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The Public's Companies

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THE PUBLIC'S COMPANIES

*Andrew K. Jennings**

ABSTRACT

This Essay uses a series of survey studies to consider how public understandings of public and private companies map into urgent debates over the role of the corporation in American society. Does a social-media company, for example, owe it to its users to follow the free-speech principles embodied in the First Amendment? May corporate managers pursue environmental, social, and governance (“ESG”) policies that could reduce short-term or long-term profits? How should companies respond to political pushback against their approaches to free expression or ESG?

The studies’ results are consistent with understandings that both public *and* private companies have greater public obligations than they do as a matter of law, including obligations to respect customer and employee speech and political rights. They are also consistent with the view that business decisions by both public and private firms may credit non-shareholder interests—those of employees, the environment, or the community—over shareholder-value maximization. Together, these results point to the potential of public corporate law understanding to influence contemporary debates by reinforcing, or countering, political actors’ policy agendas.

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INTRODUCTION

Does going public mean a company must abide its customers’ free-speech rights? May a company discriminate against employees on the basis of race, gender, or religion so long as it remains “private”? To those with just passing knowledge of constitutional, employment, or securities

law, these questions might elicit a puzzled “no.”¹ But to the broader public, or even to public figures and officials, the answers might not be so clear. When one refers to “public” and “private” companies, are there gaps between what the speaker means and what the listener hears? It might not be so unreasonable to understand that like a public road, a public park, a public school, or a public record, a public company bears obligations to society at large.² It might be assumed that remaining private would allow for avoiding such obligations.³

There are deep ambiguities in the meanings of “public” and “private” and tense boundaries between the concepts they represent.⁴ Competing understandings of “public company” and “private company” could easily exist between those knowledgeable about the black-letter aspects of corporate and securities law—or constitutional or employment law, for that matter—and those with more naïve intuitions. Such competing understandings, however, may shape public perspectives on, and in turn influence, policy.⁵ This point is especially so when businesses find themselves at the center of contentious social, political, or cultural issues. Examples include when social-media platforms police user speech (or don’t) or when firms make politically salient hiring, firing, or commercial decisions.⁶

This Essay presents a series of studies that examine these potential gaps in understanding what it means to be a “public company,” and, by implication, what it means to be a “private company.”⁷ Initial data were

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1. See *infra* Part III (discussing this question in light of federal and state law).
 2. See *infra* Part I.A.; cf. Julie F. Mead, *Right to Education or Right to Shop for Schooling: Examining Voucher Programs in Relation to State Constitutional Guarantees*, 42 FORDHAM URB. L.J. 703, 743 (2016) (citations omitted) (observing that regarding public education, “public-ness also includes public purpose, public access, public accountability, and public curriculum”).
 3. See *infra* Part II.A.2.
 4. See generally Peter J. Steinberger, *Public and Private*, 47 POL. STUD. 292 (1999) (confronting the uncertain boundary between publicness and privateness and theorizing that these statuses reflect “manners of acting”).
 5. See JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 65 (2d. ed. 2003).
 6. See *infra* Part I.B.
 7. In doing so, it contributes a corporate-meaning study to the “public understanding” literature. See, e.g., John P. Anderson et al., *Public Perceptions of Insider Trading*, 51 SETON HALL L. REV. 1035 (2021); Roseanna Sommers, *Commonsense*

collected in July 2020, a restive period when the national milieu was heavy with the outbreak of the COVID-19 pandemic, the murder of George Floyd and the national movement for Black lives, and the upcoming 2020 presidential election.⁸ To test whether respondent understandings were different after major subsequent developments—which included the 2020 presidential election, the January 6 attack on Congress, and social-media companies’ bans of those associated with the attack, including then-President Donald Trump—follow-up studies were conducted in summer 2021.⁹ By reviewing these results in light of contemporary debates about the governance, power, and purpose of corporations in American society, this Essay maps what the public might understand “public company” and “private company” to mean. In turn, it considers what that understanding might mean for public policy. It does so in three parts.

Part I reviews the technical meaning of “public company,” as well as its effective synonyms—“publicly traded company” and “reporting company”—in light of the literature on corporate publicness.¹⁰ Along with this discussion, it offers qualitative evidence that among political figures and other individuals, “public company” carries a broader, more substantive, meaning than black-letter definitions would suggest.¹¹

Part II presents a series of survey studies that ask respondents to rate the truthfulness of positive statements about corporate governance, power, and purpose. These responses in turn help illuminate what the public might understand “public company” to mean and how this understanding diverges from that of “private company.” It also presents

Consent, 129 YALE L.J. 2232 (2020); Gregory N. Mandel et al., *Intellectual Property Law’s Plagiarism Fallacy*, 2015 BYU L. REV. 917 (2015).

8. Olivia B. Waxman, *How 2020 Will Go Down in the History Books, According to Historians*, TIME (Dec. 23, 2020), <https://time.com/5917093/2020-history-books-historians/> [<https://perma.cc/XS98-UW9B>].

9. Hannah Denham, *These Are the Platforms that Have Banned Trump and His Allies*, WASH. POST. (Jan. 14, 2021), <https://www.washingtonpost.com/technology/2021/01/11/trump-banned-social-media/> [<https://perma.cc/6AQN-SBES>] (reporting that then-President Trump and allies had been banned from Twitter, Facebook, Instagram, YouTube, Amazon Web Services, Snapchat, Reddit, Twitch, and Shopify).

10. See *infra* Part II.A.

11. See *infra* Part II.B.

qualitative insights from open-ended survey questions.¹² In short, the results support there being a public understanding that firms, both public *and* private, have greater nondiscrimination obligations—such as around free speech—than they actually do.

The results also evidence a public understanding that managers may take the interests of non-shareholder stakeholders—such as those of employees, the environment, or the community—into account when making business decisions. These understandings present a mixed ideological alignment. On one hand, respondents align with the political-nondiscrimination/anti-censorship views currently prominent on the political right.¹³ On the other, they also align with a stakeholder view of corporate governance, a perspective most readily associated with political progressives.¹⁴

Part III considers these results in light of contemporary debates about corporate governance, power, and purpose. Importantly, it observes that public understanding can weigh on public policy. If public understanding aligns with the positive or normative views of policymakers and political entrepreneurs, then those actors will have the benefit of advocating for policies that are already consistent with common intuitions. If public understanding is counter to those actors' preferences, then they will bear the burden of shifting public understanding or effecting policies notwithstanding it.¹⁵

I. WHAT IS A “PUBLIC COMPANY”?

This Part considers what the public takes “public company” to mean and what that meaning might reveal more broadly about public understanding of, and expectations for, business in American society. In the United States, nearly all companies are “private” in the sense that they are not owned by government, nor established to perform governmental functions.¹⁶ To the extent a government holds corporate securities—say,

12. See *infra* Part II.B.2.

13. See, e.g., *infra* notes 47–54, 66–71, 177 and accompanying text.

14. See Christopher M. Bruner, *Center-Left Politics and Corporate Governance: What is the “Progressive” Agenda?*, 2018 BYU L. REV. 265, 269 (2018).

15. See generally Wendy J. Schiller, *Senators as Political Entrepreneurs: Using Bill Sponsorship to Shape Legislative Agendas*, 39 AM. J. POL. SCI. 186 (1995).

16. This general description does not hold for all times or contexts. For instance, the earliest American corporations were formed as public-private partnerships to meet public

as part of employee pension funds—it does so as an investor, with no special privileges over fellow holders of the same class of securities.¹⁷ A shareholder government might have authority to regulate the companies it holds shares in, but that power derives from its status as a government, not as a shareholder.¹⁸ Yet a small subset of privately held firms—including some of the most profitable, valuable, and famous—are nevertheless labeled “public” because their shares are bought and sold in a securities submarket that is itself labeled “public.”¹⁹

In a democratic society, that “public” label can connote heightened obligations of accountability to members of that society.²⁰ Drawing from that connotation, members of the public might have a naïve understanding that a *public* company is a company that has those heightened social

purposes, such as satisfying the need for infrastructure like roads, canals, banks, and railroads. See generally Elizabeth Pollman, *The History and Revival of the Corporate Purpose Clause*, 99 TEX. L. REV. 1423 (2021). Private investors supplied capital to those ventures, and state legislatures contributed legal privileges (such as limited liability) that could not be obtained through traditional common-law partnerships. *Id.* The rise of general incorporation statutes in the late nineteenth century transitioned the American corporation from a public-private venture to a predominantly private concern. *Id.* A few firms in that public-private tradition, like government-sponsored enterprises Fannie Mae and Freddie Mac, exist today. See W. Scott Frame et al., *The Rescue of Fannie Mae and Freddie Mac*, 29 J. ECON. PERSPS. 25 (2015) (reviewing the expressly public role for which Congress chartered Fannie Mae and Freddie Mac).

17. Public pension funds hold trillions of dollars’ worth of stock in publicly traded firms as part of their mandates to generate sufficient cash flow to pay promised benefits to government retirees. See Heather Gillers, *Public Pension Plans Continue to Shift into U.S. Stocks*, WALL ST. J. (Nov. 5, 2019), <https://www.wsj.com/articles/public-pension-plans-continue-to-shift-into-u-s-stocks-11572955200> [<https://perma.cc/9DBP-DLYN>]. Government agencies that administer those shares are significant corporate-governance players. See Diane Del Guercio & Jennifer Hawkins, *The Motivation and Impact of Pension Fund Activism*, 52 J. FIN. ECON. 293 (1999). But they enjoy that position in right of holding a large number of shares rather than in right of being government agencies.

18. For instance, imagine that a California state pension fund owns shares of Meta Platforms, Inc. (the parent of Facebook) but not of Alphabet Inc. (Google’s parent). The state government would have authority to regulate employment practices at both companies’ California workplaces. That the pension fund owns shares in one but not the other would be irrelevant to the exercise of its regulatory powers.

19. See *infra* notes 24, 27 and accompanying text.

20. See Marianne Antonsen & Torben Beck Jørgensen, *The ‘Publicness’ of Public Organizations*, 75 PUB. ADMIN. 337, 338 (1997) (associating “democratic accountability, production of collective goods, and due process” with publicness).

obligations, whereas a *private* company is one without them. Of course, no company, whether it is called “private” or “public,” can divorce itself from the everyday economic, social, cultural, and regulatory realities of acting in a society.²¹ Just as a person who steps into a privately owned store or drives on a publicly owned street is “in public,”²² private companies that interact with customers, vendors, and employees are also “in public.” Thus, even public companies that are in fact private, often act in public.

Against that fuzzy public/private divide, the following section examines the interplay between technical and naïve meanings of “public company.” The fact that almost all U.S. companies are privately held, even though some are called “public” (while the rest are called “private”), creates a setting ripe for confusion.

