



4-10-2015

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IS CORPORATE PATRIOTISM A VIRTUE?

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draft: comments welcome

13 SANTA CLARA JOURNAL OF INTERNATIONAL LAW __ (2015, forthcoming)

April 10, 2015

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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 otherwise be nationalized or 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.

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I. INTRODUCTION

In July 2014, President Barack Obama condemned corporations that re-charter from the United States to foreign jurisdictions in order to evade American tax liability as “economic deserters.”² 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 of international corporate operations in which firms can send not only tax revenues, but also 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.³ 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 sometimes motivates voluntary action. Quintessentially, a patriotic conscience spurs a willingness to sacrifice in service to one’s nation. This is often conceived as putting the nation before one’s *self*-interest, and doing so may be indeed be at the core of patriotic voluntarism. But people’s lives are deeply interconnected, and patriotic sacrifice may also inevitably involve

² See James Mason, *Obama Rails Against Corporate Maneuver to Evade U.S. Taxes*, Reuters, July 25, 2014, available at <http://www.reuters.com/article/2014/07/25/us-usa-tax-obama-inversions-idUSKBN0FT13K20140725>.

³ 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, 569-570 (1999). Nevertheless, before the second-half of the 20th-century, even large corporations typically were chartered, produced, and sold goods in only one country. Corporate operations went global in every sense after World War II. By the 1990’s, 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 of one's other *responsibilities*, for example, to one's spouse, or children, 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.⁴ But this literature is bereft of any meaningful attention to the place 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 the literature is bereft of any careful attention to patriotism as an element of corporate conscience. This article fills that void.

Corporations are legal entities, created by government, and made available to anyone who wants to use the corporate form to undertake "any lawful purpose."⁵ Those who start a corporation have broad latitude to specify how the entity will be run, and for whose benefit. But under the most widely used corporate law in the United States, the Delaware General Corporation Law, the default rule is that corporations must be managed to serve the interests of the corporation's shareholders, and not any other stakeholder group.⁶ Under Delaware law, 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 The

⁴ See STEPHEN NATHANSON, *PATRIOTISM, MORALITY, AND PEACE* (1993) (book-length study, summarizing literature); MARTHA NUSSBAUM (Ed.), *FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM* (1993) (collection of essays by leading intellectuals discussing patriotism); see also *infra*, Section II (discussing literature).

⁵ 8 DEL. GEN. CORP. L. §102(a)(3) (stipulating that a corporation may be formed to undertake a specified purpose, or "any lawful purpose").

⁶ In the United States, corporate promoters can purchase a corporate charter from any state they choose, they 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. See generally John Armour, et. al., *Delaware's Balancing Act*, 87 IND. L. J. 1345 (2012) (reviewing explanations for why Delaware dominates).

⁷ Some prominent scholars argue that Delaware's corporate law is ambiguous or ambivalent as to 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 (2005); Lyman Johnson & David Millon, *Corporate*

corporate law command to always put shareholders first would seem to be in tension with the idea of patriotism, or at least the idea of corporate patriotism. However, 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. 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.⁸ 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 that concern. And, of course, if patriotism is an important Irish value, then the Irish should expect that concern 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

Law after Hobby Lobby, 70 BUSINESS LAWYER 1 (2014). I critique these scholars' claims 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 not stop reading at this point on the basis of that disagreement.

⁸ 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).

to say about what the substance of that law should be. That question is pursued throughout the course of this article.⁹

American corporations in some very few industries (and fewer than in the past) are subject to specific charting, ownership, and corporate governance regulations aimed at forcing those firms to operate in ways that serve, or at least do not compromise, American interests.¹⁰ These rules suggest that the general shareholder primacy story – that firms run in

⁹ There are 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. The second is the “control test,” which looks at the nation, or nationality, that actually controls the corporation. It seems that most regulatory frameworks that use the “control” test focus on stock ownership, which is the wrong way to do it, given that the essence of the large publicly traded corporation is the *separation* of ownership and control. Control tests should be focused on the board. I pursue this angle *infra*, Section III, when examining the relevance of the nationalities of corporate board members. But there my focus remains on looking at 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 the nation in which a firm is most deeply economically enmeshed. Under this test, a firm that is chartered in the United States and owned by shareholders around the world, produces in China, and sells in Europe, might very well not be considered an American corporation. The type of test that should be used depends on the purpose of the inquiry. Linda Mabry pioneered the “economic commitment” framework, and her treatment shows that the best place for using it is where the government is concerned with subsidizing enterprises that the government thinks are going to advance specifically identified American interests, such as jobs in the United States. See Mabry, *supra* note ___ at 593-633. See also Lan Cao, *Corporate and Product Identity in the Postnational Economy: Rethinking U.S. Trade Laws*, 90 CAL. L. REV. 401 (2002) (proposing a “domestic participation” test of corporate nationality).

¹⁰ 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). Anxieties about foreign influence on domestic enterprise trace to the colonial era, but concomitant early-American thirst for capital meant that restrictions on foreign investment in the United States were relatively anemic until the early-twentieth-century. World War I revealed the strength of foreign capital’s grip on American enterprise, as billions were repatriated at the start of the war from the United States to the coffers of allies and enemies alike. 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.* After World War II, the growing wealth of the United States, and its new role as an investor abroad, dampened anxieties about foreign investment in domestic enterprise. Writing in 1961, Vagts correctly predicted that, “the future portends contraction rather than expansion . . . of restrictive legislation except in defense industries where the borders between the military establishment and private enterprise sometimes grow dim.” *Id.* at 1494. The last several decades have seen relaxation of foreign ownership restrictions in energy companies, 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 studying and making recommendations regarding foreign investment activity that could undermine American interests. See Paul Connell & Tian Huang, *Note: An Empirical Analysis of CFIUS: Examining Foreign Investment Regulation in the United States*, 39 YALE J. OF INT’L L. 131 (2014). In 1988, Congress granted the President the power to block foreign investment deemed a threat to national security. This power was delegated to CFIUS, making it potentially a very powerful administrative entity. 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. CFIUS, and other federal regulations restricting foreign influence in American business activity are important economic and political interventions, but for present purposes they nearly stand

the interests of shareholders advance the interests of all stakeholders and society as a whole – is not necessarily reliable, or at least has not been swallowed whole, politically.¹¹ In any event, in this article I am concerned with the default law that governs all corporate operations. After all, it may be difficult to tell ahead of time what kinds of companies or industries are, or will suddenly become, of acute national importance. And when that knowledge does arrive it may come 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 quickly or chaotically for 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.¹² And 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 perhaps at least to do so when the same profit can be made in a fashion that advances American interests as can be made by advancing the interests of some other country, or no country.

