of one's other responsibilities, for example, to a spouse, or child, or perhaps one's business associates, in favor of serving the nation. There are elaborate intellectual debates about the significance and legitimacy of patriotism within academic philosophy.³ But that literature is bereft of any meaningful attention to the role of patriotic conscience on the part of corporations. Corporate law scholarship, on the other hand, showcases thorough intellectual debates about the legitimacy of corporate "social responsibility" generally, but has not addressed the legitimacy of patriotism as an element of corporate social responsibility. This Article seeks to bridge these two literatures, while adding something to each.

Corporations are legal entities, created by government, and made available to anyone who wants to use the corporate form to undertake "any lawful act."⁴ Those who start a corporation have broad latitude to specify how the entity will be run, and for whose benefit.⁵ But the default rule under the most widely used corporate law in the United States, the Delaware General Corporation Law, is that corporations must be managed to serve the interests of the shareholders, and not any other stakeholder group.⁶ The interests of workers, consumers, future generations, animals, or the environment, may be taken into account in corporate governance decisions, but only to the extent that doing so is rationally related to advancing the shareholder interest.⁷ This corporate law command to always put shareholders first

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3. See STEPHEN NATHANSON, *PATRIOTISM, MORALITY, AND PEACE* (1993) (book-length study, summarizing literature); MARTHA C. NUSSBAUM, *FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM* (Joshua Cohen ed., 1993) (collection of essays by leading intellectuals discussing patriotism); see also *infra* Section II (discussing literature).
 4. DEL. CODE ANN. tit. 8, § 102(a)(3) (West 2015) (specifying that "the certificate of incorporation shall set forth . . . the nature of the business or purposes to be conducted or promoted" and stating that "[i]t shall be sufficient to state . . . that the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized.").
 5. See generally David G. Yosifon, *Opting Out of Shareholder Primacy: Is the Public Benefit Corporation Trivial?* (manuscript on file with author) (arguing that shareholder primacy can be altered through private-ordering in the corporate charter).
 6. In the United States, business promoters can purchase a corporate charter from any state they choose. Businesses need not use the corporate law of the state in which they are headquartered or where they otherwise do business. Delaware has dominated the "market" for corporate charters since the early-20th century, for reasons that continue to be debated in the academic literature. Most scholars agree that Delaware dominates because its law serves the interests of shareholders better than available alternatives. See generally John Armour, et. al., *Delaware's Balancing Act*, 87 IND. L.J. 1345 (2012) (reviewing explanations for why Delaware dominates).
 7. Some scholars argue that Delaware's corporate law is ambiguous or ambivalent on the question of whether directors must serve only shareholders, or whether they are permitted to also attend to other interests at the expense of shareholders. See, e.g., LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* (2012); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733

would seem to be in tension with the idea of patriotism, or at least the idea of corporate patriotism. Nevertheless, canonical justifications for prevailing corporate law insist that although directors are required to manage firms only on behalf of shareholders, this rule turns out to be the rule that best serves all stakeholders, and society generally.⁸ This view has not been explicitly tested against the commands of patriotism. This Article undertakes such a test.

To think about corporations operating with a patriotic conscience requires some idea of corporate nationality. This is not a straightforward matter. Is a firm that is chartered in the United States, but produces with workers in China, and sells its products in France, on behalf of Russian investors, an American company? In an important sense, it is. Corporations do not exist without the law and the sovereignty that creates them.⁹ My approach here is to consider firms that are chartered in the United States, under American law, to be American corporations. This is not an exhaustive conception, but it is an important starting place for analyzing the problem of corporate patriotism. If patriotism is an important American value, then we should expect our corporate law to prudently reflect patriotic concerns. And, of course, if patriotism is an important Irish value, then the Irish should expect the issue to be prudently reflected in their corporate law. This justification for using the chartering nation as an approach to assessing corporate patriotism has nothing yet to say about what the substance of that law should be. That question is pursued throughout the course of this Article.¹⁰

(2005). I critique these scholars' claims and insist that shareholder primacy is the law of Delaware in David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181 (2013). While my descriptive view of corporate law is relevant to the present analysis, the arguments pursued here do not depend on the correctness of that position. Therefore, I urge those who doubt that shareholder primacy is the law to continue reading despite our disagreement on that point.

8. See, e.g., STEPHEN BAINBRIDGE, *THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE* (2008).
9. See generally Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387 (2000) (explaining that central attributes of corporations, including legal segregation of corporate assets from the assets of the firm's owners, can only be achieved by affirmative state action).
10. Existing scholarship reveals three basic approaches to designating corporate nationality. The first is by chartering nation, which most scholars and policymakers seem to consider passé, but which I use, and perhaps resuscitate, for the reasons stated in the text. See Mabry, *supra* note 3, at 583–84. The second is the “control test,” which looks at the nation, or nationality, that actually controls the corporation. *Id.* at 566. I pursue control issues *infra*, Section III, when examining the relevance of the nationalities of corporate board members. But there my focus is the nationalities of the board members of *American* corporations, which, again, requires a starting place for what counts as an American corporation, and my starting place is the chartering nation. A third test is the “economic commitment” test, which designates corporate nationhood on the basis of where a firm is most deeply economically enmeshed. See *id.* at 593. Under this test, a firm that is chartered in the United States but owned by shareholders around the world, produces in China, and sells in Europe, would not be considered an American corporation. The type of test that should be used depends on the purpose of the inquiry. *Id.* at

American corporations in a few specific industries (fewer than in the past) are subject to specific charting, ownership, and governance regulations aimed at forcing those firms to operate in ways that serve, or at least do not compromise, American interests.¹¹ Such regulations suggest that the general shareholder primacy story – that firms run for shareholders advance the interests of society as a whole – is not necessarily reliable, or at least has not been swallowed whole, politically.¹² In any event, this Article is concerned with the default law that governs all corporate operations. After all, it may be difficult to know ahead of time what kinds of companies are, or will suddenly become, of acute national importance. And when that knowledge does arrive it may be too late for ordinary political processes, or even extraordinary political processes, to take effect. Consider, for example, that global pharmaceutical companies could become of vital national interest during an international pandemic, which might spread across the globe too chaotically for

593–633. *See also* Lan Cao, *Corporate and Product Identity in the Postnational Economy: Rethinking U.S. Trade Laws*, 90 CAL. L. REV. 401, 453 (2002) (proposing a “domestic participation” test of corporate nationality).

11. *See generally* Detlev F. Vagts, *The Corporate Alien: Definitional Questions in Federal Restraints on Foreign Enterprise*, 74 HARV. L. REV. 1489 (1961) (landmark and still essential study). According to Vagts, anxieties about foreign influence on domestic enterprise trace to the colonial era, but concomitant early-American thirst for capital rendered restrictions on foreign investment in the United States relatively anemic until the early-twentieth-century. *Id.* at 1493. The advent of World War I revealed extensive foreign ownership of American enterprise, as billions were repatriated at the start of the war from the United States to the coffers of allies and enemies alike. *Id.* at 1491. In response, “[t]he 1916-1930 period saw a proliferation of legislation restricting alien participation in such areas as radio, aircraft, shipping, and petroleum production.” *Id.* at 1493. After World War II, the growing wealth of the United States, and its new role as a global investor, dampened concerns about foreign investment in domestic enterprise. *Id.* at 1493. Writing in 1961, Vagts correctly predicted that, “the future portends contraction . . . of restrictive legislation except in defense industries.” *Id.* at 1494. The last several decades have seen relaxation of foreign ownership restrictions in energy, aviation, and communication industries. Nevertheless, there are continuing ebbs and flows. In 1975, President Gerald Ford issued an executive order establishing the Committee on Foreign Investment in the United States (CFIUS), which he charged with making recommendations regarding foreign investment activity that could undermine American interests. *See* Paul Connell & Tian Huang, *An Empirical Analysis of CFIUS: Examining Foreign Investment Regulation in the United States*, 39 YALE J. INT’L L. 131, 135–36 (2014). In 1988, Congress granted the President the power to block foreign investment deemed a threat to national security. *Id.* at 136. This power was delegated to CFIUS, making it a powerful administrative entity. *Id.* at 137. CFIUS’s initial charge was limited to reviewing investment in just a few industries, but its authority continually expanded over ensuing decades, and increased dramatically after the attacks of September 11, 2001. *See id.* at 132–33, 137. CFIUS, and other federal regulations restricting foreign influence in American business are important interventions, but for present purposes they are the exceptions that prove the rule: in the ordinary course, the vast majority of corporations are not subject to laws that encourage or require them to be governed in a manner that privileges American interests over the interests of other nations.
12. *See infra* text accompanying notes 43-58 (explaining and critiquing prevailing justifications for shareholder primacy in corporate governance).

political processes to operate effectively. In such a case, a patriotic company might direct emergency resources disproportionately to the United States. Absent a patriotic conscience, it might not.¹³ The “time of crisis” angle may just provide a salient way of thinking about how we want corporate decision-making to operate at more routine margins. We may want corporations to regularly operate with a patriotic conscience, or to behave patriotically when the same profit can be made advancing American interests as can be made favoring the interests of some other country, or no country.¹⁴

This Article proceeds as follows. Section II begins with a discussion of the normative legitimacy of patriotism generally. To know how we want our corporate law to intersect with patriotic impulses, we must first evaluate whether patriotism is something to be valued or avoided. With that philosophical review as background, Section II concludes by assessing more deeply the relationship between prevailing corporate governance law and concerns about patriotism. Section III examines the mechanics of corporate patriotism, and begins by emphasizing the intersection between patriotic conscience and the composition of corporate boards of directors, since it is the board that controls the corporation. That section then briefly examines reforms that might be pursued to either more intensely restrain corporate patriotism, or give patriotic conscience greater reign in corporate operations. Section IV gives a conclusion.