A. WHAT DOES IT MEAN TO BE A “PUBLIC COMPANY”?

A black-letter-law definition of “public company” is fairly straightforward.²³ Under Section 12 of the Securities Exchange Act of 1934 (the “Exchange Act”), a company becomes “public” once it hits one of three triggers: (1) it lists securities for trading on a national securities

21. See Joseph T. Mahoney et al., *The Interdependence of Private and Public Interests*, 20 ORG. SCI. 1034, 1035 (2009):

[M]any private interests are defined by reference to public institutions, practices, norms, and incentives; for example, the private interests of public corporations arise from the legal, social, and cultural context that establishes the public corporation as a juristic person with limited liability. Private interests are often shaped by *global collective goods*, which are defined as *nonexcludable* across borders, generations, and population groups[.]

22. *In Public*, OXFORD ENGLISH DICTIONARY (2d ed. 1987) (defining “in public” as “[i]n a public place; before spectators or onlookers; publicly, openly, without concealment”).

23. George S. Georgiev, *The Breakdown of the Public-Private Divide in Securities Law: Causes, Consequences, and Reforms*, 18 N.Y.U. J.L. & BUS. 221, 224 (2021) (“Even though the law still distinguishes between public and private companies, capital, and markets, the two coherent legal realms have been supplanted by a low-friction system in which public capital flows to private companies, private capital is ever more abundant, and firms can effectively eschew public company status[.]”).

exchange, like the New York Stock Exchange;²⁴ (2) it has total assets exceeding \$10 million *and* has 2,000+ shareholders or 500+ unaccredited investors;²⁵ or (3) it makes a public securities offering under the Securities Act of 1933.²⁶ A prior revision of the Model Business Corporation Act defined the term more succinctly as “a corporation that has shares listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national securities association.”²⁷ If asked on the spot what it means to be a public company, a corporate or financial practitioner would probably reply along the lines that it is a company whose shares are traded on a stock exchange.²⁸

When firms go public, they take on numerous investor-protection obligations.²⁹ They must, for instance, comply with extensive SEC-mandated public-reporting requirements,³⁰ as well as governance standards imposed by federal law and stock exchanges.³¹ Public status also sometimes triggers regulatory obligations or privileges that fall outside the securities-regulation heartland. For instance, California has enacted legislation requiring public companies headquartered in that state

24. See 15 U.S.C. § 78l(a).

25. See *id.* at § 78l(g).

26. See *id.* at § 78l(f)(1)(g).

27. MODEL BUS. CORP. ACT § 1.40(18A) (2008).

28. This is the operative definition used in the study discussed in Part II.A.5. It also aligns with the understandings of respondents who were asked to offer free-response answers to that question. See *infra* Part II.A.5 & Appendix, Table 4.

29. See 17 C.F.R. § 240.12d2-2 (delisting); see also 17 C.F.R. § 240.12g-4 (termination of reporting obligations). “Public company” serves as an umbrella term, whereas “public reporting” or “publicly traded” offer slightly more nuanced meanings. See *id.* The first reflects that a company submits mandatory, publicly accessible reports to the Securities and Exchange Commission (SEC) and the second that its securities are traded on a stock exchange. See *id.* It is possible to be one but not the other. See *id.* For example, a firm might hit the second trigger even though it never lists its shares on an exchange, or it might remain a reporting company even after its shares have been delisted. See *id.*

30. See generally, e.g., Regulation S-K, 17 C.F.R. pt. 229.1 (non-financial disclosure); Regulation S-X, 17 C.F.R. pt. 210 (financial disclosure); Rule 10b-5, 17 C.F.R. § 240.10b-5 (disclosure fraud); Regulation FD, 17 C.F.R. pt. 243 (selective disclosure); Regulation G, 17 C.F.R. pt. 244 (non-GAAP financial disclosure); Rule 14a-9, 17 C.F.R. § 240.14a-9 (proxy fraud).

31. See, e.g., N.Y.S.E., NYSE LISTED COMPANY MANUAL § 303A.09.

to satisfy board-diversity requirements,³² whereas the federal Corporate Transparency Act of 2021 exempts publicly traded firms from its beneficial-owner disclosure requirements.³³

Although these obligations could influence managerial decision-making, they do not *per se* compel managers to make different decisions than they would have made were they leading a comparable private company.³⁴ Public companies are not necessarily larger or more socially or economically important than their comparable private peers. Private peers might generate larger revenues and valuations, have bigger workforces, feature greater organizational complexity, and enjoy wider fame.³⁵ In other words, positive legal and market expectations for how a

32. CAL. CORP. CODE §§ 301.3-301.4, 2115.5–2115.6 (2021). This statute’s focus on public companies can be understood partly in terms of administrability: public firms are far less numerous than private firms and must disclose their headquarters location in their securities filings. See Exchange Act Rule 3b-7, 17 C.F.R. § 240.3b-7. This smaller population and consistent headquarters disclosure make identifying the universe of companies subject to the statute less costly for its administrator, the California secretary of state. CAL. CORP. CODE §§ 301.3-301.4, 2115.5–2115.6 (2021). The focus on public companies could also be understood as a proxy for the most important companies—those that have the greatest social and economic impacts, that employ the most people, and so on. Of course, California’s prominent startup community means that many large, important companies in the state are still privately held and thus are not subject to the statute. Andrew Dubbins, *Some Entrepreneurs Are Fleeing, but California Is Still the ‘Unicorn’ Capital of the World*, L.A. MAG. (Feb. 1, 2021), <https://www.lamag.com/citythinkblog/unicorn-california/> [<https://perma.cc/A843-YZ29>] (“California is still home to the world’s highest number of ‘unicorns’—the term for privately held start-ups valued at over \$1 billion. Only 506 such companies exist around the world. Of the 245 U.S.-based unicorns, 114 are headquartered in the Bay Area, and 19 are in L.A.”).

33. See William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116–283, 134 Stat. 3388 (2021). This exemption can be justified by the fact that public companies must already make extensive public reports, and thus the act’s anti-money-laundering purpose would not be furthered by including them in an additional disclosure regime. *Id.*

34. Cf. Robert B. Thompson & Hillary A. Sale, *Securities Fraud as Corporate Governance: Reflections upon Federalism*, 56 VAND. L. REV. 859, 872–74 (2003) (describing the information-forcing function of mandatory disclosure and its tendency to drive management decisions); but see James C. Brau & Stanley E. Fawcett, *Initial Public Offerings: An Analysis of Theory and Practice*, 61 J. FIN. 399 (2006) (finding that stay-private decisions are based partly on a desire to maintain decision-making flexibility).

35. For example, before it went public, Airbnb was the largest hotel operator in the world, outpacing its publicly traded competitors like Hilton and Marriott on key operating

company is to be a *good* company—in both the behavioral and performance senses of the word—do not neatly turn on public/private status.

Yet the distinguishing character of a public company tends to extend beyond the technical or regulatory aspects of that status. Instead, such companies are not only “public” in the Exchange Act sense of the word,³⁶ but their character can be said to be one of *publicness*. A public company is under the spotlight.³⁷ Shareholders, regulators, politicians, and the press watch it and its leaders, making their conduct more widely known and their stumbles more likely to yield consequences. For example, a startup might go about its business of building and selling products, hiring employees, getting written up in the trade press, and so on. But once it lists its shares for public trading, it starts getting written up in the *financial* press.³⁸ If before the founders were to make false promises about what their technology could do or how far along its development was, they might have received forgiveness from investors, especially if they

metrics. See Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REG. 499, 517 (2020).

36. See *supra* notes 24–26 and accompanying text.

37. See Elisabeth de Fontenay, *The Deregulation of Private Capital and the Decline of the Public Company*, 68 HASTINGS L.J. 455, 473 (2017):

Admittedly, the decline of the public company may have a wide range of consequences that extend beyond first-order economic effects. Others have argued, for example, that the bulk of corporate America should be kept under the spotlight of disclosure rules in order to improve corporate governance, to minimize systemic risk or widespread fraud, to keep regulators informed as to market innovations, or to impress upon large corporations that they are creatures of law and thus bound in some sense to fulfill the public interest.

38. Cf. Matt Levine, *Dogecoin Is Up Because It’s Funny*, BLOOMBERG OP. (May 6, 2021), <https://www.bloomberg.com/opinion/articles/2021-05-06/dogecoin-is-up-because-it-s-funny> [<https://perma.cc/VFG7-UK2W>] (“The other mistake [convicted Theranos founder Elizabeth] Holmes made was just being *so* high-profile, being on the cover of magazines, etc. If you reach a certain level of fame, you’ll get public-company-like scrutiny of your statements even if you’re running a private company.”).

ultimately made good on those promises.³⁹ But if the same company sold shares in a public offering, those lies might lead to government investigations or investor lawsuits.⁴⁰ Life is different for a public company; life is different *in* a public company, as Hillary Sale explains:

Public company fiduciaries must address the expectations of shareholders *and* Main Street about what the company can and will do. They must operate with a sense of their publicness. They must learn to comply with rules and regulations in a public manner. The failure to do so is bad for business. Publicness is not just about market status. It is about the media, bloggers, commentators, shareholders, and politicians. It is about Main Street, not about Wall Street. And Main Street is watching.⁴¹

Increasing scrutiny of public companies also suggests that as public expectations rise about their role and actions in society, their governance becomes “more textured.” Those expectations may be unmoored from state corporate laws’ traditional preference for, and deference to, privately ordered governance.⁴² This texturing permits an accretive role in corporate governance for the federal government:⁴³ what was once a disclosure-based regulatory regime comes increasingly to be substantive.⁴⁴

39. Rule 10b-5’s anti-fraud prohibition applies equally to public and private securities issuers. Elizabeth Pollman, *Private Company Lies*, 109 GEO. L.J. 353, 388 (2020). Elizabeth Pollman observes that enforcement is unlikely, however, in the case of private companies. *Id.* In contrast with the incentives of entrepreneurial plaintiff lawyers in the public-company context, victims of private securities frauds are often sophisticated, well-diversified financiers for whom litigation would likely be a money-losing and reputation-harming proposition. *Id.*; see also Matt Levine, *Money Stuff: Ignoring the Rules Sometimes Works*, BLOOMBERG OP. (Apr. 29, 2021) (suggesting that for “a venture capital fund, the optimal amount of securities-fraud exposure is significantly higher than zero” because venture capitalists have incentives to fund “aggressive and optimistic founders”).

40. See Levine, *supra* note 38; see also Verity Winship, *Private Company Fraud*, 54 U.C. DAVIS L. REV. 663, 724–29 (2020) (reporting that private companies are rarely the targets of SEC enforcement).

41. Hillary A. Sale, *The New “Public” Corporation*, 74 L. & CONTEMP. PROBS. 137, 148 (2011).

42. *Id.* at 147.