The 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

as the exceptions that prove the rule: in the ordinary course, the vast majority of corporations are not subject to governance restrictions that encourage or require them to be governed in a manner that privileges American interest over shareholder interests, or the interests of other nations.

¹¹ See *infra* text accompanying notes ___-___ (explaining and critiquing prevailing justifications for shareholder primacy in corporate governance).

¹² 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 exception” and patriotism, i.e., which country a corporation should favor, if any, in times of international crisis.

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 emphasizes the intersection between patriotic conscience and the composition of corporate boards of directors, since it is the board that controls the corporation. This section concludes by briefly examining 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 brief conclusion.

II. THE NORMATIVE VALENCE OF PATRIOTISM AND CORPORATE LAW

To know if corporate patriotism is desirable, we must first assess whether patriotism 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 shapes.¹³ Yet even among those who recognize within themselves a

¹³ The World Values Survey find 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*, IRLE Working Paper No. 136-12., available at <http://irle.berkeley.edu/workingpapers/136-12.pdf> (2012). 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. OF FIN. MARKETS. 411, 414 (2011).

Morse & Shive 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 on capital allocation: “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. Morse & Shive’s claim that capital has a “preference for patriotism” might suggest a reason for expanding beyond “wealth”

patriotic sentiment, feel proud to sometimes express it, and believe themselves willing to act on it, the impulse is controversial. The patriotic conscience is haunted by the fear that patriotism 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, but that can only justify the patriotism of the people of one nation, with everyone else being wrong. And arguments about which country is "best" are, we know, infected with motivated reasoning and subjectivity as to what counts as better in national comparisons.¹⁴

Worse than being stupid, patriotism may be corrupt in that it authorizes discrimination and chauvinism. It is a dangerous kindle, threatening always to blaze into xenophobia and imperialism.¹⁵ Even short of such horrors, it still seems morally dubious to favor the prospects of one's countrymen (countrypeople) over those of other countries, simply on the basis of national identity. 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

maximization the permissible bounds of what it means to serve the shareholder interests even under a shareholder primacy corporate governance regime. But serving the patriotic preferences of capital becomes difficult in firms with globally dispersed stockholders. If there are two equally profitable courses available to directors, one which served the national interest and the other which is indifferent to it, directors might reasonably conclude in the purely domestic context that it would serve their shareholders' non-pecuniary interests to pursue the profitable, patriotic course, rather than the indifferent one. An international corporation may be more likely, indeed may feel compelled, to select the indifferent option, so as not to insult or undermine the patriotic values of their non-American shareholders. To the extent that expansion of the shareholder base undermines non-pecuniary common denominators, then shareholder wealth maximization becomes the ever 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 this angle here, because I am less interested in the narrow question of what shareholders want 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.

¹⁴ See Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 Geo. L. Rev. 1 (2004) (reviewing social psychological research on human decision-making, including motivated reasoning and confirmation bias).

¹⁵ 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).

reason not to be. We cannot arbitrarily treat some people better than others.¹⁶ From the point of view of liberal morality, then, patriotism surely is a vice. Patriotism cannot even be regarded as just another kind of preference which should be respected as a matter of personal choice of the “there’s no accounting for taste” variety. For, in this assessment, “patriotism is like racism.”¹⁷ 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 it, or excludes it. This we appear to have done. Or, rather, we have organized a corporate law that strives to ignore or exclude patriotism, even if it does not always succeed in keeping it out.¹⁸ At least formally, shareholder primacy in corporate governance precludes corporations from acting with a patriotic conscience. If patriotism is a vice, then the exclusion of patriotic conscience from corporate operations counts as a morally desirable feature, or bonus feature, of shareholder primacy in corporate governance.

Consider an illustrative episode involving the response of American oil corporations to the OPEC oil embargo of 1973-1974.¹⁹ 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, and South Africa. American corporations complied, which was perhaps in itself not unpatriotic, given

¹⁶ 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, parental preference 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?

¹⁷ *See* Paul Gomberg, *Patriotism is Like Racism*, 101 ETHICS 144 (1990).

¹⁸ *See infra*, text accompanying notes ___-___ (discussing the problem of “patriotic slack”).

¹⁹ *See* Mabry, *supra* note ___ at 620-622. In this discussion, Mabry relies on SUBCOMM. ON MULTINATIONAL CORPORATIONS, SENATE COMM. ON FOREIGN RELATIONS, 93D CONG. 2D SESS., REPORT ON MULTINATIONAL OIL CORPORATIONS AND U.S. FOREIGN POLICY 67 (Comm. Print 1975).

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 was 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.”²⁰ Or, these corporations could have sold the oil to the highest bidder. Instead, what they decided to do was apportion the oil equally among countries affected by the embargo.²¹ 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 its customer base in anticipation of a return to normal business dynamics. But it was surely 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, this would count among the favorable attributes of shareholder primacy in corporate operations.