13. See Robert J. Rhee, *Fiduciary Exemption for Public Necessity: Shareholder Profit, Public Good, and the Hobson's Choice During a National Crisis*, 17 GEO. MASON L. REV. 661 (2010). Rhee explores the possibility of corporate law embracing a fiduciary “safe harbor” that would allow corporate directors to deviate from shareholder primacy in times of crisis, and he uses a pandemic as an example of such a crisis. Rhee’s outstanding article does not explore the relationship between his idea of “fiduciary exemption” and patriotism, i.e., which country a corporation should favor, if any, in times of international crisis.

14. This Article is meant as a general exploration of the legitimacy of corporate patriotism, and is thus intended to meaningfully inform thinking about these issues from any national perspective. Nevertheless, my presentation here sometimes focuses on American interests in vindicating or repudiating corporate patriotism, and sometimes even uses the pronoun “we” in the inquiry. I do this with reservation, but not without reasons. First, to write intelligently about corporate patriotism we must write about corporate law, and to write about corporate law we must write about a body of corporate law. My expertise is on the law of Delaware, which is the most influential corporate law in the United States, and so this inquiry is undertaken in that legal context. Second, I am an American, and part of what motivates this inquiry is my desire to better understand what I, and my countrymen and women, should think about corporate patriotism as it relates to our own national interests. Third, prose about patriotism, a specific kind of love, cannot clearly express what it means to say when the words must always be deployed at a level of generality and abstraction. Despite this, I hope that the analysis developed here will resonate with and be relevant to scholars and citizens of other nations who are struggling to think through the legality and desirability of corporate patriotism.

II. The Normative Valence of Patriotism and Corporate Law

To know if corporate patriotism is desirable, we must first assess whether patriotism itself is normatively defensible. Such an assessment is not sufficient to vindicate corporate patriotism, but it is necessary.

A. *Patriotism as Vice, Corporate Law as Virtue*

Patriotism is pervasive. In mainstream political discourse it operates as orthodoxy and assumption. It abides in the conscience of most ordinary men and women, to different degrees, and in different ways.¹⁵ Yet even among those who recognize within themselves a patriotic sentiment, proudly express it, and believe themselves willing to act on it, the impulse is suspect. The patriotic conscience is haunted by the worry that it may be stupid or corrupt, or both. Stupid, because, except for immigrants, one's homeland is an accident of their birth. It seems foolish to base a special regard, a motivating affection, on mere happenstance. This happenstance might still generate a legitimate patriotism if one could claim that their country really is the most deserving of nations, but judgement about which country is better or best are, of course, infected with motivated reasoning and subjectivity as to what counts in national comparisons.¹⁶

Worse than being stupid, patriotism may be corrupt, and corrupting. It is a dangerous kindle, threatening always to blaze into discrimination, xenophobia and imperialism.¹⁷ Even short of such horrors, it still seems morally dubious to favor the prospects of one's countrymen (countrypeople) over the people of other countries, simply on the basis of national identity. Being patriotic does not require that a person be prepared to go to any lengths for their nation, or be willing to treat foreigners in any way, no matter how rapacious, to serve one's homeland. But

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15. The World Values Survey finds patriotism to be widespread among the peoples of the world, with Americans among the most patriotic. "The United States indeed has the highest percentages of 'very proud' nationals over 25 years [of survey data]." Jerome Karabel & Daniel Laurison, *An Exceptional Nation? American Political Values in Comparative Perspective* 22 (Institute for Research on Labor and Employment, Working Paper No. 136-12, 2012), available at <http://irle.berkeley.edu/workingpapers/136-12.pdf>. Another group of researchers concludes that, generally, "Europe and Asia are less patriotic than the Americas, Africa, and the Middle East." Adair Morse & Sophie Shive, *Patriotism in Your Portfolio*, 14 J. FIN. MARKETS 411, 414 (2011).
 16. See Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L. REV. 1, 102-05 (2004) (reviewing social psychological research on human decision-making, including motivated reasoning and confirmation bias).
 17. George Orwell distinguished patriotism from nationalism, insisting that the former was characterized by "devotion to a particular place and a particular way of life, which one believes to be the best in the world but has no wish to force on other people," while "[t]he abiding purpose of every nationalist is to secure more power and more prestige . . . for the nation." George Orwell, *Notes on Nationalism*, 1 POLEMIC 1 (1945), available at http://orwell.ru/library/essays/nationalism/english/e_nat.

patriotism does seem to involve a willingness to privilege one's own nation and treat people of other nations differently at some significant margin. And that is the margin at which patriotism is an important moral problem. Enlightened, liberal morality requires us to treat all people equally, and to consider them to be equally valuable and worthy, unless they have shown themselves for some good reason not to be.¹⁸ Patriotism cannot even be regarded as just another kind of preference which should be respected as a personal choice of the "there's no accounting for taste" variety. For, in this assessment, "patriotism is like racism."¹⁹ From the point of view of liberal morality, then, patriotism surely is a vice. It should be actively repudiated, and certainly not patronized by legal designs.

If patriotism by natural people is pernicious, then it seems unlikely that corporate patriotism would be desirable. We would do well to organize a corporate law that ignores or excludes it. This we appear to have done. At least formally, shareholder primacy in corporate governance precludes corporations from acting with a patriotic conscience.²⁰ If patriotism is a vice, then the exclusion of patriotic conscience from corporate operations counts as a morally desirable feature—a bonus feature—of shareholder primacy in corporate governance law.

Consider here an illustrative episode involving the response of American corporations to the OPEC oil embargo of 1973-1974.²¹ In retaliation for western support of Israel during the Arab-Israeli War, Arab nations threatened to nationalize the property of major oil companies if they supplied oil to the United States, several European countries, or South Africa. American corporations complied, which was perhaps not in itself unpatriotic, given that the choice was comply or be nationalized by foreigners. However, the Arab nations imposing the boycott did not seek to control the way companies distributed oil that they obtained from other parts of the world. American oil companies could have privileged American interests and shipped all available oil to the United States. Indeed, the federal government was "urging U.S.-origin oil companies to bring as much oil as possible into the United States."²² Or, these corporations could have sold the oil to

18. Most people consider it morally acceptable to privilege one's own family, or at least one's own children, over the interests of strangers. See, e.g., ADAM SWIFT, HOW NOT TO BE A HYPOCRITE: SCHOOL CHOICE FOR THE MORALLY PERPLEXED PARENT (2003) (examining the legitimacy of, and moral limits to, parents' preferences for their own children). But this begs the question: do compatriots deserve to be treated specially, like family, or is it capricious to treat them better than one treats other kinds of strangers?

19. See Paul Gomberg, *Patriotism is Like Racism*, 101 ETHICS 144, 144 (1990).

20. But see *infra*, text accompanying notes 68-70 (discussing the problem of "patriotic slack").

21. See Mabry, *supra* note 2, at 620-22 (relying on STAFF OF S. COMM. ON MULTINATIONAL CORPORATIONS, 93D CONG., REP. ON MULTINATIONAL OIL CORPORATIONS AND U.S. FOREIGN POLICY 67 (Comm. Print 1975)).

22. Mabry, *supra* note 2, at 622 n. 236.

the highest bidder. Instead, what they decided to do was apportion the oil equally among countries affected by the embargo.²³ That decision could be made to fit easily into a “just so” shareholder wealth maximization story, since the firms may have been aiming to maintain good relations across their customer base in anticipation of a return to normal business dynamics.²⁴ But it surely was not patriotic, in the sense of putting America first, especially in a time of crisis. In effect, it was a choice that treated all the peoples of the world as being of one dignity. If patriotism is a vice, then shareholder primacy may be called virtuous, or at least virtue’s servant.

There is an ironic or “strange bedfellows” implication to this analysis. I speculate that the kind of people who regard themselves as strong proponents of universal humanism, and who are generally suspicious of the legitimacy of treating people differently on the basis of nationality, might, as a demographic matter, also be the kind of people who are generally suspicious of the shareholder primacy norm in corporate law. But if shareholder primacy excludes, and undermines, patriotic conscience in favor of a more even-handed treatment of people across the planet, then proponents of universal humanism might be more attracted to shareholder primacy law than they would have thought. Irony being a two-way street, proponents of shareholder primacy in corporate governance might be more committed to the pursuit of universal humanism, and the denigration of national difference, than they would have expected.

B. Patriotism as Virtue, Corporate Law as Vice

There is, however, a sophisticated tradition in moral philosophy which vindicates the widespread human tendency to be patriotic, and insists that patriotism is a virtue. As we approach these arguments, we should perhaps apply a kind of heightened scrutiny before we are willing to accept them. It might be ethically desirable to start with a presumption against the legitimacy of a moral outlook, like patriotism, which sanctions treating people differently on the basis of inherited and largely immutable characteristics. We should demand compelling arguments in favor of patriotism if they are to overcome this presumption.²⁵

A plausible approach to justifying patriotism was supplied by the great moral

23. *Id.* at 622.

24. *Cf.* RUDYARD KIPLING, *JUST SO STORIES* (1902) (fantastical stories purporting to explain how different animals came to have their unique attributes).