43. *Id.*

44. Hillary A. Sale, *Disclosure’s Purpose*, 107 GEO. L.J. 1045, 1065–66 (2019) (“Corporations are permitted to wield significant economic and political power and are

Under these circumstances, the technical meaning of “public company” that sounds in investor protection gives way. It is succeeded by a broader character of publicness centered on “what society demands of powerful institutions, in terms of transparency, accountability, and openness, in order for that power to be legitimate.”⁴⁵ That is where the fault lines rub. A practitioner advising a client might do fine to answer “what is a ‘public company’?” with black-letter law. However, when members of the broader public answer the same question, what are the chances they do so with Section 12 of the Exchange Act in mind?⁴⁶ Would a startup founder—deciding whether to take the company public—be more expected to consider (1) the technical Exchange Act obligations that move would entail, or (2) the managerial and personal consequences of leading a company under the kind of scrutiny that attends public status?

B. THE PUBLIC MEANINGS OF “PUBLIC COMPANY”

Scrolling through social and news media usually includes running into the day’s controversies over corporate decisions to: discharge employees;⁴⁷ exclude users from social media or internet hosting

therefore expected to consider the implications of their choices in a context outside the bounds of the entity. In this context, publicness is substantive, because it requires thought and action by corporate insiders.”).

45. Donald C. Langevoort & Robert B. Thompson, “Publicness” in *Contemporary Securities Regulation After the JOBS Act*, 101 GEO. L.J. 337, 340 (2013); see also Lipton, *supra* note 35, at 513 (“Illegal, immoral, or unethical behavior can be policed by consumers, employees, and other counterparties whose custom is crucial to corporate operations. Disclosure is, self-evidently, critical to these initiatives.”); Onnig H. Dombalagian, *Principles for Publicness*, 67 FLA. L. REV. 649, 666 (2016) (“Proponents of corporate social responsibility . . . view the mandatory disclosure mechanisms of federal securities law as a tool for communicating to the investment community and to the broader public when voluntary disclosures fail.”).

46. In a qualitative follow-up study, I asked respondents to explain in their own words the difference between public and private companies. Many actually did have Section 12 triggers in mind. See *infra* Part II.B.2 & Appendix, Table 4 (for those results and discussion).

47. See, e.g., Yael Halon, *Rick Santorum on CNN Departure: ‘You Get Savaged for Telling the Truth’*, FOX NEWS (May 25, 2021), <https://www.foxnews.com/media/rick-santorum-cnn-fired-native-american-culture> [https://perma.cc/2Q9Y-2HJ4]; David Folkenflik, *AP Journalists React to Reporter’s Firing*, NPR (May 24, 2021), <https://www.npr.org/2021/05/24/999897222/ap-journalists-react-to-reporters-firing>

services⁴⁸ or bring them back⁴⁹; remove products from retailer shelves or keep them there;⁵⁰ criticize or not criticize legislation;⁵¹ publish or not publish politicians' writings;⁵² side with a podcast star over a rock star;⁵³ or even decline to reprint decades-old children's books.⁵⁴ This is nothing new beneath the sun. Business decisions have long been socially and politically salient, sparking rounds of controversy, protest, and policy

[<https://perma.cc/W2JK-QN8S>]; Nick Bilton & Noam Cohen, *Mozilla's Chief Felled by View on Gay Unions*, N.Y. TIMES BITS (Apr. 3, 2014), <https://bits.blogs.nytimes.com/2014/04/03/eich-steps-down-as-mozilla-chief> [<https://perma.cc/QN76-LQSB>].

48. Amazon Web Services' termination of hosting services for Parler, a social-media application used by some individuals who attacked Congress on January 6, 2021, is one example. See Order Denying Motion for Preliminary Injunction at 13, *Parler LLC v. Amazon Web Servs., Inc.*, 514 F. Supp. 3d 1261 (W.D. Wash. Jan. 21, 2021) ("The Court rejects any suggestion that the public interest favors requiring AWS to host the incendiary speech that the record shows some of Parler's users have engaged in.").

49. Clare Duffy & Catherine Thorbecke, *Elon Musk Says He Will Begin Restoring Previously Banned Twitter Accounts Next Week*, CNN (Nov. 25, 2022), <https://www.cnn.com/2022/11/24/tech/elon-musk-amnesty-poll> [<https://perma.cc/9YAR-U74C>].

50. See, e.g., Grace Dean, *MyPillow CEO Mike Lindell Says Costco Has Pulled His Products. It's the Second-Largest Retailer to Cut Ties with Him*, BUS. INSIDER (Apr. 13, 2021), <https://www.businessinsider.com/mike-lindell-mypillow-costco-stopped-selling-products-retailer-sales-2021-4> [<https://perma.cc/62B9-QA2P>] (quoting Lindell that retailers dropping his products represents "cancel culture").

51. Charles Bethea, *Georgia's Voting Laws and Coca-Cola's Complicated History*, NEW YORKER (Apr. 19, 2021), <https://www.newyorker.com/news/us-journal/georgias-voting-laws-and-coca-colas-complicated-history> [<https://archive.ph/9acKS>].

52. See, e.g., Rachel Kramer Bussel, *Josh Hawley Is Using His Book Deal and the First Amendment to Act the Martyr*, NBC NEWS (Jan. 12, 2021), <https://www.nbcnews.com/think/opinion/josh-hawley-using-his-book-deal-first-amendment-act-martyr-ncna1253964> [<https://perma.cc/7KJQ-XA5F>]; see also Rishika Dugyala, *NYT Opinion Editor Resigns After Outrage over Tom Cotton Op-Ed*, POLITICO (June 7, 2020), <https://www.politico.com/news/2020/06/07/nyt-opinion-bennet-resigns-cotton-op-ed-306317> [<https://perma.cc/6JHQ-4P49>].

53. Anne Steele, *Spotify Takes Down Neil Young's Music After His Joe Rogan Ultimatum*, WALL ST. J. (Jan. 26, 2022), <https://www.wsj.com/articles/neil-youngs-music-is-being-taken-down-by-spotify-after-ultimatum-over-joe-rogan-11643230104> [<https://perma.cc/5GG4-22G3>].

54. See Aaron Rugar, *Why Fox News Is Having a Day-long Meltdown over Dr. Seuss*, VOX (Mar. 2, 2021), <https://www.vox.com/2021/3/2/22309176/fox-news-dr-seuss-cancel-culture-fox-news-biden> [<https://archive.li/ZTBNy>].

reaction.⁵⁵ Securities regulation itself has long been a site of activism over pressing social concerns, such as desegregation⁵⁶ and the Vietnam War.⁵⁷ With that cycle in mind, this Essay uses the current moment to tease out a lurking point: does the “publicness” or “privateness” of business matter in terms of how the public perceives business controversies? Could those public/private perceptions influence policymaking?

For instance, in a public forum, like a public park, those wishing to speak cannot be subjected to view-point discrimination.⁵⁸ And a public utility (such as an electric company) may not deny service to anyone within its service region who has means to pay.⁵⁹ Individuals’ understanding of what it means to be a public park or a public utility could have political, and ultimately legal, significance.

Consider this illustration. Imagine a mayor who grants an exclusive food concession to a contractor such that those visiting city parks must purchase food from the concessioner rather than bringing their own. There would be outrage and the city council might pass a countermending ordinance. Meanwhile, a privately owned amusement park could ban

55. See generally KLAUS WEBER & BRAYDEN G. KING, *THE OXFORD HANDBOOK OF SOCIOLOGY, SOCIAL THEORY AND ORGANIZATION STUDIES: CONTEMPORARY CURRENTS* ch. 21 (Paul Adler et al. eds., 2014) (describing this cycle).

56. See generally Harwell Wells, *Shareholder Meetings and Freedom Rides: The Story of Peck v. Greyhound* (Temple Univ. Legal Stud. Rsch. Paper No. 2021-29, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3873430 [<https://perma.cc/W2VS-NK9V>] (documenting attempts by civil-rights activists to use shareholder proposals to challenge racial segregation on Greyhound buses).

57. See generally Sarah C. Haan, *Civil Rights and Shareholder Activism: SEC v. Medical Committee for Human Rights*, 76 WASH. & LEE L. REV. 1167 (2019) (chronicling the efforts of anti-war activists to challenge via shareholder proposals Dow Chemical’s manufacture of napalm).

58. See *Frisby v. Schultz*, 487 U.S. 474, 480 (1988) (recognizing streets and public parks as traditional “public fora”).

59. See National Consumer Law Center, *Access to Utility Service* § 1.1.5 (The Concept of the Public Utility) (6th ed. 2018):

“Public” utilities often are not in fact public, in the sense of being owned or operated by the public, but instead are owned by private stockholders. They are referred to as “public” not because of the nature of the ownership of the utility, but because the utility must offer service to the public on a non-discriminatory basis.

outside food and drink without fear of a similar reaction, even if customers complained about it. The difference is that the city park is understood as a place freely accessible to picnickers; an exclusive food concession would violate that expectation. However, the amusement park is understood to be privately owned, so no customers would be outraged by a no-outside-food rule. Both are places for leisure, including eating and drinking. But the first is understood as offering free access, whereas for the second, it is understood that leisure must be paid for.

The potential for publicness to have political and legal significance is complicated by ambiguities around the meaning of the word “public” itself. The Oxford English Dictionary (“OED”), for instance, gives ninety-six distinct definitions for “public” or terms containing it.⁶⁰ Most refer to a thing that is seen, accessible, or responsible to all members of a community.⁶¹ A few pertain to things that would be understood to be privately owned and operated. A “public house,” for example, is a bar. It is understood that bars operate as private businesses with all the property rights that go with that, conditioned on rules like anti-discrimination prohibitions and health regulations.⁶² Frustrating nuances jump out,

60. *Public*, OXFORD ENGLISH DICTIONARY (2d ed. 1987) (defining to go public; in public; in the public; in the public eye; into public; to make public; public access; public accountability; public act; public affairs; public analyst; public bar; public bath; public bill; public box; public broadcaster; public broadcasting; public building; public charge; public choice; public commoner; public company; public convenience; public corporation; public defender; public diplomacy; public education; public employment; public enemy; public enemy number one; public examination; public eye; public-facing; public figure; public good; public-hearted; public-heartedness; public holiday; public housing; public intellectual; public interest; public interest immunity; public interest immunity certificate; public language; public lavatory; public lecture; public lecturer; Public Lending Right; public liability; public liability insurance; public library; public life; public limited company; public menace; public-minded; public-mindedness; public notary; public nuisance; public offer; public offering; public office; public opinion; public orator; public ownership; public park; public policy; public prints; public-private; public prosecutor; public reader; public reason; Public Record Office; public room; public sector; public servant; public speaker; public speaking; public spirit; public state; public statute; public switched telephone network; public table; public telephone; public thing; public toilet; public transit; public transport; public transportation; public utility; public-voiced; public walk; public weal; public wealth; public welfare; public woman; and public works).