There is an ironic or “strange bedfellows” implication to this analysis. It seems likely that the kind of people who regard themselves as proponents of universal human values, and who are suspicious of the legitimacy of national preference, might, as a demographic matter, often be the same kind of people who are also generally suspicious of the shareholder primacy norm in corporate operations. But if shareholder primacy excludes, and even undermines, patriotic conscience in favor of a more even-handed treatment of people across the planet, then the proponents of universal values 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

²⁰ Mabry, *supra* note ___ at 622 n. 236.

²¹ Mabry, *supra* note ___ at 622.

universal human values, 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 have in mind that we must find them to be very compelling before we will accept them. It might be ethically desirable to start with a strong presumption against the legitimacy of any moral outlook, like patriotism, which sanctions treating people differently on the basis of inherited and largely immutable characteristics. We should demand a lot of arguments in favor of patriotism if they are to overcome this presumption.²²

A potentially viable approach to morally justifiable patriotism was supplied by the great moral philosopher Alasdair MacIntyre, in his seminal lecture, “Is Patriotism a Virtue?”²³ The liberal conception of morality reviewed in the previous sub-section, MacIntyre conjectures, mistakenly conceives of morality as being something like mathematics, which can be taught, learned, and internalized without reference to the particulars of human culture and experience. Whether or not moral principles are eternal and objective, becoming a moral being 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.”²⁴ And “*particular* community” has real implications. For, while it is certainly true that the moral

²² This heightened standard of review for “suspect classifications” is highly familiar in legal analysis, but it does not appear to be conventional in moral philosophy.

²³ See Alasdair MacIntyre, *Is Patriotism a Virtue?*, The Lindley Lecture, The University of Kansas (March 26, 1984). The title of this Article is an homage to MacIntyre’s influential lecture.

²⁴ MacIntyre, *supra* note __ at 9.

principles of most cultures will “resemble and sometimes be identical”²⁵ 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.”²⁶ 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 needed for any of us to learn any morality.²⁷ If this is true, then patriotism is not only acceptable, it is laudable, and even imperative, if humans are to be moral creatures.

Proponents of patriotism seem to be arguing that patriotism may be necessary to achieve anything that comes close to what we want for humanity when we otherwise celebrate universal values. That is, endorsing patriotism as a virtue will allow people the world over, in particular nations, to flourish better than they otherwise could, such that patriotism may, in *sum*, benefit all of humanity. Put differently, it may be that in the “long-run” being patriotic, and endorsing patriotism as a virtue, 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. The “long-run” is not always a satisfying time-horizon for social policy. After all, “in the long run, we are all dead.”²⁸

²⁵ MacIntyre, *supra* note ___ at 10.

²⁶ MacIntyre, *supra* note ___ at 9.

²⁷ This approach to patriotism is consonant with the laudable trend in legal scholarship which looks to embrace a more realistic assessment of human cognition and behavior, even as it exposes important limitations of analysis grounded in more abstract conceptions of humanity, such as a simple “rational actor” model. See Jon Hanson & David Yosifon, *The Situational Character*, *supra* note ___.

²⁸ John Maynard Keynes, A TRACT ON MONETARY REFORM 80 (1923). There is an intriguing parallel between this “long-term” view of the value of patriotism and arguments that assert that shareholder primacy, while always putting the interest of shareholders first, ultimately serves the interests of society as a whole over the “long-term.” Even if this is true of shareholder primacy, it is not a dispositive justification for that corporate governance regime, since the long-term is not clearly always a morally superior time-horizon. (It is not a desirable time-horizon, for example, for people who are starving now). See Yosifon, *The Social Relations of Consumption*, *supra* note ___.

If patriotism is a virtue, then we cannot avoid the conclusion that virtue is at some level incompatible with universal humanism. 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. Being patriotic does not mean that one is prepared to go to *any* lengths for one's nation, or willing to treat foreigners in *any* way, no matter how rapacious, to serve one's homeland. But patriotism does seem to involve a willingness to privilege one's own nation and treat people of other nation's differently at some important margin, and that is the margin at which patriotism is an important moral problem.

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

Patriotism need not, indeed, must not, be dogmatic. A blind devotion would make the nation just a fiction, and would fail to provide the reality of community that is necessary for morality. Indeed, a nation's critics may be just as motivated by patriotism as are its boosters. Native critics of America, for example, often feel and express themselves in terms of national 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.²⁹ Critical assessment of one's social order is evidence that the morality making powers of patriotism are well-functioning. 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."³⁰

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* unit that can plausibly sustain the sentiments of devotion that are necessary for the kind of community-grounded, functional morality that MacIntyre describes.³¹ Patriotic love constitutes a kind of sweet spot at the intersection of size and effectiveness. Smaller units, like family and kin, are highly effective, but too small in size to have substantial cooperative utility. All of humanity is a nice size,³² but requires too much abstraction to induce more than "watery motivation" to pursue collective projects.³³ The nation is a community that *can* be plausibly imagined, and it is a potent kind of imagining.³⁴ More than potent, it is also at least potentially a politically legitimate way of orchestrating a moral community (if democratically organized, for example). Nussbaum insists that "even in a

²⁹ This sentiment was succinctly expressed by Leonard Cohen in his anthem, *Democracy*: "I love the country but / I can't stand the scene." Leonard Cohen, *Democracy*, THE FUTURE (1992).

³⁰ MacIntyre, *supra* note __ at 9-10.

³¹ Martha C. Nussbaum, *Teaching Patriotism: Love and Critical Freedom*, 79 U. CHI. L. REV. 213 (2012) (hereinafter, "Teaching Patriotism"). See also Martha C. Nussbaum, POLITICAL EMOTIONS: WHY LOVE MATTERS FOR JUSTICE 214 (2013). Curiously, unlike most contemporary scholars writing about patriotism, Nussbaum does not address her arguments to MacIntyre's treatment. Nevertheless, her contributions build nicely on MacIntyre's framework.

