

the Pareto fallacy of corporate profitability, [*211] contentedly telling their political interlocutors that corporate profitability makes all stakeholders better off.ⁿ⁵³ So the agents of corporate social and political speech may believe they have conformed to the norm of public reason just as sincerely as do regular people. But they are no more successful at it.

The incompatibility between the norm of public reason and the dynamics of corporate speech has two iniquitous effects. The first is that while corporations often succeed in achieving the policies they promote, such policies are not reliably in the public interest, but are instead reflective of corporate bias and motivation, which is shareholder primacy. The second consequence is that, for reasons Kahan makes clear, the public and policymakers are largely suspicious and resentful of corporate political speech. It may be that the "merely" sincere adherence to the norm of public reason by firms operating in the political realm is what helps give rise to the abiding skepticism and animosity that Americans have towards corporations.ⁿ⁵⁴ The juxtaposition of professed objectivity or public spirit with the bias that we otherwise know they have is particularly galling. One survey from 2002 found that 70 percent of Americans "did not trust what . . . corporations told them and 60 percent called corporate wrongdoing 'a widespread problem.'"ⁿ⁵⁵

The discourse norms that animate corporate speech inevitably clash with the norm of public reason, deepening our cynicism about the legitimacy of both corporations and government. Corporate political speech advances the firm's mission of corporate profitability, but it inhibits the mission of political speech in a free society. In particular, it precludes the full development of consumer, worker, and environmental protection regimes that are needed before shareholder primacy in corporate governance can be sanctified.ⁿ⁵⁶

II. REFORMING CORPORATE LAW THROUGH PRESCRIPTIVE DISCOURSE NORMS

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

A. The Utility of Multi-Fiduciary Discourse

Progressive corporate law scholars have suggested that an alternative to shareholder primacy might be a corporate governance regime that requires directors to actively attend to the interests of multiple stakeholders at the level of firm governance.ⁿ⁵⁷ In a multi-stakeholder regime directors would be charged with attending to the interests of all of the firm's stakeholders with care and loyalty. Such a regime could be enforced the same way that fiduciary obligations are presently enforced by corporate law: by imposing discourse obligations on directors. Under a multi-stakeholder regime directors would be required to become informed about and discuss—in the honest, complete, good-faith fashion of

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