61. *Id.*

62. Of course, the existence and compulsory nature of these rules suggest a public claim on even a privately owned bar.

however. The terms “company” and “corporation” are used largely interchangeably and generically by scholars, practitioners, and market participants.⁶³ Yet in the OED, a “public company” is a privately owned company that has made “its shares available to be traded on a major stock exchange,” whereas a “public *corporation*” is a “municipal corporation” or a “government-owned company.”⁶⁴ Quite the difference. With all these possible meanings, could individuals be blamed if they are unsure quite what “public” means from one context to the next?

A look at contemporary social media helps inform this question. There, anecdotal evidence suggests that some see controversies involving prominent companies, notice that they are “public” companies, observe that those companies act in ways that other “public” institutions ought not, and then conclude that the public companies have done something wrong—unconstitutional, even. If the freedom to say what one wants cannot be abridged when it comes to public parks, how can the same not be said for Facebook or Twitter, which, after all, are (or, in Twitter’s cases, were) *public* companies?⁶⁵

For example, Bernie Moreno, a former Ohio U.S. Senate candidate who describes himself as “one of the most successful car dealers in the United States of America,”⁶⁶ posed the following question when Fox News took down online copies of an interview in which then-President Trump disputed the 2020 election: “If a public company can censor an interview between a President and a member of the media, imagine the

63. The results of the study described in Part II.A show that respondents also use the generic “company” and statute-specific “corporation” interchangeably. *See infra* Part II.A.

64. *See* OXFORD ENGLISH DICTIONARY, *supra* note 60.

65. Twitter, although now privately held, was a public company when this Essay was first written. *See* Twitter, Inc., Form 15-12G (Nov. 7, 2022), <https://www.sec.gov/Archives/edgar/data/1418091/000119312522279042/d412732d1512g.htm> [<https://perma.cc/M4E6-WZNL>] (terminating Twitter’s registration as a public company).

66. BERNIE MORENO FOR OHIO, *Meet Bernie Moreno*, <https://web.archive.org/web/20210515141045/https://berniemoreno.com/meet-bernie-moreno/> [<https://archive.ph/OyaFa>] (last visited May 7, 2021).

ensorship a public company can have on private citizens. #CancelCulture is cancelling the principles that make America Great!”⁶⁷

Months later, after the Facebook Oversight Board announced that it would not overturn a decision to suspend Trump’s Facebook account, U.S. Representative Lauren Boebert reacted on Twitter: “Free speech for thee but not for me. I guess Facebook thinks the first amendment only applies to leftists.”⁶⁸ U.S. Representative Elise Stefanik, weeks before she became Republican conference chair in the House of Representatives, denounced Twitter’s suspension of her communications director’s account as “unconstitutional overreach.”⁶⁹ Kevin McCarthy, then the Republican House leader, tweeted a warning to the technology industry using similar terms: “Twitter (all big tech), if you shut down constitutionally protected speech (not lewd and obscene) you should lose [47 U.S.C. §] 230 protection. Acting as publisher and censorship regime should mean shutting down the business model you rely on today, and I will work to make that happen.”⁷⁰

Other Twitter users raised objections not just on behalf of the customers of public companies that make controversial decisions but also on behalf of their employees. One objected to Goodyear’s prohibition on employees wearing “MAGA” hats while on the job: “That’s not right. They’re taking a political position. They are a public company that is infringing on free speech.”⁷¹ A subtext of that post—“[t]hey’re taking a

67. Bernie Moreno (@berniemoreno), TWITTER (Mar. 31, 2021, 7:07 PM), <https://twitter.com/berniemoreno/status/1377397265866895362> [<https://perma.cc/2ELM-T4RB>].

68. Rep. Lauren Boebert (@RepBoebert), TWITTER (May 5, 2021, 11:36 AM), <https://twitter.com/RepBoebert/status/1389967227563163648> [<https://perma.cc/L6LD-E5VS>].

69. Elise Stefanik (@EliseStefanik), TWITTER (May 6, 2021, 7:26 AM), <https://twitter.com/elisestefanik/status/1390266720544337920> [<https://perma.cc/W7LXNMVM>].

70. Kevin McCarthy (@SpeakerMcCarthy), TWITTER (Jan. 4, 2022, 2:29 PM), <https://twitter.com/GOPLeader/status/1478448444796772352> [<https://perma.cc/75V7-EXVK>].

71. Coach Anderson (@GeoffLAnderson), TWITTER (Aug. 19, 2020, 2:08 PM), <https://twitter.com/geofflanderson/status/1296146991379079168> [<https://perma.cc/WET2-7PZX>].

political position”—suggests an understanding that, like a governmental body, public companies ought to observe partisan neutrality.⁷²

American Enterprise Institute analyst James Pethokoukis pointed out that Twitter, as a privately owned company, “has no obligation to let itself be a tool for insurrection” in deciding whether to remove users, like Trump, from its platform.⁷³ A user replied that to the contrary, as a *public* company, Twitter has “responsibility to its shareholders . . . [m]any of . . . whom believe in free speech and disagree with censorship.”⁷⁴ This turn away from users’ free-speech rights and toward shareholders’ values echoes arguments that shareholders’ welfare extends beyond their wealth and includes things like environmental and health protections and civil and labor rights.⁷⁵ From this view, it follows that even under a shareholder-primacy model, managers may pursue values other than profit maximization because shareholders also want to drink clean water, avoid climate disaster, and work in safe and equitable workplaces.⁷⁶ Perhaps they also value the ability to say on social media whatever one wishes?

72. See *Stanson v. Mott*, 551 P.2d 1, 9 (Cal. 1976) (“A fundamental precept of this nation’s democratic electoral process is that the government may not ‘take sides’ in election contests or bestow an unfair advantage on one of several competing factions.”); see also *Stern v. Kramarsky*, 375 N.Y.S.2d 235, 235 (Sup. Ct. 1975) (“As a State agency supported by public funds they cannot advocate their favored position on any issue or for any candidates, as such. So long as they are an arm of the state government they must maintain a position of neutrality and impartiality.”).

73. James Pethokoukis (@JimPethokoukis), TWITTER (Jan. 8, 2021, 6:47 PM), <https://twitter.com/JimPethokoukis/status/1347691419629199362> [<https://perma.cc/GU5W-C8WD>].

74. Crunchy (@CD_Payne), TWITTER (Jan. 8, 2021, 7:18 PM), https://twitter.com/CD_Payne/status/1347699104193908736 [<https://perma.cc/68AB-ZRFX>].

75. See Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCT. 247, 248 (2017) (“The ultimate shareholders of a company (in the case of institutional investors, those who invest in the institutions) are ordinary people who in their daily lives are concerned about money, but not just about money. They have ethical and social concerns.”); see also David H. Webber, *Use and Abuse Labor’s Capital*, 89 N.Y.U. L. REV. 2106, 2126–42 (2014) (explaining why retirement-plan fiduciaries should consider the interests of plan participants and beneficiaries more broadly than maximizing fund value).

76. Cf. Hart & Zingales, *supra* note 75 (explaining that individuals who directly or indirectly invest in securities have interests in maximizing their welfare, not their wealth).

This potential divergence in understanding extends beyond issues of free speech and censorship. The public's commercial access also comes up. For example, after actor Scott Baio criticized Costco Wholesale's COVID-19 mask mandate, comedian Christopher Titus noted that Costco is a "private business" free to require that customers wear shirts, shoes, or masks.⁷⁷ Baio had a ready retort that "[Costco]'s a public company."⁷⁸ To prove his point, he posted screenshots showing that Costco Wholesale Corporation is traded on the Nasdaq and files reports with the SEC.⁷⁹

Other Twitter users replied that public-company status is irrelevant to Costco's store policies.⁸⁰ Law professor Samuel Brunson, for example, quipped that "Mr. Baio, like many people on Twitter, seems to significantly misunderstand what it means to be a public company."⁸¹ The next day, Baio doubled down with a video reasserting that Costco is a public company and ought not have a mask mandate.⁸² Indeed, in recent years the observation that "X is a private business, and so it is free to do Y" has become familiar enough on social media to itself become a meme. When Surgeon General Vivek Murthy said in a television interview that social-media platforms "have an important role to play" in tackling misinformation about COVID-19 vaccines,⁸³ podcaster and former biology professor Bret Weinstein sarcastically remarked that "[t]he

77. See Christopher Titus (@TitusNation), TWITTER (May 16, 2021, 1:16 PM), <https://twitter.com/TitusNation/status/1393978754867687424> [<https://perma.cc/95T2-V4B4>] (replying to Scott Baio (@ScottBaio), TWITTER (May 16, 2021 9:19 AM), <https://web.archive.org/web/20210516162428/https://twitter.com/ScottBaio/status/1393964383974223873> [<https://archive.li/nhAC3>]).

78. Scott Baio (@ScottBaio), TWITTER (May 16, 2021 1:27 PM), <https://web.archive.org/web/20210516204644/https://twitter.com/ScottBaio/status/1394026785981964288> [<https://archive.li/sg7tB>].

79. *Id.*

80. *Id.* (collecting replies from Twitter users to Baio's original post).

81. Sam Brunson (@smbnsn), TWITTER (May 16, 2021, 6:06 PM), <https://twitter.com/smbnsn/status/1394051549744271361> [<https://perma.cc/QMZ9-3WXZ>].

82. Scott Baio (@ScottBaio), TWITTER (May 17, 2021 12:56 PM), <https://twitter.com/ScottBaio/status/1394336141428412417> [<https://perma.cc/KC3G-5XZS>].

83. Adam Staten, *Spotify to Remove Neil Young's Music over Joe Rogan Spat, Surgeon General Weighs In*, NEWSWEEK (Jan. 26, 2022), <https://www.newsweek.com/spotify-remove-neil-youngs-music-over-joe-rogan-spat-surgeon-general-weighs-1673369> [<https://perma.cc/A9SM-GJGA>].

Surgeon General is a private company. He can censor whoever he wants.”⁸⁴

Although the most prominent examples of this public/private tension might appear to emanate from the right side of the political spectrum, examples can be found on the left as well. For instance, Ben Meiselas, an attorney and co-founder of the left-wing MeidasTouch political action committee, announced that the group would sue Fox News for declining to air its advertising related to the January 6 attack on Congress.⁸⁵ He did, however, acknowledge that Fox News is a private business and suggested that the group would pursue an antitrust claim against the network.⁸⁶

These social-media posts provide anecdotal evidence of some level of disconnect between a technical meaning of a “public company” and other intuitions that attribute obligations of expressive nondiscrimination and neutrality to that status. The latter intuitions could perhaps be dismissed as mere misapprehension. It would be easy to explain that the First Amendment—absent narrow exceptions—does not apply to non-state actors,⁸⁷ and that public companies, despite their label, are privately owned.⁸⁸ It is unlikely, however, that such black-letter points would satisfy those who attribute *publicness* to those firms.