³² Nussbaum, *supra* note __ 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.").

³³ Nussbaum, *Teaching Patriotism*, *supra* note __ at 17. 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 (Oxford 1958) (Ernest Barker, trans)).

³⁴ See also Richard D. Parker, *Homeland: An Essay on Patriotism*, 25 HARV. J. OF L. AND PUB. POL. 407, 408 (2002), *supra* note __ (designating patriotism as a "precious resource").

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.”³⁵

Yes, patriotism can be “the last refuge of the scoundrel,”³⁶ masking self-serving conduct at the expense of spurring mistreatment of out-groups. But Nussbaum thinks the danger can be managed, and must be managed. It is not plausible to think that human society can be organized in strictly rational ways. Emotion is going to motivate and be present in civil life. It is better to confront that reality directly, so that its 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.³⁷

If 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 American corporations with international operations may, in their pursuit of profit, make decisions that undermine the interests of the nation, or that end up advantaging other nations at the expense of the United States.

A successful critique of shareholder primacy in corporate governance, I have argued elsewhere, may lead to the conclusion that we should reform corporate law to allow or require directors to attend to the interests of multiple corporate stakeholders, and not just shareholders.³⁸ Bringing a patriotism analysis into the critique of shareholder primacy may provide an angle that makes such a reform more plausible, as it can provide a way of

³⁵ NUSSBAUM, POLITICAL EMOTIONS, *supra* note __ at 224.

³⁶ James Boswell attributed this enduring quip to Dr. Johnson in Boswell’s, *THE LIFE OF SAMUEL JOHNSON* (1791).

³⁷ NUSSBAUM, POLITICAL EMOTIONS, *supra* note __ at 256.

³⁸ See generally Yosifon, *The Law of Corporate Purpose*, *supra* note __.

focusing discourses of corporate social responsibility that sometimes strike observers as too unmoored. For example, some people talk about corporations closing domestic factories and moving jobs overseas as a failure of corporate social responsibility. But such behavior is only “irresponsible” if there is good reason to consider the interests of American workers to be greater than those of foreign workers, who may indeed be more desperate, and enjoy less of a social safety net, 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 have a morality, or a coherent and compelling sense of social responsibility, unless they are to have *a* morality, formed in and responsive to a devotion to a particular community, a particular nation. Corporate patriotism may be a crucial component to real corporate social responsibility.

c. Patriotism and Canonical Corporate Theory

Proponents of the shareholder primacy norm in corporate governance would be quick to argue (they are never too slow to argue) that even if patriotism is a virtue, that does not necessarily mean that it should be pursued through corporate operations. That is, patriotism may be like environmentalism. A laudable goal, but one better pursued through mechanisms other than corporate governance. Indeed, it may be that excluding patriotism from the corporate domain is crucial to its greater flourishing in society generally, since shareholder primacy is essential to creating the wealth that can provide material support for humanity’s pursuit of such ennobling projects as patriotism and morality. Further, Stephen Bainbridge argues (in a different, but relevant context) that American corporations, made powerful by

shareholder primacy, stand as a bulwark against “the slaving maw” of Leviathan,³⁹ keeping alive a vital civil society that stands between the people and a too-powerful, commanding State.⁴⁰ 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 parallels the canonical claim that corporations ultimately serve society best by behaving without specific regard for non-shareholding members of society.⁴¹ We must review that canonical claim before we can assess its application to corporate patriotism.⁴² It goes like this:

Capital investment is crucial to creating jobs and making 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, such as the terms of employment in the factory, and the quality of goods at the cash register. Unlike shareholders, workers and consumers can credibly, continuously threaten to stop making their contributions to corporate operations if they are unsatisfied with the returns they are receiving.

While it is true that *sometimes* all corporate stakeholder interests are aligned, such that shareholders are best served by firms dealing responsibly with workers, consumers and others, it is also true that this is not always the case, not for all types of businesses, and not

³⁹ Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 897 (1997)

⁴⁰ *Id.* at 897.

⁴¹ See, e.g., STEPHEN BAINBRIDGE, *THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE* (2008).

⁴² 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).

over all time horizons. Corporations, realistic proponents of shareholder primacy understand, will pursue profits wherever they can find them, including by dealing sharply with non-shareholders in ways that workers and consumers with limited expertise, and always limited cognitive resources, find hard to monitor or detect (for example, firms may skimp on worker or consumer safety). Nevertheless, the prevailing view is that corporate governance should still not deviate from its focus only on generating wealth for shareholders. Instead, directors should be made to pursue the goal of profit subject to *external* rules that the government sets out to protect non-shareholders (i.e., labor laws and consumer protection statutes), 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.⁴³ My critique has focused on the implausibility of the “external government regulation” phase of the shareholder primacy justification. First, it must be seen that corporations charged with pursuing profits for shareholders will do so not only by exploiting non-shareholders in the market when they can, but also by operating within the *political* domain to stunt the development of profit-disrupting regulations that would impede such exploitation. This may take the form of stymieing protective regulations that would otherwise bind the firm, or it may involve pursuing artificially onerous industry regulations that favor incumbents over new entrants, reducing competition that could otherwise benefit workers and consumers.