25. This heightened standard of review for “suspect classifications” is routine in legal analysis. *See* Richard E. Levy, *Political Process and Individual Fairness Rationales in the U.S. Supreme Court’s Suspect Classification Jurisprudence*, 50 *WASHBURN L.J.* 33, 35 (2010) (reviewing and assessing contours of suspect classification analysis). But it does not appear to be conventional in moral philosophy.

philosopher Alasdair MacIntyre, in his seminal lecture, “Is Patriotism a Virtue?”²⁶ MacIntyre conjectures that the liberal conception of morality, which I summarized in the previous sub-section, mistakenly thinks of morality as something like mathematics, which can be thought, taught, and internalized without reference to the particulars of human culture and experience. To the contrary, whether or not moral principles are themselves eternal and objective, becoming a moral person always involves specific, subjective experience. As a matter of human reality, it may turn out that “an essential characteristic of the morality which each of us acquires [is] that it is learned from, in, and through the way of life of some particular community.”²⁷ While it is true that the moral principles of most cultures will “resemble and sometimes be identical”²⁸ with each other, it is nevertheless also true that learning to embrace those principles must be grounded in experience of and devotion to a distinct “social order.”²⁹ It is not so much that our moral communities lead us to different moralities, it is that a special commitment to our community, a sense of identification with it, the kind of identification that spurs a willingness and desire to serve its interests and sacrifice for it, is psychologically necessary for any of us to learn any morality.³⁰ If this is true, then patriotism is not only acceptable, it is commendable, and even imperative, if humans are to be moral creatures.

It may be suggested that even if MacIntyre shows that patriotism is necessary for moral development, it does not follow that patriotism must be, or can be, a component of a resultant, fully developed morality. Once matured, a person may be able to push away the scaffolding of patriotic sentiment, in order to regard and treat all humans equally. But I think that suggestion is not consistent with MacIntyre’s conjecture. If the morally mature person looks past her own community, seeing and treating all others in a scrupulously universalist fashion, then her own conduct threatens to undermine the maintenance of the moral community, replete with specific devotion, on which moral development for others depends. By acting in a morally “superior” fashion herself, the supposedly mature universalist undermines the conditions of morality as such.³¹

MacIntyre’s defense of patriotism implies that parochialism is necessary to achieve anything that comes close to what we want for humanity when we otherwise

26. See ALASDAIR MACINTYRE, *IS PATRIOTISM A VIRTUE?: THE LINDLEY LECTURE* (1984). The title of this Article is an homage to MacIntyre’s influential lecture.

27. *Id.* at 8.

28. *Id.*

29. *Id.* at 9.

30. This approach to patriotism is consonant with the laudable trend in legal scholarship which looks to find grounding in a realistic assessment of human cognition and behavior, and expose important limitations of methods attached to more abstract conceptions of humanity, such as a simple “rational actor” model. See generally Hanson & Yosifon, *supra* note 16, at 10.

31. I am grateful to Robert Shanklin for his interlocution with me on this issue.

celebrate universalism. Embracing patriotism as a virtue will allow people the world over, in particular nations, to flourish better than they otherwise could without the morality-making powers of patriotism. Put differently, it may be that in the “long-run” patriotism best serves the interests of all of humanity. Yet even if that is true, it is also still true that along time horizons other than the “long-run,” and for particular people, perhaps whole generations, patriotism will sanction narrowly construed illiberalism. This may be a regrettable, hard-hearted reality, especially, for example, when we are talking about the allocation of scarce resources. And we are always talking about the allocation of scarce resources.³²

But even if patriotism is necessary, it need not be, indeed, it must not be, dogmatic. A blind devotion to one’s country, an unwillingness to see its flaws and faults, would make national pride a childish fiction, instead of a rich source of community-based morality-making. Undoubtedly, a nation’s critics are often just as motivated by patriotic love as are a nation’s boosters. Native critics of America, for example, often feel and express themselves in terms of shame or embarrassment. These are emotions that could only be felt by a patriot, never by an enemy or a neutral. You cannot be disappointed in something that you do not regard with a special tenderness.³³ Critical assessment of one’s social order is evidence that the morality making powers of patriotism are working. According to MacIntyre, instead of blindly accepting one’s nation as it is or has been, what a morally functional patriotism requires is commitment to the nation “as a project.”³⁴

MacIntyre’s lecture was a compelling exposition of the possible legitimacy, or even necessity, of parochialism in human morality. But there is little in it that explains why the nation should or must describe the contours of that parochialism. Martha Nussbaum, also a proponent of patriotism, does a better job of explaining that when she argues that the nation is the largest organizational structure that can plausibly sustain the sentiments of devotion that are necessary for the kind of community-grounded, efficacious morality that MacIntyre describes.³⁵ For Nussbaum, patriotic

32. The “long-term” is not always a satisfying time-horizon for social policy. It is a repugnant time-horizon, for example, for people who are starving now. Indeed, “in the long run, we are all dead.” JOHN MAYNARD KEYNES, *A TRACT ON MONETARY REFORM* 80 (1923). See David G. Yosifon, *The Social Relations of Consumption: Corporate Law and the Meaning of Consumer Culture*, 2016 BYU L. REV. 101 (2016) (critiquing time-horizon ambiguity in the work of defenders of shareholder primacy).

33. This is succinctly expressed by Leonard Cohen in his 1992 anthem, *Democracy*: “I love the country but / I can’t stand the scene.” LEONARD COHEN, *Democracy, on THE FUTURE* (Sony Records, 1992).

34. MACINTYRE, *supra* note 26, at 13.

35. See Martha C. Nussbaum, *Teaching Patriotism: Love and Critical Freedom*, 79 U. CHI. L. REV. 213 (2012) [hereinafter Nussbaum, *Teaching Patriotism*]; see also MARTHA C. NUSSBAUM, *POLITICAL EMOTIONS: WHY LOVE MATTERS FOR JUSTICE* 214 (2013) [hereinafter NUSSBAUM, *POLITICAL EMOTIONS*]. Curiously, unlike most contemporary scholars writing about patriotism, Nussbaum does not address her arguments to MacIntyre’s treatment. Nevertheless, her contributions build

love constitutes a kind of sweet spot at the intersection of size and effectiveness. Smaller groups, like families, are highly motivating, but too small in number to have substantial cooperative utility. All of humanity is a nice size,³⁶ but requires too much abstraction to induce more than “watery motivation” to pursue collective projects.³⁷ The nation is a community that can be plausibly imagined, and it is a potent kind of imagining.³⁸ More than potent, it is also at least potentially a politically legitimate way of orchestrating a moral community (if democratically organized, for example).³⁹

Yes, patriotism can be “the last refuge of a scoundrel,”⁴⁰ masking self-serving conduct and spurring mistreatment of out-groups. But Nussbaum thinks the danger can be managed, and must be managed. It is not plausible, she insists, to think that human society can be organized in strictly rational ways. Emotion is going to operate in civic life. It is better to confront that reality directly, so that emotion’s constructive aspects can be harnessed, and its destructive tendencies contained:

If people interested in relief of poverty, justice for minorities, political and religious liberty, democracy, and global justice eschew symbol and rhetoric, fearing all appeals to emotion and imagination as inherently dangerous and irrational, people with less appetizing aims will monopolize these forces, to the detriment of democracy, and of people.⁴¹

If, as philosophers like MacIntyre and Nussbaum insist, patriotism is a virtue, then there may be legitimate grounds to condemn the exclusion of patriotic conscience from corporate governance law. It may be appropriate to worry that large American corporations with international operations, in their relentless pursuit of profit, will make decisions that harm the nation, or otherwise undermine the conditions upon which patriotism may flourish.

C. Patriotism and Canonical Corporate Theory

Proponents of the shareholder primacy norm in corporate governance would be

nicely on MacIntyre’s framework.

36. Nussbaum, *Teaching Patriotism*, *supra* note 36, at 224 (“Some believe that the very idea of a nation is a primitive one, to be superseded ultimately by the universal love of all humanity.”).
37. *Id.* at 232. Nussbaum’s use of “watery” motivation draws on Aristotle’s critique of the idea, discussed in Plato’s Republic, of raising children by the polity, rather than in families. *Id.* (citing ARISTOTLE, *THE POLITICS OF ARISTOTLE* 1262b (Ernest Baker trans., Oxford 1958)).
38. See Richard D. Parker, *Homeland: An Essay on Patriotism*, 25 HARV. J. L. & PUB. POL’Y 407, 427 (2002) (designating patriotism as a “precious resource”).
39. NUSSBAUM, *POLITICAL EMOTIONS*, *supra* note 36, at 224 (“[E]ven in a world dedicated to the pursuit of global justice, the nation has a valuable role to play, as the largest unit we know so far that is sufficiently accountable to people and expressive of their voices.”).
40. James Boswell attributed this enduring quip to Dr. Johnson in Boswell’s, *THE LIFE OF SAMUEL JOHNSON* 448 (1791).
41. NUSSBAUM, *POLITICAL EMOTIONS*, *supra* note 36, at 256.

quick to argue (they are never slow to argue) that even if patriotism is a virtue, it does not necessarily follow that patriotism should be pursued through corporate operations. For these thinkers, patriotism may be like environmentalism: an important goal, but one better achieved through mechanisms other than corporate governance. Indeed, it may be that excluding patriotism from the corporate domain is crucial to supporting its greater flourishing in society generally. Shareholder primacy may be essential to creating the material prosperity that can support humanity's pursuit of such ennobling projects as patriotism and morality. More subtly, Stephen Bainbridge argues (in a different, but relevant context) that American corporations, made powerful by shareholder primacy, stand as an effective bulwark against "the slaving maw" of Leviathan,⁴² keeping alive a vital civil society that stands between the people and a too-powerful, commanding State.⁴³ This space of voluntary action is where authentic patriotism flourishes. These claims could be restated as the view that patriotism is ultimately best served by corporations behaving without regard to a patriotic conscience. It replicates the canonical claim by advocates of shareholder primacy that corporations ultimately serve society best by focusing only on shareholder value, and behaving without specific regard for any competing non-shareholder interests, or other moral aims.⁴⁴ We must review that canonical claim before we can assess its application to the question of corporate patriotism.⁴⁵ It goes like this:

Capital is scarce, and its investment is crucial if we are to create jobs and make consumer goods widely available. Shareholder primacy in corporate governance gives owners of capital the incentive they need to invest in diverse corporate operations over which they will have little control, and from which they will have no chance of exit unless they can sell their shares to a willing buyer. Workers and consumers do not need attention in corporate governance, because they are well-positioned to monitor their own interests in corporate operations. Workers can directly, or through unions, negotiate the terms of their employment at the factory. Consumers can manage their corporate involvement by examining the quality and suitability of goods on offer. Unlike locked-in shareholders, workers and consumers can credibly, continuously threaten to stop making their contributions to corporate operations if they are unsatisfied with the returns the firm is providing them. To keep good workers, firms must offer competitive wages. To attract additional

42. Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 895 (1997).