Indeed, those points might gloss over a deeper stream of positive understandings on the part of some citizens. For example, one Twitter

84. Bret Weinstein (@BretWeinstein), TWITTER (Jan. 26, 2022 2:47 PM), <https://twitter.com/BretWeinstein/status/1486425636352585736> [<https://perma.cc/25XUE3G5>].

85. Ben Meiselas (@meiselasb), TWITTER (June 13, 2021, 2:20 PM), <https://twitter.com/meiselasb/status/1404186842807762947> [<https://perma.cc/BNL2-5Q QJ>].

86. Ben Meiselas (@meiselasb), TWITTER (June 13, 2021 6:26 PM), <https://twitter.com/meiselasb/status/1404203539052720131> [<https://perma.cc/WQ24-VXFR>] (“Can a private company that has a monopoly over right-wing media based on its conspiracy with a former disgraced President and a current anti-democratic political party prevent commerce by a pro-democracy political action committee such as MeidasTouch? I think not.”).

87. *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 1, 9 (2019).

88. Adolf Berle argued, however, that because the corporation’s existence relies on a state grant, it is a “quasi-public” institution and so the application of the First and Fourteenth Amendments to it would not be unfounded. Adolf A. Berle, Jr., *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933, 945, 951–52 (1952).

user, who supported the platform's decision to ban Trump, nevertheless expressed concern that a "public company" was engaged in "censorship," viewing the decision as a "slippery slope."⁸⁹ In this light, publicness is caught up with controversies over censorship,⁹⁰ platform liability,⁹¹ competition within the technology industry,⁹² and corporate power and purpose broadly speaking.

Recall the earlier examples of the city park and the amusement park and how exclusive concessions at each would spark opposite reactions, activism versus acquiescence.⁹³ If the public understands public-company status not as a legal term of art but as implying some greater obligation to be visible, available, or responsible to society, it is more likely that objections to those firms' socially salient decisions enter political contention.

These social and policy debates rage. This Essay does not resolve them. But it does show that as "public" has many connotations, it is not unreasonable to understand the significance of "public company" outside its Exchange Act roots. Public understanding, whether it is descriptively

89. Bregman's Wheelbarrow (@newguymeltz), TWITTER (Jan. 9, 2021, 9:50 AM), <https://twitter.com/newguymeltz/status/1347918636749631489> [<https://perma.cc/PBT7-LPL9>] ("Truth is, we all would have been better off if they took Trump's Twitter away long ago . . . but when a public company goes down the censorship road, it's a slippery slope.").

90. See, e.g., Donald Trump, Jr., *If Big Tech Can Censor Me, Think What It Can Do to You*, REALCLEARPOLITICS (Feb. 22, 2019), https://www.realclearpolitics.com/articles/2019/02/22/if_big_tech_can_censor_me_think_what_it_can_do_to_you_139555.html [<https://perma.cc/5JNS-ZS6R>] ("Those of us with a big enough public profile to hold the tech giants accountable for their partisan speech-policing have a duty to do so. Ordinary conservatives can't force multibillion-dollar companies to guarantee their right to free speech, which is exactly what the liberals are counting on.").

91. See, e.g., Sen. Josh Hawley, *Senator Hawley Introduces Legislation to Amend Section 230 Immunity for Big Tech Companies*, JOSH HAWLEY U.S. SEN. FOR MO. (June 19, 2019), <https://www.hawley.senate.gov/senator-hawley-introduces-legislation-amend-section-230-immunity-big-tech-companies> [<https://perma.cc/M3YM-9JP7>] ("Sen. Hawley's legislation removes the immunity big tech companies receive under Section 230 unless they submit to an external audit that proves by clear and convincing evidence that their algorithms and content-removal practices are politically neutral.").

92. See generally STAFF OF SUBCOMM. ON ANTITRUST, COM. & ADMIN. L., 116TH CONG., INVESTIGATION OF COMPETITION IN DIGIT. MKTS. (2020).

93. See *supra* Part I.B.

right or wrong, can influence politics and policy, and thus there is profit in reckoning with it.⁹⁴

II. WHAT DOES THE PUBLIC UNDERSTAND ABOUT PUBLIC AND PRIVATE COMPANIES?: SURVEY EVIDENCE

I conducted survey studies over a multi-year period to identify differential responses regarding a company's obligations or practices when it is identified as being either "public" or "private."⁹⁵ The first study was conducted in July 2020 ("2020 Original Study"). Follow-up studies were conducted in summer 2021 ("2021 Follow-up Studies"), including a free-response qualitative study ("Qualitative Study"). To avoid potential bias from respondents participating in later studies (test-retest bias), respondents who responded to a given survey were excluded from participation in subsequent studies.⁹⁶ Results are reported in this Part and in the Appendix.⁹⁷

A. 2020 ORIGINAL STUDY

The 2020 Original Study comprised 30 positive statements about the governance of firms and their obligations to constituencies like the government, investors, employees, customers, the environment, the community, and even journalists. Statements were primarily designed with debates over corporate governance, power, and purpose in mind, although a few were designed to appraise the validity of the survey instrument itself.⁹⁸ These statements can be found in this part or the

94. Cf. Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law & Social Movements*, 123 YALE L.J. 2740, 2743 (2014) (theorizing the "cultural shifts that make durable legal change possible").

95. The study design was submitted to the Stanford University Institutional Review Board for exemption review and was determined to be exempt research.

96. See generally Hannah Schwarz et al., *Memory Effects in Repeated Survey Questions Reviving the Empirical Investigation of the Independent Measurements Assumption*, 14 SURV. RSCH. METHODS 325 (2020) (providing experimental evidence of test-retest bias in survey studies).

97. See *infra* App.

98. For instance, the survey stated that companies are obliged not to discriminate against employees on account of certain protected statuses and also that the government owns all or part of companies. American adults of all political opinions would be

Appendix, Table 1.⁹⁹ Each respondent was randomly assigned to one of four treatments, which had identically worded statements apart from substituting the terms “public,” “private,” “publicly traded,” and “public reporting” within them. For example, Statement #1 was “Y companies are governed by a board of directors,” with Y being one of the four variable terms.¹⁰⁰ I chose the first two terms to examine whether respondents’ understanding of corporate obligations and practices differ depending on public or private status. The last two terms offer technical nuances on “public company.” They were chosen to test whether a company being “traded” or “reporting” influenced responses despite those terms being largely synonymous with “public.”

U.S.-resident adult respondents were surveyed via Amazon Mechanical Turk (“MTurk”), a platform used in social-science research to recruit convenience samples.¹⁰¹ A total 490 respondents completed the survey, and the 407 respondents who passed three randomized attention checks were included in the results.¹⁰² As further quality assurance, only U.S.-based respondents with over 1,000 completed tasks and a 98% approval rate were permitted to take the surveys.¹⁰³ Respondents self-

expected to understand the former statement to be true and the latter to be false. Had respondents not been, as they in fact were, fairly uniform in finding the first to be true and the second not to be true, I would have questioned the instrument’s validity for more controversial or nuanced statements.

99. See *infra* App., tbl. 1.

100. *Id.*

101. In recent years, MTurk has been increasingly used for empirical legal research. See, e.g., Hajin Kim, *Expecting Corporate Prosociality* 13–14 (Coase-Sandor Working Paper Series in Law and Economics, Working Paper No. 978, 2022) https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1101&context=law_and_economics_wp [<https://archive.li/6MFDV>]; Sommers, *supra* note 7, at 2235 (using MTurk for an applied-meaning experiment to test public understanding of “consent”); Krin Irvine et al., *Law and Psychology Grows Up, Goes Online, and Replicates*, 15 J. EMPIRICAL L. STUD. 320, 334 (2018) (conducting a series of replication studies using MTurk and commercial survey panels).

102. Attention checks are intended to ensure that survey data do not include noise from inattentive respondents. Adam J. Berinsky et al., *Separating the Shirkers from the Workers? Making Sure Respondents Pay Attention on Self-Administered Surveys*, 58 AM. J. POL. SCI. 739, 752 (2014). They do create the potential, however, to bias results and thus to reduce the external validity of a survey-based study. *Id.*

103. See Douglas J. Ahler et al., *The Micro-Task Market for Lemons: Data Quality on Amazon’s Mechanical Turk* 32–34 (July 29, 2020), gsocd.com/research

identified their genders, racial backgrounds, ages, and educational achievement, as well as their political ideologies (from very liberal to very conservative) along a seven-point Likert scale.¹⁰⁴ Respondents were 56.2% male, 70.7% white, and 63.7% were holders of a bachelor's degree or higher, whereas in 2020 those percentages in the general population were 49.2%, 60.1%, and 31.1%.¹⁰⁵ The mean respondent was 39.1 years old, whereas the 2019 national average was 38.4.¹⁰⁶

Apart from demographic questions, respondents were asked to rate each statement as “always true,” “sometimes true,” or “never true.” These statements were meant to capture respondents’ intuitions. Respondents were instructed not to do outside research but rather to rate the truthfulness of statements based on their best understanding or pre-existing knowledge. Statements were randomized to avoid order effects.¹⁰⁷ The survey statements do not have necessarily “correct”

/papers/turk.pdf [https://perma.cc/WK7N-CU7F] (recommending best practices for response quality).

104. See Timothy R. Hinkin, *A Brief Tutorial on the Development of Measures for Use in Survey Questionnaires*, 1 ORGAN. RES. METHODS 104 (1998) (explaining that a Likert scale is used in questionnaire research for factor analysis occurring along intervals, such as asking respondents whether they strongly disagree, disagree, neither agree nor disagree, agree, or strongly agree with a statement).

105. This sample is not demographically representative of U.S. adults. *But see* Sommers, *supra* note 7, at 2249 n.90 (observing that convenience samples recruited from MTurk “tend to be more representative than other convenience samples researchers often use, such as college students” and collecting literature); *see also* Michael Buhrmester et al., *Amazon’s Mechanical Turk: A New Source of Inexpensive, Yet High-Quality, Data?*, 6 PERSPS. PSYCH. SCI. 3, 5 (2011) (“MTurk participants are at least as diverse and more representative of non-college populations than those of typical Internet and traditional samples. Most important, we found that the quality of data provided by MTurk met or exceeded the psychometric standards associated with published research.”); *QuickFacts, U.S. Population Estimates*, U.S. CENSUS BUREAU (July 1, 2019), (V2019), <https://www.census.gov/quickfacts/fact/table/US/PST045219> [https://perma.cc/Q85F-XBBG].

106. *65 and Older Population Grows Rapidly as Baby Boomers Age*, U.S. CENSUS BUREAU (June 25, 2020), <https://www.census.gov/newsroom/press-releases/2020/65-older-population-grows.html> [https://perma.cc/EP28-PFY2].