Mainstream corporate theorists 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

⁴³ 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).

corporations should be kept out of the political arena, thus allowing the government to operate free of corporate influence. Before *Citizens United*, that was an intellectually defensible position. But now it is implausible, since *Citizens United* holds that corporations have a constitutional right to political engagement. The legitimacy of shareholder primacy in corporate governance depends upon a robust regulatory system that is insulated from corporate influence. As long as *Citizens United* is good constitutional law, shareholder primacy will be bad corporate theory.⁴⁴

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 global shareholders. While 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 politicians, that reflect sincerely held conceptions of the public good.⁴⁵ 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 will certainly claim that there is harmony between the public interest and the policies they pursue in the shareholder interest, but even where this is so the corporate political activity can only be called public-spirited by coincidence. While non-corporate persons may

⁴⁴ *Id.*

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

also attempt to capture governmental machinery for private gain, it is not morally legitimate for them to do so, and their political activity is not *necessarily* privately motivated, as it is with corporations. This feature of corporate political speech disrupts the already fragile operation of the norm of public reason, which is a crucial piece of the machinery of patriotism.⁴⁶

Profit-maximizing decisions to operate corporations internationally may also have adverse collateral effects on the dynamics of patriotic consciousness. 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.⁴⁷ 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.⁴⁸

⁴⁶ 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 __. Kahan proposes a creative, psychologically plausible, 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 stakeholders, which I explore in David G. Yosifon, *Discourse Norms as Default Rules: Structuring Corporate Speech to Multiple Stakeholders*, 21 HEALTH MATRIX 189 (2011).

⁴⁷ See David G. Yosifon, *The Social Relations of Consumption: Corporate Law and the Meaning of Consumer Culture*, 2015 B.Y.U. L. REV. __ (2015, forthcoming).

⁴⁸ The expansion of consumer culture and the rise of global corporate operations has perhaps made patriotism a more pressing, stressful issue in the lives of ordinary people than it was in earlier eras. For previous generations, the question of patriotism emerged as a decisional issue only episodically, for example, when deciding whether to volunteer for military service in times of war. In previous eras consumption, 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, as consumers must continually decide whether to favor American or universal interests in their consumption behavior. In this way patriotism becomes a monetized, tractable, routine problem, instead of an exceptional encounter that is not reducible to dollars.

Thus, Bainbridge's claim that shareholder primacy's powerful corporations stand as a shield between the people and Leviathan,⁴⁹ which might be viewed as nurturing a place for the operation of true patriotism, is not plausible. Both justifications for, and critiques of, shareholder primacy imply that under that corporate law system government regulation will be widespread. 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.⁵⁰

This move has two principle problems. First, it whistles past the problem that shareholder-primacy theory had long admirably admitted, which is 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 theoretical position 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 First Amendment law in the Night Watchman State, then the Night Watchman will not for long be kept to her limited duties. Shareholder primacy firms will recognize that profits are to be made by pushing for the growth of government, and influencing its operation in the service of

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 (2011).

⁴⁹ See *supra* text accompanying notes ___-__.

⁵⁰ See Stephen M. Bainbridge, *Corporate Social Responsibility in the Night Watchman State* (2014), available http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2494003.

shareholders. The *Citizens United*-State will swallow the Night Watchman State, with a shareholder-centric Leviathan.⁵¹

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 that advance the interests of some nation other than the United States. Government regulation cannot be counted on to curb such anti-patriotic abuses, in part because shareholder primacy corporations will operate politically to stunt such 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 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.

* * *

In epilogue to this sub-section, a word about the patriotic implications of corporate tax inversions. The shareholder primacy norm may from time-to-time compel directors 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.⁵² Tax-inversions fundamentally alter the relationship between a corporation and the nation in

⁵¹ See David G. Yosifon, *The Citizens United Gambit in Corporate Theory: A Reply to Bainbridge on Strine & Walter* (2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2510967.

⁵² See David G. Yosifon, "Corporate Tax Ethics," *The Corporate Social Responsibility Podcast*, available at <https://itunes.apple.com/us/podcast/corporate-social-responsibility/id807976212?mt=2> (2014) (interview with executives at Flextronics, Inc., a global manufacturing concern, regarding the ethics of corporate tax inversions).

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. Formally, a corporation that re-charters in a foreign country ceases to exist and a new corporation, with a new motherland, is created. While there is a hallowed tradition in American legal and popular discourse insisting on the propriety of lawful tax avoidance,⁵³ this latitude would seem to stop at the border. Nobody would consider it anti-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 would, in our morality, have some pretty fancy explaining to do if they wanted to situate themselves as an American patriot.

However, tax inversions may ironically mitigate the problem of corporate influence in the American political process, making shareholder primacy in firm governance more theoretically sound, and giving clearer reign to the play of patriotic sentiment by the electorate in the political process. When an American corporation re-charters in another country it falls subject to federal law that forbids foreign corporations from making expenditures in connection with local, state, or federal elections in the United States.⁵⁴ And this kind of restriction may still be constitutionally permissible. The majority in *Citizens United* specifically noted that its holding “need not [and did not] reach the question whether

⁵³ 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 (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.). While Hand’s juridical statements on the propriety of tax avoidance are often referenced, he 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 notes __-__ (discussing this essay).

⁵⁴ 52 U.S.C.A. § 30121 makes it “unlawful for” (1) a foreign national . . . to make a contribution or . . . an . . . independent expenditure . . . for an electioneering communication.” The section goes on to state that “Foreign national” means “(1) a foreign principal, as such term is defined by section 611(b) of Title 22.” And 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.”

the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process."⁵⁵ 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."⁵⁶

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, for example, claims 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.⁵⁷ A righteous patriotism must submit to the constraint of foreign influence.

⁵⁵ *Citizens United v. Federal Elections Commission*, 558 U.S. 310, 362 (2010) (citing 2 U.S.C. § 441e (contribution and expenditure ban applied to "foreign national[s]")).

⁵⁶ *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 LOYOLA L.A. L. REV. 951 (2011). Justice Stevens addressed the issue of foreign corporations several times in his *Citizens United* dissent. Sardonicly he claims 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: To do otherwise, after all, could "enhance the relative voice" of some (*i.e.*, humans) over others (*i.e.*, nonhumans) Under the majority's view, I suppose it may be a First Amendment problem that corporations are not permitted to vote, given that voting is, among other things, a form of speech.

Id. (emphasis in original).

⁵⁷ See Nussbaum, *Teaching Patriotism*, *supra* note ___ at 249-250.