43. *Id.* at 897.

44. See, e.g., BAINBRIDGE, *THE NEW CORPORATE GOVERNANCE*, *supra* note 8.

45. See generally Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1 (2004) (summarizing and critiquing justifications for shareholder primacy in corporate law).

consumer dollars, they must provide desirable goods at a good price. Since shareholders only receive profits, in the form of dividends, after consumers have received their goods and workers have been paid their wages, defenders of shareholder primacy insist that all stakeholders are necessarily served when directors aim to improve the lot of shareholders.

Now, realistic proponents of shareholder primacy do admit that once firms are charged with profit-maximization, they will duly pursue those profits wherever they can be found, including by dealing sharply with non-shareholders in ways those groups are unable to monitor or detect. Most obviously, firms may skimp on worker or consumer safety when they can get away with it. Or they may pollute the environment to reduce the costs of production and increase profitability. Despite these social vulnerabilities, the canonical view is that corporate governance should still not deviate from its efficient, effective focus only on generating wealth for shareholders. Instead, advocates of shareholder primacy insist that directors should be made to pursue the goal of shareholder profit subject to external regulations that the government sets out to protect non-shareholders (e.g., labor laws, consumer protection statutes, and environmental laws), thereby forcing firms to pursue profits in non-exploitative ways. This commitment to external regulation sees no need, and leaves no quarter, for other values, such as patriotic conscience, in corporate governance.

I have argued elsewhere that this account of shareholder primacy does not add up, even on its own terms.⁴⁶ My critique has focused on the implausibility of relying on external government regulation to curb the exploitative impulses that shareholder primacy in corporate governance creates. Corporations charged with pursuing profits for shareholders will do so not only by exploiting non-shareholders in the market, but also by operating within the political domain to stunt the development of profit-disrupting regulations that would impede such exploitation. This can take the form of stymieing protective regulations that would otherwise constrain profitability, or it may involve pursuing artificially onerous regulations that favor incumbent firms over new entrants, reducing competition that would otherwise benefit workers and consumers.⁴⁷

Again, mainstream corporate theorists do accept that corporations will endeavor to capture regulation in pursuit of profit. But they still want corporations only to focus on shareholders. What should be done, shareholder primacists used to insist (from their last refuge) is that corporations should be kept out of the political arena, thus allowing the government to set up protective regulations free of corporate

46. See, e.g., David G. Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social Responsibility After Citizens United*, 89 N. C. L. REV. 1197 (2011).

47. See *id.*

influence. Before *Citizens United v. Federal Election Commission*,⁴⁸ that was an intellectually defensible position. But now it is implausible. *Citizens United* holds that corporations have a constitutional right to political engagement. As long as *Citizens United* is good constitutional law, shareholder primacy will be bad corporate theory.⁴⁹ The legitimacy of shareholder primacy in corporate governance depends upon a robust regulatory system that is insulated from corporate influence.

This public-choice critique of the shareholder primacy model has special resonance in the analysis of corporate patriotism. Firms may work to undermine labor, consumer, or environmental restrictions otherwise aimed at protecting American interests, for the sole purpose of serving their shareholders. While it may be said that government action, operating always by command, cannot contain the element of volunteerism necessary to be called patriotic, political activity can be patriotic. Indeed, political activity is illegitimate unless it is patriotic. The “norm of public reason” requires political speakers to restrain private, selfish interests in favor of advancing arguments, to the public and when directly lobbying government, that reflect sincerely held conceptions of the public good.⁵⁰ But corporations do not speak in such a fashion. They only speak from a motive to serve shareholder interests. Indeed, if corporations do speak to serve the public interest, that speech is illegitimate from a corporate law perspective, at least when such speech conflicts with the interests of their shareholders. Firms may certainly claim there is harmony between the public interest and the policies they pursue on behalf of shareholders, but even where this is so, the corporate speech can only be called public-spirited by coincidence. Non-corporate persons may also attempt to capture governmental machinery for private gain, but it is not morally legitimate for them to do so, and the political activity of natural people is not necessarily privately motivated, as it is with corporations.⁵¹ Shareholder primacy in the political arena disrupts the already fragile operation of the norm of public reason, which is a crucial piece of the machinery of patriotism.⁵²

48. 558 U.S. 310 (2010).

49. *See id.* at 1199.

50. *See* Dan Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 143-45 (2007) (describing, critiquing, and offering an alternative to the norm of public reason).

51. Of course, this analysis only applies to (that vast majority of firms) that operate under the default shareholder primacy governance norm. *See* Yosifon, *Opting Out of Shareholder Primacy*, *supra* note 6.

52. It may be that the obviousness of this feature of corporate political speech exposes the implausibility of the norm of public reason in political discourse more generally. We see that corporations only speak for private interest, and we then assume, maybe correctly, that natural people speak the same way. Dan Kahan argues that the norm of public reason is implausible as a cognitive matter, in that motivated reasoning always infects our advocacy. Pretensions to complying with the norm only antagonize our interlocutors, since they know we are not really abiding by it. *See* Kahan, *supra* note 51. Kahan proposes a creative, psychologically plausible,

It can now be seen that there is a conflict between the canonical account's call for the creation of external government regulation to restrain the predictable overreach of shareholder primacy in corporate operations, and Professor Bainbridge's claim, noted above, that one of the benefits of shareholder primacy is that it helps create powerful corporations that stand as a shield protecting civil society, where true patriotism lives, against an otherwise encroaching Leviathan.⁵³ Supporters of shareholder primacy (including Bainbridge himself) recognize that shareholder primacy in corporate governance incentivizes exploitative, externalizing corporate operations, which in turn requires the maintenance of a large, powerful regulatory state to restrain such abuses. A large state is implied by shareholder primacy, not negated by it. And this large state, critics of shareholder primacy insist, cannot be relied upon to do what shareholder primacy advocates call on it to do. Instead, shareholder primacy critics expect the state to be used by corporations to extend their pursuit of profits on behalf shareholders. On this view, the state becomes a sword of the corporation.

More recently, Bainbridge has argued that shareholder primacy in corporate governance would still be desirable even in a "Night Watchman State," where the role of government was limited to contract-enforcement and policing. This is pitched as a reply to the argument that firms will work to capture government in order to more effectively serve shareholder interests, rather than leaving government to curb corporate abuse. If such a threat is real, Bainbridge reasons, then we should do without big government altogether, neither relying on it to curb corporate abuse, nor leaving it vulnerable to corporate capture.⁵⁴

This move has two basic failings. First, it whistles past the problem that shareholder-primacy advocates had long admirably admitted, that shareholder-primacy firms will have the incentive and often the power to exploit non-shareholding stakeholders. The "Night Watchman" argument retreats to the less desirable position which claims that such exploitation is worth leaving unremedied in light of the gains that shareholder primacy otherwise provides to society. Second, if Citizens United is to remain good constitutional law in the Night Watchman State (and Bainbridge is a defender of the Citizens United decision), then the night

philosophically acceptable, but unfortunately named alternative to the norm of public reason, which he calls "expressive over-determination." *Id.* The broader reform of political discourse norms would require a reform of the way corporations speak to and about their non-shareholding stakeholders, which I explore in David G. Yosifon, *Discourse Norms as Default Rules: Structuring Corporate Speech to Multiple Stakeholders*, 21 HEALTH MATRIX 189, 191-92 (2011).

53. See *supra* text accompanying notes 42-43.

54. See Stephen M. Bainbridge, *Corporate Social Responsibility in the Night Watchman State*, 115 COLUM. L. REV. SIDEBAR 39, 52-53 (2015).

watchman will not be kept to her limited duties for long. Shareholder primacy firms will recognize that profits can be made by pushing for the growth of government and influencing its operation in the service of shareholders. The Citizens United State will swallow the Night Watchman State with a shareholder-centric Leviathan.⁵⁵

Profit-maximizing decisions to operate corporations internationally may also have other adverse collateral effects on the dynamics of patriotic conscience. It could plausibly be argued that international corporate operations threaten to marginalize the importance of national identity, and depth of patriotic sentiment, among people generally. International corporations disaggregate ownership and control, and production and consumption, across national borders. Where the national connection between production and consumption is severed, an important relationship that might otherwise form the basis of patriotic sentiment is destroyed.⁵⁶ I have in mind the community that is created by the production of food in the American heartland, and its consumption on the American coasts. The production of durable goods in Michigan, for consumption in Mississippi. As production and consumption are separated across national borders, the patriotic imagination thins.⁵⁷

In summary then, if patriotism is a virtue, corporate law may be a vice. Shareholder primacy excludes patriotic conscience from the boardroom, leading firms to make decisions without regard to the national interest. For firms operating in the international arena, this may often cause them to make decisions that undermine American interests or advance the interests of competing nations. Government regulation cannot be counted on to curb such anti-patriotic corporate abuses, in part because shareholder primacy corporations will operate politically to stunt regulatory efforts, in continued service to their shareholders. Such political activity also pollutes the waters of legitimate political discourse with strictly private expression, poisoning a crucial but fragile environment in which authentic

55. See David Yosifon, *The Citizen's United Gambit In Corporate Theory: A Reply to Bainbridge on Strine and Walter* 6 (Santa Clara Sch. Law, Working Paper No. 4-14, 2014)

56. See Yosifon, *The Social Relations of Consumption*, *supra* note 32.

57. The expansion of consumer culture and the rise of global corporate operations has perhaps made patriotism a more routine issue in the lives of ordinary people than it was in earlier eras. For previous generations, the question of patriotism emerged as a decisional matter only episodically, for example, when deciding whether to volunteer for military service in times of war. In previous eras, consumer goods, being generally nationally produced, did not implicate the question of national advantage. "Marginal patriotism," if I may, is a feature of consumer culture under global capitalism. Consumers must continually decide whether to favor American or universal interests in their consumption behavior. In this way patriotism becomes a monetized, routine problem, instead of an exceptional encounter that is not reducible to dollars. Consumers may prefer marginal patriotic decisions to be made "in-house" at the level of corporate governance, rather than serially struggling with them "in the market." See David G. Yosifon, *Towards a Firm-Based Theory of Consumption*, 46 WAKE FOREST L. REV. 447, 460 (2011).

patriotism may otherwise be nurtured. By disaggregating the corporate nexus of ownership, control, production, and consumption across national borders, firms with international operations also compromise the conditions of community-identification that are necessary to the effective operation of patriotic impulse.