107. See Kenneth A. Rasinski et al., *Question Order Effects*, 1 APA HANDBOOK OF RESEARCH METHODS IN PSYCHOLOGY: FOUNDATIONS, PLANNING, MEASURES, AND PSYCHOMETRICS ch. 13 (Harris Cooper et al. eds., 2012) (reviewing randomization methods to address order effects).

responses. For example, corporate-law experts might disagree over Statements #26 through #29 regarding business decisions and stakeholder interests.¹⁰⁸ Meanwhile, employment-law experts would note that some of the employment-law questions require more information—such as location or number of employees—to answer definitively.¹⁰⁹ Instructions and questions were posed to capture respondents' positive understandings rather than their normative beliefs.

Responses were coded as 0 for “always true,” 1 for “sometimes true,” and 2 for “always true.”¹¹⁰ I performed three sets of tests on the ordinal responses generated from the surveys. First, because the survey data are nonparametric, I performed one-way ANOVA on ranks (Kruskal-Wallis) tests for each survey statement across the four levels (i.e., “public,” “private,” “publicly traded,” and “public reporting”). Second, for statements for which I rejected the null hypothesis that no treatment was dominant over another, I performed Wilcoxon-Mann-Whitney tests between the reference “public” level and the other three treatments. Third, for statements in the “public” and “private” groups only, I performed ordered logistic regressions¹¹¹ using as independent variables respondents' self-reported genders, racial backgrounds, ages, educational

108. *Infra App.*, tbl. 1; see Virginia Harper Ho, “*Enlightened Shareholder Value*”: *Corporate Governance Beyond the Shareholder-Stakeholder Divide*, 36 J. CORP. L. 59, 71 (2010) (“Over the course of the past century, the famous debate between Adolph Berle and Merrick Dodd in the Harvard Law Review over the nature and purpose of the corporation has been traced and retraced in a pendulum swing between two fundamental positions.”).

109. For instance, Title VII's prohibitions on certain discriminatory employment practices applies only to employers with fifteen or more employees. 42 U.S.C. §§ 2000e(b), 2000e-2(a)(1).

110. When the average response is under 0.5, I report the average in the table as “always true” and when it is 1.5 or above, “never true.” Average responses 0.5 or greater but less than 1.0 are “sometimes true (plus)” and average responses 1.0 or greater but less than 1.5 are “sometimes true (minus).” Shaded statements indicate that a one-way ANOVA on ranks (Kruskal-Wallis) test resulted in rejection of the null hypothesis that no treatment dominated others in mean responses. Within those shaded statements, italicized responses indicate that Wilcoxon-Mann-Whitney tests showed statistically significant differences between mean responses for a treatment (“private,” “publicly traded,” or “public reporting”) and the mean response for the “public” reference.

111. I used ordered logistic regression because it does not assume normality or homogeneity of variances, assumptions that the ordinal survey data would violate.

attainment, and political ideologies.¹¹² Significant results are reported at the .05, .01, and .001 levels.¹¹³

The results suggest that respondents have a nuanced, and somewhat sophisticated, understanding of the differences between “public” and “private” companies, as well as what the two have in common. Female and male respondents appeared to largely share intuitions, although there is evidence that female respondents had intuitions more aligned with corporate publicness compared to male respondents.¹¹⁴ And, surprisingly, political conservatives and non-conservatives were mostly aligned. This Essay splits the discussion of the results into corporate governance, power, and purpose topics. Although some results have obvious explanations (e.g., respondents across the board responded that companies may not practice various forms of employment discrimination, which would be commonly understood),¹¹⁵ I discuss less-certain explanations of other results. Readers will likely identify other plausible explanations. Discussions are followed by tabular results.

1. Corporate Governance

The first results relate to corporate governance—how firms are governed and how they are regulated as firms or as securities issuers.

112. See *infra* App., tbl. 2. Gender, racial background, educational attainment, and political ideology were indicator variables for whether respondents (1) identified as female, (2) identified as not white (including those who identified solely as Hispanic but excluding those who identified as both white and Hispanic), (3) had less than a bachelor’s degree, and (4) self-reported ideology scores from 5 to 7 on the seven-point Likert scale. *Id.*

113. These results are not Bonferroni adjusted. Those adjustments would likely be overly conservative given the denominator—30 statements—and the conceptual linkages and relationships between survey statements.

114. See *infra* App.

115. Cf. 42 U.S.C. § 2000e-10; 29 C.F.R. § 1601.30 (requiring employers to post conspicuous workplace notices identifying prohibited discriminatory practices and complaint procedures).

a. Board Governance

I started with the workaday statement that “companies are governed by a board of directors.”¹¹⁶ Mean responses ranged from “sometimes true” to “always true,” but there were statistically significant differences between the “public” treatment and the “private” and “publicly traded” treatments.¹¹⁷ One interpretation is that respondents understood the governance of private companies as being more flexible (such that a board of directors would not always be present), whereas the term “publicly traded” suggested more proscriptive governance standards.¹¹⁸ This possibility recalls the earlier point about the accretive federal role via the securities laws in corporate governance of public companies.¹¹⁹

Responses to the statement that some directors are appointed by the government were largely in line with a savvy response. As expected, the mean response was that government never appoints directors of privately owned companies, even the listed ones. I posed this question to test for an intuition that like boards of other “public” institutions—public universities, public airports, public libraries, and so on—public-company boards are also appointed by government. Respondents largely did not take the bait.¹²⁰

116. *Infra* App., tbl. 1.

117. *See id.*

118. *E.g.*, a limited liability company or partnership might have managers but no board of directors. *See* UNIF. LTD. LIAB. CO. ACT § 407 (revised 2013). In some states, close corporations may also be managed by the shareholders themselves without the need to have a board of directors. *See* DEL. CODE ANN. tit. 8. § 351 (2023).

119. *See* Sale, *supra* note 41 and accompanying text.

120. Those who chose “sometimes true” do have a point, though: government does sometimes exercise a direct governance role over ostensibly private concerns, as in the case of the 2009 automaker bailouts. *See, e.g.*, Bill Vasic, *Washington Played a Big Part in G.M. Turnaround*, N.Y. TIMES (Nov. 2, 2010) (noting that the federal government appointed G.M. directors in connection with the automaker’s 2009 bailout). Scholars have also suggested that a direct role for government in corporate governance could promote the public interest. *See, e.g.*, Saule T. Omarova, *Bank Governance and Systemic Stability: The “Golden Share” Approach*, 68 ALA. L. REV. 1029 (2017) (offering a thought experiment around the use of government-held “golden shares” in bank governance); *see also* Joan MacLeod Heminway, *Federal Interventions in Private Enterprise in the United States: Their Genesis in and Effects on Corporate Finance Instruments and Transactions*, 40 SETON HALL L. REV. 1487 (2010) (reviewing direct U.S. government interventions and semi-nationalizations during the late-2000s financial and automotive crises).

However, the result for the analogous statement about partial employee appointment diverged from the government-appointment statement. Across all treatments, the mean response was that employees sometimes elect directors. It is questionable that respondents have mistakenly assumed that German-style codetermination is practiced in the United States.¹²¹ These responses might also be prompted by an understanding that employees are often also shareholders who in that capacity may vote for their employers' directors. That might be especially true in closely held companies.¹²² It might also reflect an intuition that employees can influence their employers' governance.¹²³

Table 1: Corporate-governance statements (board governance).¹²⁴

Survey Statements	Y			
	Public n = 105	Private n = 107	Publicly traded n = 100	Public reporting n = 95
1. Y companies are governed by a board of directors.	0.56	0.87***	0.39*	0.45
2. Some of the members of a Y company's board of directors are appointed by the government.	1.48	1.52	1.49	1.49

121. Some nations do, however, mandate worker representation on corporate boards. See generally Grant M. Hayden & Matthew T. Bodie, *Codetermination in Theory and Practice*, 73 FLA. L. REV. 321 (2021). In the United States, Senator Elizabeth Warren has proposed that the largest firms be federally chartered and that no less than 2/5ths of their board seats be elected by their employees. Accountable Capitalism Act, S. 3348, 115th Cong. § 6 (2018).

122. INTERNAL REVENUE SERVICE, PUBLICATION 542: CORPORATIONS 3 (Jan. 2022), <https://www.irs.gov/pub/irs-pdf/p542.pdf> [<https://perma.cc/5ZAD-XJHG>] (defining "closely held corporation" for federal tax-law purposes as being not a "personal service corporation" and being majority owned by five or fewer individuals).

123. See Anat Alon-Beck, *Times The Times They Are A-Changin': When Tech Employees Revolt!*, 80 MD. L. REV. 120, 135–38 (2020).

124. See *infra* App., tbl 1.

3. Some of the members of a Y company's board of directors are elected by the company's employees.	1.03	0.99	0.92	0.96
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* $p < .05$

*** $p < .001$

b. Corporate Regulation

Intriguingly, respondents, on average, rated it as always true that “public,” “publicly traded,” and “public reporting” companies are subject to government regulation and inspection, but rated it, on average, as only sometimes-true for private companies. These results suggest that respondents understand private companies as being less susceptible to public obligations or interventions.¹²⁵ Two explanations readily arise from such a view.

First, the “private” result might reflect an intuition that private companies are apt to be smaller or in business lines that are less regulated compared to many public companies.¹²⁶ There would be little policy import to such an intuition. Or, second, the results could reflect an understanding that staying private is a means to opt out (at least at the margins) of regulatory systems or public obligations.

That second explanation, if valid, would carry substantial policy implications, like fueling deregulatory pushes.¹²⁷ It would also be consistent with the disputed hypothesis that increased regulatory costs following passage of the Sarbanes-Oxley Act of 2002 at the margin dissuades private companies from going or staying public.¹²⁸ Still, these

125. These statements were about government regulation and inspection generally and did not single out “securities regulation.” Differences in the three “public” treatments and the “private” reference would be expected in that case, but this result regarding generic regulation and inspection would not be as expected.

126. See *infra* Part II.D.2 (describing a study of the role of “bigness” in shaping views around corporate power and purpose).

127. Cf. De Fontenay, *supra* note 37, at 467 (“The deregulatory wave that swept over the United States beginning in the 1970s did not leave the securities laws untouched. Many of the most significant restrictions on raising private capital and trading private securities have been lifted or defanged since the 1980s.”).