III. PATRIOTISM AND THE CORPORATE BOARD

As a matter of corporate law, and maybe even reality, “the business and affairs of every corporation . . . [is] managed by or under the direction of a board of directors.”⁵⁸ 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. Descriptive Corporate Patriotism

Directors, like all humans, have limited cognitive capacity and motivational discipline.⁵⁹ 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 non-shareholder interests.⁶⁰ 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.⁶¹ It may happen subconsciously, or in ways that directors are able to subjectively experience as being consistent with their fiduciary obligations. By operation of motivated reasoning, directors may sincerely believe that corporate choices that comport with their patriotic conscience are also good for shareholders. Such “patriotic slacking” may be desirable or it may be problematic, but either

⁵⁸ 8 DGCL § 141(a).

⁵⁹ See generally Hanson & Yosifon, *The Situation Character*, *supra* note ____.

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

⁶¹ We might expect the magnitude of this “patriotic slack” to be a function of the strength of 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 citizens to be relatively less patriotic for America, and foreign corporations dominated by foreign citizens to be relatively more patriotic for foreign countries. See Oxelheim and Randoy, 2003, *supra* note ____ at 2370 (“The Anglo-American system is commonly regarded as the most demanding corporate governance system.”); Oxelheim, *supra* note ____ at 191 (noting a “difference in management style between Anglo-American directors (who may be more focused on shareholder value) and non-Anglo-American directors, who may be more motivated in satisfying a broader set of stakeholders.”). 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 worse corporate law. Perhaps Morse and Shive can run the numbers. See *supra*, n. ____.

way, it compels us to think about the consequences of the nationalities of directors serving on corporate boards.

Now hold on a minute. We must stand guard against the known devils of patriotism: stereotyping and xenophobia. The reader should be wary, as is the author. Yet there seems to be no escape from the inquiry, if patriotism is either a vice or a virtue. If directors cannot be trusted to restrain their patriotic conscience where the law calls for shareholder primacy, or if I am wrong in my depiction of corporate law and the law already countenances patriotic conscience on corporate boards,⁶² then the patriotic commitments of corporate directors, to the United States or another country, becomes a legitimate issue of concern for all corporate stakeholders. 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. If, on the other hand, 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 directorial slack manifesting in the patriotic dimension will privilege American interests, rather than those of some foreign country.

Little is known, empirically, about either 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 “despite extensive ongoing research on boards of directors, the internationalization of corporate boards

⁶² See *supra* n. ___ (noting that some scholars disagree with my description of prevailing corporate law standards).

remains relatively unexplored.”⁶³ Neither Delaware, nor the federal securities laws, nor the major stock exchange listing rules require firms to report the nationality of corporate directors who are serving or running in proxy contests. 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.

There are, however, both 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 they are resident in the foreign country where the U.S. corporation has operations, then foreign national directors might be better placed than other directors to monitor corporate operations in that country. A foreign national might also have special insight about how to effectively reach customers in their own homeland, insight which may not be readily apparent to American directors. The 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 or workers there, or managing regulatory relations with the foreign

⁶³ Lars Oxelheim, Aleksandra Gregoric, Trond Randoy, and Steen Thomsen, *On the Internationalization of Corporate Boards: The Case of Nordic Firms*, 44 J. INT’L. BUS. STUDIES 173, 173 (2013); Lars Oxelheim and Trond Randoy, *The Impact of Foreign Board Membership on Firm Value*, 27 J. OF BANKING & FINANCE 2369, 2370 (2003) (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, these researchers did find support for their reasonable hypothesis that “firm internationalization relates to the internationalization of the boardroom.” Oxelheim, et. al, *supra* note ___ at 186, and more particularly, internationalization of the 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.* 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.* at ___ at 176.

government or local communities.⁶⁴ These “connections” can be among the main benefits that a director brings to a board.⁶⁵

From a legal perspective, both Delaware corporate law and federal securities regulations may 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 corporations 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.⁶⁶ *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. When two other, U.S.-based independent directors became aware of the theft, they

⁶⁴ See Stephen Bainbridge, *THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE* (2009) (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 to guide development of the firm’s broad strategies, and forging connections between the firm and outside resources to which the director has special access).

⁶⁵ 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. OF ACCOUNTING & ECONOMICS 527 (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.* It seems reasonable to expect that an updated accounting would shower increased percentages. Masulis and his colleagues found that FIDs add the most value for firms that are engaged in international acquisitions. Nevertheless, 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.

The principle explanation these researchers gave for these adverse effects is the high transactions costs FIDs bear in traveling long distances for board meetings and other corporate functions. 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. 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 during ordinary business hours. The authors do allow as a secondary explanation the influence on directors of their homeland’s law, culture, and norms which are often more lax on corporate governance standards, in the authors’ estimation, 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.*

⁶⁶ See *In Re Puda Coal, Inc., Stockholders Litigation*, C.A. No. 6476-CS (DEL. CH., February 6, 2013), available at <http://www.delawarelitigation.com/files/2013/02/puda-case.pdf> (hereinafter, “*Puda Coal*”).

resigned.⁶⁷ Shareholders brought suit against the allegedly thieving director, and against the directors on whose watch the thieving occurred.⁶⁸ From the bench, Strine 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.⁶⁹

Strine goes on (as is his want):

[I]f 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 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.⁷⁰

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. And his disquisition showcases the magic words that bring hope, or fear,

⁶⁷ *Id.*

⁶⁸ See *In Re Puuda Coal*, *supra* note __, <http://www.delawarelitigation.com/files/2013/02/puda-case.pdf>. Another interesting element of the case is Strine's recognition that the default judgment he was entering on behalf of the plaintiffs against the Chinese national director was going to be difficult to enforce, given that he was in China. This is another dimension of concern to the effective regulation corporate governance where there is increased service of foreign nationals on the boards of domestic corporation. As it does particularly implicate patriotism issues, I note but do not pursue the issue here.