Before concluding this sub-section, a special word is in order about the patriotic implications of corporate “tax inversions,” the subject that so raised the ire of President Obama in the speech referenced at the start of this Article.⁵⁸ The shareholder primacy norm may from time-to-time compel directors, acting in good faith, to pursue fundamental changes in corporate structure, including re-chartering from the United States to some foreign jurisdiction in order to obtain more favorable tax treatment.⁵⁹ Tax-inversions fundamentally alter the relationship between a corporation and the nation in which it was created. When a corporation re-charters in Ireland or Singapore, it no longer relies on Delaware or the United States for its existence. While there is a hallowed tradition in American legal and popular discourse insisting on the propriety of lawful tax avoidance,⁶⁰ this latitude would seem to stop at the border. Nobody would consider it un-American to move from New Jersey to Texas to find a more favorable tax situation. But a person who renounces American citizenship and moves to another country for tax purposes has, in our morality, some pretty fancy explaining to do if they want to situate themselves still as an American patriot.

Ironically, however, corporate tax inversions may actually mitigate the problem of corporate influence in the American political process, thereby giving clearer reign to the play of patriotic sentiment by natural persons in the political process, and making shareholder primacy in firm governance more theoretically sound. When an American corporation re-charters in another country it falls subject to federal law

58. See *supra* text accompanying note 1.

59. See David G. Yosifon, “Corporate Tax Ethics,” *The Corporate Social Responsibility Podcast* (2014), <https://itunes.apple.com/us/podcast/corporate-social-responsibility/id807976212?mt=2> (interview with executives at Flextronics, Inc., a global manufacturing concern, regarding the ethics of corporate tax inversions).

60. See *Helvering v. Gregory*, 69 F.2d 809, 810-11 (2d Cir. 1934). (“Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one’s taxes.”) (Hand, J.); *Commissioner v. Newman*, 159 F.2d 848, 850-51 (2d Cir. 1947) (“Over and over again courts have said that there is nothing sinister in so arranging one’s affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant.”) (Hand, J., dissenting). Hand was also the author of one of the most celebrated texts explaining and celebrating American patriotism: *The Spirit of Liberty* (1944). See *infra* text accompanying note 113 (discussing this essay).

that forbids foreign corporations from making expenditures in connection with local, state, or federal elections in the United States.⁶¹ And this kind of restriction may still be constitutionally permissible. The majority in *Citizens United* specifically noted that its holding “need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation’s political process.”⁶² The speech restriction that was before the Court in that case was “not limited to corporations or associations that were created in foreign countries or funded predominately by foreign shareholders. It therefore would be overbroad even if we assumed, *arguendo*, that the Government has a compelling interest in limiting foreign influence over our political process.”⁶³

To deepen this irony, however, consider that legitimate patriotism may require that foreign corporations be given the right to participate in American political discourse, especially if American corporations are doing so. Nussbaum rightly insists that because patriotic impulses will always threaten to unjustly malign foreigners, a robust patriotism must have in place free speech guarantees so that such foreigners can express and defend themselves, and constrain that malignant tendency.⁶⁴ A righteous patriotism must submit to the constraint of foreign influence.

III. Patriotism and the Corporate Board

The first part of this Article was concerned with assessing whether corporate

61. See 52 U.S.C. § 30121 (2015) (“unlawful for (1) a foreign national . . . to make- (A) a contribution or . . . [an] independent expenditure . . . for an electioneering communication.”). The statute goes on to state that “Foreign national” means “(1) a foreign principal, as such term is defined by section 611(b) of title 22.” *Id.* Section 611(b) of Title 22 defines a “foreign principal” as, *inter alia*, “(3) a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.” 22 U.S.C. § 611 (2015).

62. *Citizens United v. Fed. Elections Comm’n*, 558 U.S. 310, 362 (2010) (citing 2 U.S.C. § 441e) (contribution and expenditure ban applied to “foreign national[s]”).

63. *Id.* It is probably best to read Kennedy’s statement as genuine reservation of the issue, rather than a winking suggestion that he would be open to restrictions of this sort. See also Matt A. Vega, *The First Amendment Lost in Translation: Preventing Foreign Influence in U.S. Elections After Citizens United v. FEC*, 44 LOY. L.A. L. REV. 951, 1007 (2011). Justice Stevens addressed the issue of foreign corporations several times in his *Citizens United* dissent. In sardonic tones, he insists that the view of the First Amendment adopted by the majority would also protect speech by foreign firms:

[O]ur colleagues’ assumption that the identity of a speaker has *no* relevance to the Government’s ability to regulate political speech would lead to some remarkable conclusions. Such an assumption would have accorded the propaganda broadcasts to our troops by “Tokyo Rose” during World War II the same protection as speech by Allied commanders. More pertinently, it would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans.

Citizens United, 558 U.S. at 424.

64. See Nussbaum, *Teaching Patriotism*, *supra* note 36, at 249-50.

patriotism is desirable or pernicious. This section is concerned with exploring how we might get more corporate patriotism, if we desire it, or how we might better restrain it, if we do not.⁶⁵

As a matter of corporate law, and sometimes even reality, “the business and affairs of every corporation . . . [is] managed by or under the direction of a board of directors.”⁶⁶ Therefore, the place to focus (a crucial place to focus) in assessing the threat or promise of patriotic conscience in corporate operations is the boardroom.

A. *Director Nationality and Corporate Patriotism*

Directors, like all humans, have limited cognitive capacity and ethical restraint.⁶⁷ While the law requires directors to manage firms solely in the interest of shareholders, they do not always do so. Sometimes they serve their own pecuniary or non-pecuniary interests, and sometimes they serve the interests of non-shareholding stakeholders.⁶⁸ If we assume that directors, like most people, are patriotic, then we must assume that directors’ patriotic conscience will at some margin influence corporate decision-making. It may even happen (or most often happen) subconsciously, or in ways that directors, through motivated reasoning, are able to subjectively experience as being consistent with their fiduciary obligations. This “patriotic slacking” may be socially desirable or it may be pernicious, depending on your assessment of the claims reviewed in the previous section, but either way, it compels us to think about the consequences of the nationalities of directors serving on corporate boards.⁶⁹

65. Morse & Shive, *supra* note 15, argue that there is a global capital-allocation bias that results from investors privileging national firms over foreign ones. “Asset pricing theory predicts that investors should hold the world market portfolio, not a portfolio primarily of domestic stock. Country portfolios with small domestic holdings are, however, simply not observed.” *Id.* They find a significant impact: “The economic magnitude of patriotism’s effect is large: an average country invests 3-5% more for its aggregate portfolio abroad with a one standard deviation drop in patriotism.” *Id.* Now that’s econometrics. The claim that capital has a preference for patriotism might suggest a reason for expanding, beyond wealth maximization, the permissible bounds of what it means to serve shareholder interests, even under a shareholder primacy regime. But serving the patriotic preferences of capital becomes difficult in firms with globally dispersed stockholders. To the extent that national diversity in shareholder-base undermines non-pecuniary common denominators, then shareholder wealth maximization inevitably becomes the more exclusive focus of corporate governance. *Cf.* Edward B. Rock, *Shareholder Eugenics in the Public Corporation*, 97 CORNELL L. REV. 849 (2012). I do not pursue the question of shareholders’ preference for patriotism here, because I am less interested in the narrow question of what capital wants from corporate governance than I am in the more fundamental questions of what society wants, or should want, and can expect to get from it.

66. DEL. CODE ANN. tit. 8, § 141(a) (2014 West).

67. *See generally* Hanson & Yosifon, *supra* note 15.

68. *See* Douglas G. Baird & M. Todd Henderson, *Other People’s Money*, 60 STAN. L. REV. 1309, 1310 (2008).

69. We might expect the magnitude of this “patriotic slack” to be a function of the strength of directors’

Now hold on a minute. We must stand guard against the known devils of patriotic discourse: stereotyping and xenophobia. The reader should be wary, as is the author. Yet there seems to be no escape from the demographic inquiry. If directors cannot be trusted to always restrain their patriotic conscience where the law calls for shareholder primacy, or if I am wrong in my depiction of corporate law and it already countenances non-shareholderist impulses on corporate boards,⁷⁰ then the patriotic commitments of corporate directors, to the United States or another country, becomes an issue of real concern. So we must proceed, suspicious of ourselves and our reasoning, and only ever provisionally committing to our conclusions.