128. Robert Prentice, *Sarbanes-Oxley: The Evidence Regarding the Impact SOX 404*, 29 CARDOZO L. REV. 703, 733–39 (2007).

explanations should not be overstated. Consider that respondents, on average, agreed that it is always true that securities fraud committed by a firm is subject to both governmental and private enforcement. This point suggests that respondents recognize that all firms are subject to public rules and that private status is not a free pass.¹²⁹

Table 2: Corporate-governance statements (corporate regulation).¹³⁰

Survey Statements	Y			
	Public n = 105	Private n = 107	Publicly traded n = 100	Public reporting n = 95
<i>Is the statement always true (0), sometimes true (1), or never true (2)?</i>				
4. Y companies are subject to regulation by government agencies.	0.4	0.57*	0.20 n = 99	0.27
5. Y companies are subject to inspection by government agencies.	0.37	0.61**	0.31	0.33
7. If a Y company commits fraud related to investments in the company, the government can take action against it.	0.24	0.41	0.23	0.33
8. If a Y company commits fraud related to investments in the company, individual investors can sue the company.	0.41	0.47	0.34	0.38

* $p < .05$

** $p < .01$

129. Indeed, prior to the Second Circuit's decision in *SEC v. Texas Gulf Sulphur*, 401 F.2d 833 (1968), private securities-fraud actions prototypically arose in connection with the securities of close corporations, rather than public ones. See *supra* Pollman, note 39, at 363–65.

130. *Infra* App., tbl. 1.

c. Corporate Transparency and Disclosure

A public company's distinguishing feature is it must produce extensive and continuous disclosure, both to current investors and to the public at large.¹³¹ This part of the study related to respondents' understandings of just how far firms' transparency and disclosure obligations go. As part of this set, I posed the rather ridiculous statement that companies must produce internal documents to journalists if requested. This statement was meant to test whether respondents would conflate the concept of public records—which are generally available to the public, including journalists¹³²—with records belonging to public companies.

Once again, respondents largely did not take the bait. Mean responses on Statement #11 for the three public treatment groups—that is, “public,” “publicly traded,” and “public reporting”—were that it is sometimes true that firms must provide internal documents to journalists, but the responses were not far off from tipping into the never-true side of the scale.¹³³ The mean response for the “private” treatment group was “never true,” a significant difference from the “public” group. This result supports there being different intuitions on the transparency obligations of public companies and those of truly public institutions, like governments.¹³⁴

Respondents were more likely, though, to respond that investors and the government enjoy information rights. They agreed that public, publicly traded, and public reporting companies must release financial statements annually, but they agreed less with this statement in the case of private companies (for which the difference from the “public” mean

131. See *supra* note 30 (listing major regulatory sources of public-company disclosure obligations).

132. See Freedom of Information Act, 5 U.S.C. § 552(a)(3)(A) (“[E]ach agency, upon any request for records . . . shall make the records promptly available to any person.”); see also *State Freedom of Information Laws*, NAT’L FREEDOM OF INFO. COAL., <https://www.nfoic.org/state-freedom-of-information-laws> [<https://perma.cc/A9SH-NTHL>] (collecting state open-records laws).

133. *Infra* App., tbl. 1.

134. This explanation would benefit from a follow-up study confirming whether the public understands that public records are generally available via open-government statutes, and thus they must be produced to journalists upon request.

was significant).¹³⁵ The presence of books-and-records and financial-statement provisions in state corporate law supports these intuitions, although given their relative obscurity, it seems doubtful that respondents had them specifically in mind.¹³⁶ Further, there was a significant difference for Statement #10 (regarding disclosure requirements for offerings), with “public” respondents being closer to an “always true” average that pre-offering disclosures must be made to investors.¹³⁷ Yet, overall, these statements are reasonably well aligned to current law and are consistent with an intuition that investors have information rights, especially in “public” companies. The results were also consistent with respondents having, on average, a firm understanding that public companies bear public-disclosure obligations.¹³⁸

Respondents generally agreed that firms must produce internal documents to the government, at least sometimes, although there too was a significant difference in the “public” and “private” treatment groups’ mean responses.¹³⁹ Finally, respondents agreed, on average, that those litigating against a firm might be entitled to production of internal documents; for that statement there was no significant difference among treatments. This is consistent with the public/private distinction being

135. The obligation to publish financial statements is unique to public companies. *See* 15 U.S.C. § 78m (requiring public companies to file periodic and other reports).

136. *See, e.g.*, DEL. CODE ANN. tit. 8. § 220 (2023) (“Any stockholder, in person or by attorney or other agent, shall, upon written demand under oath stating the purpose thereof, have the right during the usual hours for business to inspect for any proper purpose, and to make copies and extracts from [the company’s records].”); *see also, e.g.*, VA. CODE ANN. § 13.1-774 (requiring even privately held corporations to provide annual financial statements to requesting shareholders).

137. *Infra* Appendix, Table 1.

138. *See supra* note 30 (listing regulatory sources of public-company disclosure obligations).

139. It is true that numerous federal, state, and local agencies possess broad authority to issue administrative subpoenas for testimony or document production. Miriam H. Baer, *Law Enforcement’s Lochner*, 105 MINN. L. REV. 1667, 1698 (2021). Corporate records are not an entirely open book to government, however. Firms may challenge information requests on the grounds that they violate a constitutional privilege, the legislature’s expectations for the conduct of investigations, or judicial standards for the enforcement of administrative subpoenas. *SEC v. Jerry T. O’Brien, Inc.*, 467 U.S. 735, 741–42 (1984); *accord* *United States v. Powell*, 379 U.S. 48 (1964).

irrelevant in the civil discovery context.¹⁴⁰ Overall, this set of results supports that respondents understood firms to have transparency obligations, especially to investors. It also supported that respondents understood those transparency obligations to be greatest in the case of public firms. These intuitions would largely track those of securities-law experts or practitioners.¹⁴¹

Table 3: Corporate-governance statements (corporate transparency/disclosure).¹⁴²

Survey Statements	Y			
	Public n = 105	Private n = 107	Publicly traded n = 100	Public reporting n = 95
Is the statement always true (0), sometimes true (1), or never true (2)?				
6. Y companies are required to have an independent auditor audit their books each year.	0.67	0.91*	0.39**	0.46*
9. Y companies are required to publish their financial statements each year so that anyone who wants to see them can do so.	0.33	1.12***	0.23	0.29
10. When a Y company seeks more money from investors, it must publish a disclosure document about the investment and anyone who wants to see it may see the document.	0.53	0.82***	0.36	0.42
11. Y companies are required to provide internal documents if a journalist requests them.	1.16	1.5*** n = 106	1.27 n = 99	1.29

140. Cf. FED. R. CIV. P. 34 (governing document discovery without regard to party status); *but see* VA. CODE ANN. § 8.01-420.4:1(B) (distinguishing between public and private companies in the context of officer depositions).

141. Cf. *supra* note 135 (giving one example of the public-company disclosure requirements with which securities-law experts and practitioners).

142. *Infra* App., tbl. 1.

12. Y companies are required to provide internal documents if an investor requests them.	0.72	0.91*	0.66 n = 99	0.73
13. Y companies are required to provide internal documents if the government requests them.	0.52	0.69*	0.31***	0.37
14. If someone sues a Y company and requests copies of internal company documents related to the lawsuit, the company must provide the documents to that person.	0.64	0.72	0.59	0.61

* $p < .05$ ** $p < .01$ *** $p < .001$

d. Investor Protection

Investor protection is the core justification of public-company disclosure obligations.¹⁴³ The final set of governance-related results are on statements designed to test whether respondents have a disclosure-or merit-based understanding of investor protection. Respondents, on average, understood that the government at least sometimes engages in merit review of securities offerings: either to ensure that investments are “safe” or that a business is “profitable.” These results suggest deeper study of the public’s understanding of how the securities laws protect investors is necessary. Many products like airplanes, medicine, or meat are merit reviewed by government agencies.¹⁴⁴ Purchasing products

143. See generally Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669 (1984).

144. For instance, the Federal Aviation Administration issues airworthiness directives when an “aircraft, aircraft engine[], propeller[], [or] appliance[]” has an “unsafe condition,” thus prohibiting the product’s use in aviation. 14 C.F.R. §§ 39.4–39.9. The Food and Drug Administration has established an “efficient and thorough drug review process in order to . . . [f]acilitate the approval of drugs shown to be safe and effective [and] ensure the disapproval of drugs not shown to be safe and effective.” 21 C.F.R. § 314.2. And Congress enacted the Federal Meat Inspection Act of 1906 to give

regulated under these regimes thus comes with some level of quality assurance.¹⁴⁵ These results are consistent with an understanding that securities regulation offers a similar type of protection.

This explanation, if valid, raises a question: do prospective retail investors view risk disclosures around securities the same as they do for those other products? That is, there is always a risk of a plane crashing, medicine having dangerous side effects, or meat being tainted, but with safety regulations in place, those risks are minute enough to be rationally ignored.¹⁴⁶

The same cannot be said for securities.¹⁴⁷ Some state securities regulators do merit review proposed offerings when those offerings are not for “covered securities” under the National Securities Markets Improvement Act of 1996.¹⁴⁸ But securities that will be offered on a national exchange—that is, the kinds of securities members of the public will tend to buy, either directly or indirectly through funds—are reviewed only by the SEC and only on a disclosure, not a merit, basis.¹⁴⁹ If the

government inspectors a direct role in ensuring that “unwholesome, adulterated, mislabeled, or deceptively packaged” meat would not enter the nation’s food supply. 21 U.S.C. § 602.

145. *See id.*

146. Despite the low risk of using these merit-reviewed products, individuals may nevertheless have an irrational fear of doing so. *See, e.g.,* André T. Möller et al., *Irrational Cognitions and the Fear of Flying*, 16 J. RATIONAL-EMOTIVE & COGNITIVE-BEHAVIOR THERAPY 135 (1998) (finding that some individuals experience anxiety while flying due to their overestimation of its dangers); *see also* Sarah Geoghegan et al., *Vaccine Safety: Myths and Misinformation*, 11 FRONTIERS IN MICROBIOLOGY 1 (2020) (reviewing misinformation about vaccination that can reduce use of childhood vaccines).

147. Except, perhaps, for things like U.S. Treasury securities. *See* Yesha Yadav, *The Failed Regulation of U.S. Treasury Markets*, 121 COLUM. L. REV. 1173, 1186 (2021) (“As they are backed by the full faith and credit of the United States, its political institutions, consumer and capital markets, and taxing power, Treasuries are generally viewed as default-proof. Investors worldwide rely on them as a fail-safe store of value to protect against risk, volatility, and investment losses.”).

148. *See* National Securities Markets Improvement Act of 1996 § 102, Pub. L. No. 104-290, 110 Stat. 3417.