⁶⁹ See *In Re Puda Coal, Inc. Stockholders Litigation*, Consolidated C.A. No. 6476-CS, Delaware Court of Chancery, available at <http://www.delawarelitigation.com/files/2013/02/puda-case.pdf>

⁷⁰ *Id.* The future will tell, but Strine may here be engaging 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 (1997) (arguing that even as they 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 even where it falls short of creating legal liability).

to corporate lawyers (depending on their side of the “v.”). Having deep knowledge of the foreign countries in which a Delaware firm is operating is a matter of “good faith.”⁷¹ It is a matter of “loyalty.”⁷² Under Delaware law corporate charters may exculpate a director from having to pay money for violations of their duty of care to the corporation and its stockholders, but exposure to damages for violations of good faith and loyalty can never be waived.⁷³ All of the action in shareholder litigation, therefore, is over what counts as loyalty and good-faith. And 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 federal push 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.⁷⁴ After the 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.”⁷⁵ 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 pushing firms to look to foreign nationals as candidates to serve on their boards of directors.⁷⁶

⁷¹ See *Puda Coal*, *supra* note __ at __.

⁷² See *Puda Coal*, *supra* note __ at __.

⁷³ 8 DGCL 102(b)(7) (“[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.”).

⁷⁴ 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).

⁷⁵ STEPHEN M. BAINBRIDGE, CORPORATE GOVERNANCE AFTER THE FINANCIAL CRISIS 78 (2012).

⁷⁶ Cf. Oxelheim & Radnoy, *supra* note __ (2003) (“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.”) Even

If patriotism is a vice, then the legal and business forces that would seem to be compelling 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 American firms.

b. Prescriptive Corporate Patriotism

In 2008, a U.S.-based shareholder activist group 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)”⁷⁷ 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.⁷⁸

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

outside of formal requirements, boards may want to reach far for new members to avoid signaling that they are falling prey to the deferential culture exhibited in “old-boy” networks. *Id.* Oxelheim & Radnoy conclude that foreign firms will find substantial value in putting American directors on their boards. This will increase the “demand” for American directors, further drawing away the supply available for American firms, and forcing more firms to bring on foreign directors. Oxelheim and Radnoy make the interesting argument that international firms find it cheaper to signal their compliance with American corporate governance norms by putting Americans on their board, rather than actually organizing under American corporate governance law, and being subject to expensive SEC regulations. Oxelheim and Radnoy, *supra* note __ at 2370. Their argument may be flipped to hypothesize that American firms might put foreign nationals on the board to signal to foreign-stakeholders that their interests will be regarded in a way that is not, strictly speaking, compatible with U.S. corporate governance norms. Oxelheim and Radnoy argue that even one Anglo-American director can change a board’s culture and result in more active boards; again, perhaps the inverse is also true, with even one foreigner changing the culture of an American board.

⁷⁷ “MONSANTO CO.” CCH-SECNAL WSB No. 1117200801 (C.C.H.), 2008 WL 8785663 (hereinafter, “Monsanto”).

⁷⁸ *Id.*

if it would “cause the company to violate any state, federal, or foreign law to which it is subject.”⁷⁹ The firm argued that the proposal conflicted with Delaware law:

[T]he Proposal, if adopted, 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. Moreover, the Board could also determine that it is in the best interests of the Company and its shareowners to nominate a foreign national to the Board (or appoint a foreign national to the Board to fill a vacancy) but may be constrained in that selection due to the nominee’s inability to take the oath. . . . Such subordination is impermissible under Delaware law.⁸⁰

This is an interesting confession of a major corporate board’s view of the relationship between corporate law and national allegiance. The abiding principle, according to Monsanto, is “the Company and its shareowners.”⁸¹ Adhering to that charge may sometimes require directors to make decisions which may not comport with “true faith and allegiance to the Constitution of the United States.”⁸² Delaware law, of course, requires directors always to follow “applicable law,”⁸³ but this “true faith and allegiance”⁸⁴ verbiage suggests something more (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: “[t]here appears to be some basis for your view that Monsanto may exclude the proposal under rule 14a-8(i)(2).”⁸⁵

Note that the Monsanto shareholders’ proposal did not, *per se*, attempt to forbid foreign nationals from serving on Monsanto’s board. Regulation of the nationality of corporate

⁷⁹ 17 C.F.R. § 240.14a-8(i)(1) (2011).

⁸⁰ See *Monsanto*, *supra* note ____.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

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.⁸⁶ But in the United States, general 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, and the hallowed principles that animate such prohibitions.⁸⁷

The Monsanto shareholder proposal, even while steering clear of nationality restrictions, is purple and a little embarrassing. But it showcases the problems of corporate patriotism with which this article is concerned, and it provides occasion for thinking about how corporate law’s exclusion of patriotic conscience from board decision-making might be legitimately altered. Despite marginal opportunities for slacking, of patriotic or more selfish varieties, the law of fiduciary duty, incentive based pay structures, and corporate culture, may keep directors of American corporations, regardless of their nationality, for the most part, working “hard and honest”⁸⁸ 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 law to improve its patriotic comportment.⁸⁹

⁸⁶ Oxelheim & Radnoy, *supra* note __ (2003) at 2375 n. 2.

⁸⁷ 42 U.S.C.A. §2002e-2(a) (“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.A. §2002e-2(g). Again, this article is concerned with the general case.

⁸⁸ EASTERBROOK & FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991) (characterizing the essence of fiduciary duty).

⁸⁹ Indeed, in a sense that we may want to credit, the moral legitimacy of patriotism is beside the point. The fact is that many people, Americans in particular, are patriotic and value patriotism. *See supra* n. __ (citing data from the World Values Survey showcasing high levels of patriotism among Americans). If we think that the law should help deliver what people want, then we should be concerned about whether our corporate law is sufficiently supporting patriotism irrespective of our assessment of the desirability of it doing so.