If patriotism is a vice, then it may be desirable to encourage large firms, especially those with international operations, to populate their boards with directors reflecting a broad array of nationalities. Each director's personal patriotic instincts might counterbalance their fellow director's instincts, with no national bias prevailing. On the other hand, if patriotism is a virtue, then it might be desirable to ensure that the boards of American firms operating internationally are dominated by American nationals, such that inevitable directorial slack manifesting in the patriotic dimension will privilege American interests, rather than those of some foreign country.

Little is known, empirically, about the nationality composition of corporate boards or the implications of director nationality on corporate governance dynamics. After surveying the literature, one group of researchers found that “[d]espite extensive ongoing research on boards of directors, . . . the internationalization of corporate boards remains relatively unexplored.”⁷¹ Neither Delaware, nor the federal

patriotism, on the one hand, and the strength of corporate law, on the other. Because American corporate law is typically viewed as the “best,” in the sense that it most effectively reduces directorial slack, we might expect American corporations dominated by American directors to be relatively less patriotic for America, and foreign corporations dominated by foreign citizens to be relatively more patriotic for foreign countries. See Lars Oxelheim & Trond Randoy, *The Impact of Foreign Board Membership on Firm Value*, 27 J. BANKING & FIN. 2369, 2370 (2003) (“The Anglo-American system is commonly regarded as the most demanding corporate governance system.”) However, Americans start out with a more patriotic baseline, so this may counterbalance the strength of American corporate law, resulting in similar rates of patriotic slack as are seen in nations with less patriotism, and weaker corporate law. Perhaps Morse & Shive can run the numbers. See *supra*, note 16.

70. See *supra* note 7 (noting that some scholars disagree with my description of prevailing corporate law standards).

71. Oxelheim & Randoy, *The Impact of Foreign Board Membership on Firm Value*, *supra* note 70, at 2370 (noting that the “process of globalizing corporate governance systems has recently been invigorated by the general abolition of capital controls and better access to a global shareholder base.”). Writing about Nordic firms, Oxelheim and his collaborators did find support for their reasonable hypothesis that “firm internationalization relates to the internationalization of the boardroom.” Lars Oxelheim et al., *On the Internationalization of Corporate Boards: The Case of Nordic Firms*, 44 J. INT'L BUS. STUD. 173, 173 (2013). More particularly, internationalization of the

securities laws, nor the major stock exchanges require firms to report the nationality of directors who are serving on their boards or running in corporate elections. Likewise, biographies of directors in annual reports generally do not include this information. Director nationality may be an element of disclosure that should be pursued in order to allow tracking and evaluation of patriotic concerns.

Nevertheless, there are economic and legal reasons to expect that American corporations with global business operations will increasingly have higher proportions of foreign national directors serving as corporate directors. Firms might find this profitable for several reasons. If the company is operating in another country, a national of that country might be better placed than American directors to monitor the firm's foreign operations. A foreign national may have special, subtle knowledge about how to effectively reach customers in their own homeland—insight that may not be readily apparent to American directors. A foreign-national director might also have a network of contacts and resources in the foreign country that will lower the firm's costs of attracting capital and workers, or managing regulatory relations with the foreign government or local communities.⁷² These “connections” can be among the main benefits that a foreign director brings to a board.⁷³

boardroom “relates primarily to the financial internationalization of these firms.” *Id.* The authors made their prediction based on the fact that, “[a] vast psychological literature also shows that trustworthiness is enhanced by perceived demographic similarities, shared norms and values.” *Id.* at 176. For that reason, they expected that “foreign shareholders may be more confident that directors from their own country will represent their interests more forcefully.” *Id.*

72. See STEPHEN BAINBRIDGE, *THE NEW CORPORATE GOVERNANCE*, *supra* note 8 at 79-80 (explaining that the three main functions of corporate directors are providing oversight of firm operations, including hiring, compensating, and firing the Chief Executive Officer, helping guide development of the firm's broad strategies, and forging connections between the firm and outside resources to which the director has special access).

73. One interesting study, however, found that corporations with foreign independent directors performed *worse* along a number of measures, including incidents of intentional misreporting, higher CEO pay, and overall return on investment, than firms without such directors. See Ronald W. Masulis et al., *Globalizing the Boardroom: The Effects of Foreign Directors on Corporate Governance and Firm Performance*, 53 J. ACCT. & ECON. 527, 529 (2012). This study found that among S&P 1500 companies from 1998 to 2006, FIDs (the authors' acronym for foreign independent directors) accounted for about 13 percent of all independent directors, and that for boards with at least one FID, they accounted for 18 percent of all independent directors. *Id.* at 529. The authors conclude that while for individual firms in given years FIDs can be very valuable, on net, these gains do not compensate for the losses otherwise associated with FID presence on the boards of U.S. corporations. *Id.*

The principle explanation these researchers gave for their findings is the high transactions costs FIDs bear in traveling long distances for board meetings and other corporate functions. *Id.* The authors found that FIDs are “nearly three times more likely” to miss 25 percent of board meetings than are non-FIDs. *Id.* This explanation seems inadequate to me. As the authors note, Delaware allows attendance at board meetings by telephone. *Id.* at 535 n.22. The only additional transaction cost regarding telephonic attendance would possibly be inconvenient meeting times due to time-zone differences. But odd-hour board meetings for FIDs might cut in favor of availability for busy executives with competing responsibilities. The authors do allow as a secondary explanation the influence on the FIDs of their homeland's law,

From a legal perspective, Delaware corporate law and federal securities regulations may also be pushing American firms with global operations to put foreign nationals on their boards. Leo Strine, now Chief Justice of the Delaware Supreme Court, made clear in one of his last cases as Chancellor of the Delaware Court of Chancery, that corporate boards with operations in foreign countries must have directorial eyes and ears in those foreign countries if they are to satisfy their monitoring obligations under Delaware law.⁷⁴ In *Re Puda Coal, Inc. Stockholders Litigation* was a case alleging that a Chinese-national, independent director of a Delaware corporation doing business in China, had stolen assets belonging to the company.⁷⁵ When two other U.S.-based independent directors became aware of the theft, they resigned.⁷⁶ Shareholders brought suit against the allegedly thieving director, and against the directors on whose watch the thieving occurred. After entering a default judgment against the absent Chinese director,⁷⁷ then-Chancellor Strine refused to dismiss the case against the American directors. From the bench, he said:

If you're going to have a company domiciled . . . in Delaware and the assets and operations of the company are situated in China that [sic], in order for you to meet your obligation of good faith, you better have your physical body in China an awful lot. You better have in place a system of controls to make sure that you know that you actually own the assets. You better have the language skills to navigate the environment in which the company is operating.⁷⁸

Strine goes on (as is his want):

[I]f the assets are in Russia, if they're in Nigeria, if they're in the Middle East, if they're in China . . . you're not going to be able to sit in your home in the U.S. and do a conference call four times a year and discharge your duty of loyalty. That won't cut it. That there will be specific challenges that deal with linguistic, cultural and

culture, and norms, which are often more lax on corporate governance standards than those that prevail in the United States: "we do find that FIDs from weak corporate governance countries display an even greater tendency to miss board meetings than FIDs from strong corporate governance countries." *Id.* at 551.

74. See Oral Argument and the Court's Ruling, *In re Puda Coal, Inc.*, Stockholders Litigation, C.A. No. 6476-CS (Del. Ch., Feb. 6, 2013) at 17-18, available at <http://www.delawarelitigation.com/files/2013/02/puda-case.pdf> [hereinafter *Puda Coal*].

75. *Id.*

76. *Id.*

77. *Id.* Strine recognized that the default judgment he was entering against the Chinese national director was going to be difficult to enforce, given that the defendant was in China. *Id.* at 26. This is another dimension of concern in the effective regulation of corporate governance where there is increased service of foreign nationals on the boards of domestic corporations.

78. See *id.* at 17-18.

others [sic] in terms of the effort that you have to put in to discharge your duty of loyalty.

....

If it's a situation where, frankly, all the flow of information is in the language that I don't understand, in a culture where there's, frankly, not legal strictures or structures or ethical mores yet that may be advanced to the level where I'm comfortable? It would be very difficult if I didn't know the language, the tools. You better be careful there.⁷⁹

Strine is clearly signaling that for corporations with international operations, at least some directors may need implicit cultural knowledge of the foreign societies in which their firms are doing business. Moreover, his disquisition showcases the magic words that bring fear, or hope, to corporate lawyers (depending on their side of the "v."). Having deep knowledge of the countries in which their firm is operating is a matter of directorial "good faith."⁸⁰ It is a matter of "loyalty."⁸¹ Under Delaware law, corporate charters may protect directors from having to pay damages for violations of their duty of care to the corporation, but exposure to damages for violations of good faith and loyalty always remains.⁸² All of the real action in shareholder litigation today, therefore, is over what counts as loyalty and good faith. Strine is signaling that knowledge of foreign places, mores, and ways of life, for firms with international operations, is very much a part of the action. This may have the effect of pushing boards to appoint more foreign nationals as directors.

Beyond Delaware, there may be implications for board nationality demographics in the relentless push by the federal government and the national stock exchanges for "independent" directors on the boards of large corporations. The Sarbanes-Oxley reforms of 2002 required for the first time that the boards of publicly traded corporations be comprised of a majority of independent directors.⁸³ After the

79. *Id.* at 21-22. Strine may be engaging here more in aspirational suasion than actual legal line drawing. Nevertheless, such talk from a Delaware jurist, now the Chief Justice of the Delaware Supreme Court, can be highly influential even where it is not, strictly speaking, making law. See Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1103 (1997) (arguing that even as Delaware courts usually decline to formally hold directors liable for violating their fiduciary obligations to shareholders, Delaware jurists nevertheless endeavor to influence directorial conduct by signaling best practices and shaming poor conduct).

80. See *Puda Coal*, *supra* note 74 at 17.

81. *Id.* at 21.

82. DEL. CODE ANN. tit. 8, § 102(b)(7) (West 2015) ("[T]he certificate of incorporation may also contain . . . A provision eliminating or limiting the personal liability of a director . . . for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty . . . [or] (ii) for acts or omissions not in good faith.").

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

subprime mortgage crisis of 2008, “the trend toward board independence accelerated as Congress and other regulators appointed independent directors as the capitalist cavalry and charged them with riding to the system’s rescue.”⁸⁴ This push to put independent directors on corporate boards, coupled with increasingly strict definitions of what counts as “independent,” may have the unintended consequence of sending search firms more regularly onto foreign shores, looking for qualified foreign nationals as candidates to serve on domestic boards of directors.⁸⁵

If corporate patriotism is a vice, then the legal and business forces that would seem to be compelling the internationalization of the boards of American companies should be celebrated and extended. If corporate patriotism is a virtue, then these dynamics may need to be critically assessed in terms of their impact on the patriotic impulses of domestic firms.

B. Prescriptive Corporate Patriotism

Despite marginal opportunities for slacking, of patriotic or more selfish varieties, the law of fiduciary duty, incentive-based pay structures, and corporate culture, keep directors of American corporations working “hard and honest,”⁸⁶ for the most part,⁸⁷ on behalf of the shareholders. If we presume that directors largely restrain their patriotic conscience, as the law requires, and if corporate patriotism is a virtue, then we may want to reform our corporate governance standards to improve its patriotic comportment. The challenge is to develop ethically responsible reforms that invite patriotism into the boardroom, while keeping the door shut to bigotry and discrimination. This mix is hard enough to get right in the individual human heart. It will prove harder still to build into the design of our corporate governance law. Yet the importance of the issue compels us to struggle for a proper solution, lest

84. STEPHEN M. BAINBRIDGE, *CORPORATE GOVERNANCE AFTER THE FINANCIAL CRISIS* 78 (Oxford University Press, 1st ed. 2012).

85. See Scott C. Herlihy, et. al., *Director Tenure: A Solution in Search of a Problem*, Harvard Law School Forum on Corporate Governance and Financial Regulation (January 23, 2015), <http://corpgov.law.harvard.edu/2015/01/23/director-tenure-a-solution-in-search-of-a-problem> (“[G]ood directors are hard to find. . . . [O]nly a limited number of people possess both the management experience and industry knowledge required to serve capably as public company directors. Further restrictions on board service dramatically shrink that limited pool of talent.”). See also Oxelheim & Randoy, *supra* note 70, at 2374 (“There is a limited pool of board candidates in a small country, and a conflict of interest can easily arise in connection with interlocking board membership.”). Oxelheim and Randoy conclude that foreign firms find substantial value in putting American directors on their boards. *Id.* at 2394. This increases the “demand” for American directors, further drawing away the supply available for American firms, and forcing more firms to bring on foreign directors.

86. EASTERBROOK & FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 90-93 (1991) (characterizing the essence of fiduciary duty).

87. *Id.*

others work towards solutions that we may deem improper.

In 2008, a U.S.-based activist-shareholder submitted a “shareholder proposal” to the Board of Directors of the Monsanto Corporation, a Delaware corporation with global operations, which, if adopted by the shareholders, would have required Monsanto’s corporate directors to “solemnly swear (or affirm)”⁸⁸ this oath:

I will support and defend the Constitution of the United States against all enemies, foreign and domestic. I will bear true faith and allegiance to the Constitution of the United States. I take this obligation freely—recognizing that approval of my nomination and election as a Director of the Board of the Monsanto Corporation brings with it significant personal responsibility. I take this oath without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.⁸⁹

Monsanto petitioned the SEC for permission to exclude the proposal from the corporate proxy, pursuant to SEC Rule 14a-8(i)(2), which allows a shareholder proposal to be excluded if it would “cause the company to violate any state, federal, or foreign law to which it is subject.”⁹⁰ Monsanto claimed that the proposal conflicted with Delaware law:

[T]he Proposal . . . would impermissibly restrict the directors’ exercise of their fiduciary duties. . . . The directors could be forced, as a result of taking the oath, to vote against (or refrain from taking) a proposed action even if such action were permissible under applicable law and, as determined by the directors in the exercise of their fiduciary duties, would otherwise be in the best interests of the Company and its shareowners.⁹¹

This is an interesting confession of a major corporate board’s view of the relationship between fiduciary obligation and national allegiance. The abiding principle, according to Monsanto, is “the Company and its shareowners.”⁹² Adhering to that charge can sometimes require directors to make decisions that may not comport with “true faith and allegiance to the Constitution of the United States.”⁹³ Delaware law, of course, requires directors to always follow “applicable law,”⁹⁴ but this “true faith and allegiance”⁹⁵ verbiage suggests a responsibility for something

88. Monsanto Corp., SEC No-Action Letter, 2008 WL 8785663 Fed. Sec. L. Rep. (CCH) (Nov. 7, 2008). [hereinafter Monsanto].

89. *Id.*

90. Shareholder Proposals, 17 C.F.R. § 240.14a-8(i)(2) (2015).

91. *Monsanto*, *supra* note 88 at *3.

92. *Id.*

93. *Id.* at *9.

94. *Id.* at *3.

95. *Id.* at *9.

more than that (at least it did to Monsanto's lawyers), and the only "more" directors can know under Delaware law is more for the shareholders. The SEC allowed Monsanto to exclude the proposal from the corporate proxy by returning a "no action letter" that simply stated, without analysis or citation: "There appears to be some basis for your view that Monsanto may exclude the proposal under rule 14a-8(i)(2)."⁹⁶

The Monsanto shareholders' proposal did not outright forbid foreign nationals from serving on Monsanto's board, but it would certainly have made board internationalization more difficult. Regulation of the nationality of corporate directors is not unknown in other countries. Danish corporations, for example, must have Danish citizens comprise at least half of the board, and the chairperson of the board must be Danish.⁹⁷ In the United States, director-nationality restrictions in corporate charters or bylaws, or a reform of state-based corporate law to specify nationality requirements, would likely run afoul of federal prohibitions against "national origin" discrimination in hiring.⁹⁸

Even while steering clear of explicit nationality restrictions, the Monsanto shareholder proposal is an undesirable approach to improving the patriotic deportment of American firms. It neglects the global corporation's legitimate needs for directors from many nations, and its purple "loyalty oath" approach would likely hinder, rather than advance, critical, searching discourse on patriotic concerns in the boardroom, even if we did want firms like Monsanto to have a patriotic conscience. Nevertheless, the Monsanto shareholder proposal reflects an identification of, and effort to grapple with, the problems of corporate patriotism with which this Article has been concerned. The somewhat embarrassing loyalty oath proposal should motivate the development of reasonable alternative reforms.

I think that a promising approach could be grounded in an alteration of directors' fiduciary obligations in a manner that would encourage greater attention to the national interest in the course of corporate governance. To begin to see how this might be done, let us consider a feature of the Delaware corporate code which would only mistakenly be viewed as having already done what I propose, but which could be built-upon, or tinkered with, to achieve my suggestion. For simplicity and clarity, when at the start of this article I described the law of corporate purpose in Delaware

96. *Id.* at *15.

97. Oxelheim & Radnoy, *supra* note 71, at 12 n.2.

98. 42 U.S.C. § 2000e-2(a) (2013) ("It shall be an unlawful employment practice . . . to fail or refuse to hire . . . any individual because of such individual's . . . national origin."). Title VII does permit national origin discrimination in hiring if it is "in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President." 42 U.S.C. § 2000e-2(g). Again, this Article is concerned with the general case.

as being decidedly shareholderist,⁹⁹ I held-back from the discussion an oft-neglected piece of statutory language which muddies the clarity of that picture, but does not alter the black letter law that it depicts. Section 122(12) of the Delaware corporate code provides that “every corporation . . . shall have power to . . . [t]ransact any lawful business which the corporation’s board of directors shall find to be in aid of governmental authority.”¹⁰⁰

This sub-section has received little scholarly attention, and has never been interpreted by any Delaware court. I have previously examined the history of the provision, and found the original intent behind it to be at least ambiguous.¹⁰¹ Despite that history, my assessment is that it is implausible to think that Delaware courts, asked to construe section 122(12), would find in it a fulcrum to reverse decades of their own jurisprudence specifying that shareholder primacy is the law in Delaware.¹⁰² Undoubtedly, this “power” would be interpreted as of a piece with other kinds of corporate powers (e.g., the power to own property, or enter contracts, or buy insurance for directors) all of which may only legitimately be exercised as means towards satisfying corporate law’s inveterate charge to serve the shareholders.

Even if the provision were interpreted to allow corporate deviation from shareholder interests in order to serve governmental authority, an unresolved, pressing question for present purposes would remain: which governmental authority shall the corporate enterprise aid? Section 122(12) was based on a similar provision in the Model Business Corporation Act, the original 1950 version of which stated that every corporation “shall have power . . . in time of war to transact any lawful business in aid of the United States in prosecution of the war.”¹⁰³ Delaware’s section 122(12) power applies much more broadly (not just during wartime), and does not specify which country the firm is authorized to aid. It might, for example, be an anti-American government that the corporation aids in pursuit of profit for its shareholders. The muddle of section 122(12) provides us with an opportunity to devise from its rudiments a patriotic corporate governance reform of our own

99. See *supra* text accompanying notes 7-8.

100. DEL. CODE ANN. tit. 8, § 122(12) (West 2015). See generally David G. Yosifon, *Corporate Aid of Governmental Authority: History and Analysis of an Obscure Power in Delaware Corporate Law*, 10 U. ST. THOMAS L.J. 1086 (2013).