For simplicity and clarity, when I described the law of corporate purpose in Delaware as decidedly shareholderist at the start of this Article,⁹⁰ I did not make reference to an obscure sub-section of the Delaware corporate code which muddies the clarity of that picture, but does not alter the black letter law that it depicts. I now introduce that sub-section, by way of establishing a point of departure for thinking about how corporate law might be reformed to allow or compel greater patriotic conscience in the boardroom.

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.”⁹¹ 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.⁹² Despite that history, my assessment is that it is nevertheless implausible to think that the Delaware courts, asked to construe §122(12), would find in it a fulcrum to reverse decades of their own jurisprudence specifying that shareholder primacy is the law in Delaware.⁹³ However, even if the provision were interpreted to allow corporate deviation from shareholder interests in order to serve governmental authority, the pressing question for present purposes remains: *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

⁹⁰ See *supra* text accompanying notes __-__.

⁹¹ 8 DGCL §122(12). 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. REV. 1086 (2013).

⁹² *Id.* (emphasis added).

⁹³ See Yosifon, *Corporate Aid of Governmental Authority*, *supra* note __ at 1103-1115.

prosecution of the war.”⁹⁴ Delaware’s §122(12) power facially applies much more broadly (not just during wartime), and does not specify *which* government the firm is authorized to aid. It might, for example, be an anti-American government that the corporation aids on behalf of its shareholders. The lack of clarity in Section 122(12) provides an extant statutory starting point for thinking more precisely about how patriotic reform of corporate governance law could be pursued.⁹⁵

Such reform could be pursued at multiple levels. For example, a modest reform would embed in corporate law a requirement that where a corporate decision pits the interests of the United States against those of some other nation or nations, but corporate profitability will not be affected either way, then directors must choose the course that privileges American over other national interests. 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

⁹⁴ MODEL BUS. CORP. ACT ANN. § 4(n) (West 1960). 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 __ at 1091-1095 (noting that while the drafter’s 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).

⁹⁵ Any reformative impulse that significantly modified shareholder primacy in corporate governance would have to be made through federal chartering. 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.

a mandatory or permissive devotion to the United States if they did not want to be burdened by a patriotic conscience.⁹⁶

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?⁹⁷ Nobody can say for sure. Patriotism has no particular substantive valence. Just as religion, prudently conceived, preaches love for the poor but abstains from prescribing the secular arrangements that most effectively eliminate poverty, so too must patriotism evince a love for country without specifying the political designs that properly express that love.⁹⁸ An act is authentically patriotic if the motive that produced it is (critically reflective) love for country; it cannot be ascribed from evaluation of the act itself.⁹⁹ 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

⁹⁶ As written, Section 122(12) appears to be immutable. But this may be more a residue of poor drafting than it is an expression of legislative intent. See Yosifon, *Corporate Aid of Governmental Authority*, *supra* note __ at 1111-1113 (discussing the immutability of Section 122(12)).

⁹⁷ See ADOLF A. BERLE, JR., *THE 20TH CENTURY CAPITALIST REVOLUTION* 116-164 (1954). Berle, who was a diplomat before he was a scholar, emphasizes 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 Berle's scholarship).

⁹⁸ See, e.g., Pope Paul VI, *Pastoral Constitution on the Church in the Modern World* (1965) ("The Church, by reason of her role and competence, is not identified in any way with the political community nor bound to any political system. . . . The Church and the political community in their own fields are autonomous and independent from each other."). Turning more particularly to the problem of patriotism in the same writing, Pope Paul seems rather to dodge than confront the central problematic: "Citizens must cultivate a generous and loyal spirit of patriotism, but without being narrow-minded. This means that they will always direct their attention to the good of the whole human family, united by the different ties which bind together races, people, and nations." *Id.* True to the prudent principle articulated in his first quote in this footnote, Pope Paul's comment on patriotism has very little to offer secular theorists regarding the prudent design of corporate law.

⁹⁹ 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 __ at 214. Conservative bias is also too often evident in academic discourse on patriotism. See, e.g., Parker, *Homeland: An Essay on Patriotism*, *supra* note __ at 410 (otherwise thoughtfully assessing the discourse of patriotism after 9/11, 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.)").

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 Chancery.”¹⁰⁰

Above all we should pursue reforms that encourage directors to be open and up front 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, because the law of corporate governance stands as a constant warning that directors violate their fiduciary duties if they govern in other than the shareholder interest. This is a recipe for confusion and obfuscation regarding the role of patriotic conscience in firm governance. Nussbaum promotes a “critical public culture,” which makes the threats and opportunities of patriotic conscience explicit.¹⁰¹ 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 there about their honest assessment of what impact a proposed corporate decision will have on national interests.

¹⁰⁰ *Meinhard v. Salmon*, 249 N.Y. 545, 465 (1928) (Cardozo, J).

¹⁰¹ See Nussbaum, *supra* note __ at 224.

IV. CONCLUSION

The law of corporate conscience is presently undergoing important doctrinal and conceptual developments.¹⁰² In this milieu, it is likely that the question of corporate patriotism, never fully silent but often effectively avoided, will soon command the explicit attention of the public and policymakers. When this moment strikes, 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 explicitly 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 started out. In intellectual ventures, this is surely a sign that some difficult terrain has been traversed. But it also makes clear that difficult terrain remains to be covered. 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, when he wrote: “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.”¹⁰³

¹⁰² See *Citizens United*, *supra* note __ (corporate political rights under the U.S. Constitution), *Burnell v. Hobby*, 573 U.S. __ (2014) (religious right 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).

¹⁰³ LEARNED HAND, *THE SPIRIT OF LIBERTY* 190 (1952).