101. *Id.*

102. See *id.* at 1103-1115.

103. MODEL BUS. CORP. ACT ANN. § 4(n) (West 1960) (emphasis added). This provision in the Model Act was clearly intended by its drafters to authorize departure from the shareholder primacy norm when aiding an American war effort. The official annotation to the provision stated: “The section explicitly recognizes that in time of war a corporation may validly assume *responsibilities* that it would not normally undertake in peacetime.” *Id.* (emphasis added). See also Yosifon, *Corporate Aid of Governmental Authority*, *supra* note 100, at 1091-95 (noting that while the drafters of Delaware’s §122(12) were influenced by the Model Act, it is not clear that they shared the Model Act’s views about the “governmental aid” power authorizing deviation from shareholder primacy).

design.¹⁰⁴

Such reform could be conceived at different levels of intensity.¹⁰⁵ A modest corporate law reform could require that where a corporation faces a decision that would either favor the United States or favor some other country, and the choice would not affect profitability either way, then directors must choose the course that privileges America over other nations. A more significant reform would explicitly permit corporate directors to privilege the interests of the United States even where doing so would compromise shareholder value, if the shareholder interest is small relative to the national interest (for example, in a time of emergency or a period of crisis). A still more serious reform would require directors to do that. Or corporate law could permit or require directorial sacrifice of the shareholder interest in favor of the national interest, irrespective of the relative stakes in the corporate decision. Another approach would be to make these kinds of patriotic standards mutable, such that firms would be required to actively renounce a mandatory or permissive devotion to the United States if they did not want to be burdened by any such encumbrance on profitability.¹⁰⁶

The reforms that I am describing here would permit or require a patriotic conscience in corporate decision-making. They prescribe a change in corporate motive. Nothing has been said, nor can anything be said, about substantive changes in corporate behavior that would result. What kind of corporate decision is patriotic? Is it more patriotic for an American firm to keep a factory in the United States in order to provide jobs for American workers, or to shut down the American-based factory and move it to China, thus inserting an element of American influence in Chinese domestic affairs?¹⁰⁷ This is a matter of judgment. Patriotism has no

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104. Of course, a patriotic corporation might endeavor to aid its homeland in ways that did not directly intersect with government authority at all. *See supra*, text accompanying notes 42-43 (emphasizing the importance of civil society as a space in which patriotism is nurtured and acts). Section 122(12) speaks to aiding “governmental authority.” There is evidence that the drafters of at least the Model Code provision on which Delaware’s provision was based intended this phrase to be interpreted very broadly to include any aspect of social life that government might touch on in the most general way. *See* Yosifon, *Corporate Aid of Governmental Authority*, *supra* note 100, at 1103-13.
 105. Any reform that significantly modified shareholder primacy in corporate governance would have to be made through federal preemption of the state law of corporate chartering, or at least federal imposition of minimum governance standards on state charters. Delaware would never willingly give up shareholder primacy, and if it did, another state would quickly adopt it, since these are the charters capital prefers, if it can get them.
 106. *See generally* Ian Ayers, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 *Yale L. J.* 2032 (2012); *see also* Yosifon, *Corporate Aid of Governmental Authority*, *supra* note 100, at 1111-13 (discussing the apparent immutability of section 122(12) as drafted).
 107. *See* ADOLF A. BERLE, JR., *THE 20TH CENTURY CAPITALIST REVOLUTION* 116-164 (1954). Berle, who was a diplomat before he was a scholar, emphasized the ways in which American influence has spread around the world often more effectively through America’s corporations than through its diplomatic corps. *See also* Stephen F. Diamond, *The Myth of Corporate Governance* (unpublished manuscript on file with author) (examining the relationship between Berle’s diplomatic work and

deductively applicable content. An act is authentically patriotic if the motive that produced it is (critically reflective) love for country; behavior cannot be called patriotic or unpatriotic simply by looking at what is done.¹⁰⁸ Any reform that seeks to allow or compel a place for patriotism in the boardroom should emphasize process, never seeking to narrowly prescribe any orthodoxy in patriotic conscience. Corporate law already reflects the broad outlines of this framework. It rigidly distinguishes evaluations of proper fiduciary motivation from the evaluation of substantive decision-making. The former corporate law does in searching, demanding fashion, the latter it recognizes as “beyond the science of the chancery.”¹⁰⁹ This light-handed approach to reform seeking greater corporate patriotism may strike some as unlikely to have much effect, if they are merely “orienting,” without any substantive valence, and with little chance for judicial enforcement. But if corporate operations stripped of patriotic conscience are a threat to patriotic values, it is precisely because of the orientation of corporate governance presently achieved through the shareholder primacy norm, which does its powerful work without substantive edicts, or much judicial oversight. At the heart of corporate power is corporate purpose; change that purpose and you can change the corporate heart.

Many critics of shareholder primacy theory have suggested replacing it with an approach to corporate governance that requires directors to be more socially responsible by actively attending to multiple interests, rather than just shareholders.¹¹⁰ Proponents of shareholder primacy, however, have insisted that such a program is too intractable and would give directors too little guidance about how to govern. Corporate patriotism may help bring a program of corporate social responsibility into a more plausible focus. Consider this: some people talk about corporations closing domestic factories and moving jobs overseas as a failure of

Berle’s scholarship).

108. Nussbaum comes too close to violating this principle when she cites, for example, the “erosion of the New Deal in the United States” as an example of “institutions and laws” that have not “sustained themselves in the absence of love directed at one’s fellow citizens and the nation as a whole.” NUSSBAUM, *POLITICAL EMOTIONS*, *supra* note 36 at 214. Conservative bias is also too often evident in academic discourse on patriotism. *See, e.g.*, Parker, *supra* note 39 at 410 (otherwise thoughtfully assessing the discourse of patriotism after the terrorist attacks of September 11, 2001, but not resisting the urge to write things like: “Recall the expectations of a return to ‘McCarthyism,’ mobilizing patriotic sentiment to compel political conformity. (In some circles, Waiting for McCarthy is a habitual self-dramatizing pose.)”).
109. *Meinhard v. Salmon*, 164 N.E. 545, 547 (N.Y. 1928). In contemporary corporate law terms this is known as the “business judgment rule.” So long as directors’ decisions are informed, deliberate, disinterested, made in good faith, and legal, courts will not review the substance of the decision that was undertaken, even if it turns out to have been a poor, unusual, or disastrous decision for the corporation. There is an extensive academic debate about the purpose of the business judgment rule, but its doctrinal basis can be easily understood as straight-forward fidelity to the statutory injunction that the board, and nobody else, runs the corporation.
110. *See generally* Yosifon, *The Law of Corporate Purpose*, *supra* note 7.

corporate social responsibility. But such behavior is only socially “irresponsible” if there is reason to consider the interests of American workers to be more important than those of foreign workers, who may be more desperate than their American counterparts. Patriotism offers a sufficient level of abstraction, but one that is also not too abstract, to provide a framework through which corporate directors can approach the problem of social responsibility. Indeed, if patriotism’s philosophers are to be believed, then it is impossible for a corporation, or a corporate board of directors, to behave morally or embrace a compelling sense of social responsibility, unless they have *a* morality, formed in and responsive to a devotion to a particular community—a particular nation. Corporate patriotism may be a crucial component of corporate social responsibility.

Whether corporate patriotism is repugnant or desirable, we should pursue reforms that encourage directors to be open and honest with themselves, each other, their shareholders, and the public, about the role that patriotism is or is not playing in their decision-making. Because patriotism is an important part of individual identity, and perhaps an important fulcrum of moral life, it is reasonable to believe that patriotic conscience is operating at some level in the boardroom. But corporate law as it currently stands precludes explicit, deliberative discourse on the patriotic questions implicated in corporate decision-making. The law of corporate governance stands as a constant warning that directors will violate their fiduciary duties if they govern a manner other than in the shareholder interest. This is a recipe for confusion and obfuscation regarding the role of patriotic conscience in firm governance. We must make the threats and opportunities of patriotic conscience explicit.¹¹¹ A critical kind of patriotism can only take root in and emerge out of the boardroom if directors are licensed, or compelled, to speak freely about their honest assessment of what impact a proposed course of corporate conduct will have on national interests.

IV. Conclusion

The law and policy of corporate conscience is presently undergoing important doctrinal and conceptual developments.¹¹² In this milieu, it is likely that the question of corporate patriotism, never fully silent but often effectively ignored, will soon command the attention of the public and policymakers. When this moment strikes,

111. See Nussbaum, *Teaching Patriotism*, supra note 36, at 224 (advocating a “critical public culture” that invites both patriotic display and continuous, searching assessment of the morality of the national project).

112. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (corporate political speech rights under the U.S. Constitution); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (religious rights of corporations under the Religious Freedom Restoration Act). See also Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MINN. L. REV. 27 (2014); James D. Nelson, *The Freedom of Business Association*, 115 COLUM. L. REV. 461 (2015).

corporate theory should be prepared to play its part, clarifying and making explicit the terms and consequences of distinct positions.

No particular viewpoint can find exclusive vindication in the assessment here provided. It is hoped that the stakes of corporate patriotism have been clearly posed, and routes towards either promoting or constraining it usefully suggested. When I set out on this project, it was my intention to develop and defend a specific claim about the legitimacy, or illegitimacy, of corporate patriotism. But I find myself finally less committed on the issue than when I began. In intellectual ventures, this is surely a sign that some difficult terrain has been traversed. But it also makes clear that some hard traveling remains. Further advance through the challenges posed by the problems of corporate patriotism will surely be best accomplished by embrace of that intellectual posture expressed by Judge Learned Hand in his exploration of the significance of patriotism: "What is the spirit of liberty? I cannot define it; I can only tell you my own faith. The spirit of liberty is the spirit which is not too sure it is right."¹¹³

113. LEARNED HAND, *THE SPIRIT OF LIBERTY* 190 (1952).