149. 15 U.S.C. § 77r(b)(1)(A) (subjecting publicly traded securities to exclusive federal registration (i.e., not dual state-federal registration)); *see also* THOMAS LEE HAZEN, *THE LAW OF SECURITIES REGULATION* 18 (7th ed. 2017) (“The federal [securities] legislation . . . did not (and, as amended, still does not) establish a system of merit regulation The focus on disclosure was based on the conclusion that sunlight is the best disinfectant.”).

public assumes that exchange-based offerings are merit reviewed, such a misapprehension would have sobering implications for investor protection. That is particularly so in a “GameStop” era of resurgent retail investment in individual issuers.¹⁵⁰

This potential that the public may mistakenly believe that the SEC assesses the merits of offerings has been present since the earliest days of federal securities regulation.¹⁵¹ More recently, the SEC has identified offerings that tout “SEC approval” as an investor-protection concern, suggesting that the results could be consistent with what regulators see in their own market surveillance and enforcement activity.¹⁵² Equally sobering are the “sometimes true” means for the “private” group’s Statements #16 and #17, which suggest that respondents understand even *private* offerings to be made with some merit-review quality assurance.¹⁵³ If such an understanding is widespread, might it foster “Ponzi schemes next door”?¹⁵⁴

150. See Sergio Alberto Gramitto Ricci & Christina M. Sautter, *Corporate Governance Gaming: The Collective Power of Retail Investors*, 22 NEV. L.J. 51, 51–53 (2021) (documenting the rise of “wireless” retail investors and explaining why their motivations for investing differ from earlier generations of retail investors and from institutional investors).

151. See Alexander I. Platt, *The Administrative Origins of Mandatory Disclosure*, 49 J. CORP. L. (forthcoming 2024) (citing early sources expressing concern that the public will view SEC review as “approving” securities offerings on the merits).

152. See SEC, *Investor Alert: Beware of Claims that the SEC Has Approved Offerings* (Apr. 30, 2019), <https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-alerts/investor-1> [<https://archive.ph/QdHJO>]:

[Y]ou should know that a filing does not mean that the SEC has in any way validated or approved of the offering. Indeed, the SEC never “approves” an offering The SEC has recently observed situations in which sponsors of [initial coin offerings] have allegedly touted SEC forms and filings as indications that the investment has been “approved” by the SEC. That is not true. Although a company may make a filing on the SEC’s EDGAR database, that filing does not confer any special status.

153. *Infra* App., tbl. 1.

154. Andrew K. Jennings, *State Securities Enforcement*, 47 BYU L. REV. 67, 72 (2021).

Table 4: Corporate-governance statements (investor protection).¹⁵⁵

Survey Statements	Y			
	Public n = 105	Private n = 107	Publicly traded n = 100	Public reporting n = 95
Is the statement always true (0), sometimes true (1), or never true (2)?				
15. The shares of a Y company are traded on an exchange like the New York Stock Exchange or Nasdaq.	0.30	0.23**	0.91*** ¹⁵⁶ n = 99	0.49
16. Before a Y company can sell shares, the government first examines the company to make sure its stock is a safe investment for investors.	1.04	1.12	1.03	1.14
17. Before a Y company can sell shares, the government first examines the company to make sure it has a profitable business.	1.22	1.25	1.17	1.23

* $p < .05$ *** $p < .001$

2. Corporate Power

Corporate power is a hot topic in academic circles, on cable news, and in the halls of Congress. Is it proper for social-media firms to ban the

155. Some statements included in Tables 1, 2, and 3, could also be said to reflect an investor protection concern, but for brevity they are not reprinted in Table 4. *See supra* Tables 1, 2, 3.

156. This result is one of the few highly significant differences found in this study, yet the “publicly traded” group is the furthest of the four groups from an “always true” average on the statement most associated with that term: of course the shares of publicly traded companies are traded on an exchange. The highly significant result suggests there is a terminology effect for this group—and the effect is seen on the statement for which it would be most expected—but the direction of the effect runs opposite from what would be expected.

sitting president of the United States from using their platforms?¹⁵⁷ Is expression on their platforms at their commercial forbearance, or do higher principles of freedom of speech ever come into play?¹⁵⁸ Must retailers make decisions on what products to carry, or technology providers decisions on whom to provide services, without regard to the political or social values associated with those products or commercial counterparties?¹⁵⁹ These questions are not resolved here, but this Essay's data can help illuminate the social milieu in which they arise. Indeed, the question of public understanding of corporate power is perhaps the topic that most needs investigation.

The most direct and personal experiences citizens have with corporate power is as employee or customer. Do respondents understand that power to be constrained by an obligation to respect those constituents' speech and associational rights, as state power is? On average, respondents across all treatment groups responded that it is "sometimes true" that companies must respect their employees' and customers' "constitutional right to freedom of speech"; the responses for the three public treatments came close to an "always true" average.

Respondents in the "public" treatment on average responded that public companies are always prohibited from discriminating against employees or customers based on their political beliefs.¹⁶⁰ Those in the "public reporting" group thought the same for political discrimination against employees, and all the other mean results were that those forms of discrimination are sometimes unlawful. There were, however, no significant differences between treatment groups. These results can be compared to an analogous Statement #23 on race, gender, religion, national origin, and disability.¹⁶¹

157. See Danny Crichton, *The Deplatforming of President Trump*, TECHCRUNCH (Jan. 9, 2021), <https://techcrunch.com/2021/01/09/the-deplatforming-of-a-president> [<https://perma.cc/4XYV-XJLL>].

158. See *supra* notes 66–71 and accompanying text.

159. See Joel Rosenblatt, *Parler Faces 'Difficulties' as Amazon Wins Early Court Fight*, BLOOMBERG (Jan. 21, 2021), <https://www.bloomberg.com/news/articles/2021-01-21/parler-judge-refuses-to-make-amazon-restore-site-s-web-hosting> [<https://archive.li/a2u3Q>].

160. See *infra* note 269 and accompanying text.

161. *Infra* App., tbl. 1.

Although, on average, all treatment groups said that it is always true that these kinds of discrimination are prohibited, there was a significant difference in the mean response between the “public” and “private” groups. This point suggests, again, an understanding by some that private companies may avoid substantive business regulation. Altogether, however, the comparisons between the speech—and political—beliefs statements and the invidious-discrimination statements suggest a surer understanding that businesses are prohibited from practicing the latter.

Corporate power in the political and electoral domains is also hotly contested.¹⁶² Do respondents understand firms to exercise political and electoral influence through direct contributions to political candidates and parties, rather than through trade associations, employee-led political-action committees, or independent expenditures?¹⁶³ Respondents across all four groups responded that it is sometimes true that companies are permitted to make campaign contributions to congressional and presidential candidates, despite the continued viability of the statutory prohibition on direct corporate contributions to federal campaign committees.¹⁶⁴ This result was expected, given that popular discussion of the Supreme Court’s *Citizens United* decision¹⁶⁵ does not always clearly point out that direct-contribution prohibitions remain enforced.¹⁶⁶ This

162. See CIARA TORRES-SPELLISCY, *CORPORATE CITIZEN? AN ARGUMENT FOR THE SEPARATION OF CORPORATION AND STATE* (2016) (including a full treatment of the debate).

163. See Wendy L. Hansen et al., *The Effects of Citizens United on Corporate Spending in the 2012 Presidential Election*, 77 J. POL. 535 (2015) (offering an empirical analysis of the ways corporations or individuals within corporations spend on political campaigns).

164. 52 U.S.C. § 30118.

165. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (holding that corporations have a First Amendment right to make independent electioneering expenditures); see also *SpeechNow.org v. Fed. Election Comm’n*, 599 F.3d 686 (D.C. Cir. 2010) (extending *Citizens United*).

166. For instance, during her presidential campaign, U.S. Senator Elizabeth Warren pledged not to accept “corporate PAC money” and urged a ban on such contributions. See *Getting Big Money Out of Politics*, WARREN FOR SENATE (Sept. 28, 2023), <https://elizabethwarren.com/plans/campaign-finance-reform> [<https://perma.cc/7YHC-XS6J>]. Even though Warren points out that direct contributions are not allowed, a person without much knowledge about the ins-and-outs of federal campaign finance law might assume that “corporate PAC money” is “corporate money,” rather than contributions made by a company’s employees to a separate entity. See *id.*; see also *Political Action Committees (“PACs”)*, FED. ELECTION COMM’N (Sept. 28, 2023), <https://www.fec>.

study poses only one statement directly related to the role of business in democratic processes. The necessarily limited insights generated from responses on this statement thus recommend further study around public understanding of corporate involvement in campaigns and elections.

Overall, corporate power appears to be an area in which naïve understanding might diverge from expert understanding. Such divergence has a number of policy implications. For instance, if the public mistakenly understands corporations to engage in political spending the same way that individuals do—by contributing to candidates—it might also mistakenly expect that information about corporate political spending is available in publicly accessible campaign-finance reports (as individuals' contributions are). Such a misunderstanding could diminish urgency around congressionally mandated transparency for corporate political spending.¹⁶⁷ In another example, if elected officials seek to prohibit social-media firms from policing speech on their platforms, it is helpful to those ends if much of the public already understands that such policing already is not permissible. In that case, any new policy would be merely remedial to already wrongful corporate conduct.¹⁶⁸

gov/press/resources-journalists/political-action-committees-pacs [https://perma.cc/KB68-9GTT] (explaining, for the benefit of journalists, the various kinds of finance committees, including corporate and labor PACs).

167. Cf. Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262, 338 (2016) (arguing that transparency of corporate political spending “involves uniquely significant public interests” that requires public regulation).

168. See, e.g., *infra* note 267 and accompanying text.

Table 5: Corporate-power statements.¹⁶⁹

Survey Statements	Y			
	Public n = 105	Private n = 107	Publicly traded n = 100	Public reporting n = 95
18. A Y company is required to respect its employees' constitutional right to freedom of speech.	0.56	0.72	0.6	0.6
19. A Y company is required to respect its customers' constitutional right to freedom of speech.	0.55	0.69	0.6	0.63
20. A Y company is allowed to make campaign contributions to the campaign of a candidate for Congress or president.	0.66	0.55	0.72	0.68
21. A Y company must provide its products or services to any customer who has the ability to pay.	0.74	0.81	0.65 n = 99	0.82
22. A Y company must refrain from discriminating against its customers on account of their race, gender, religion, national origin, or disability.	0.16	0.38**	0.28	0.21
23. A Y company must refrain from discriminating against its employees on account of their race, gender, religion, national origin, or disability.	0.27	0.28 n = 106	0.20 n = 99	0.23

169. See *infra* App., tbl. 1.

24. A Y company must refrain from discriminating against its customers on account of their political beliefs.	0.47	0.70 n = 106	0.61	0.58
25. A Y company must refrain from discriminating against its employees on account of their political beliefs.	0.4	0.61	0.59 n = 99	0.46

** $p < .01$

3. Corporate Purpose

Corporate purpose is another hot topic¹⁷⁰ and is among corporate law's most fundamental and longstanding questions.¹⁷¹ Are corporate managers duty bound to maximize shareholder value, or are they permitted to take nonshareholder stakeholder interests into account, even if doing so will mean producing less profit for shareholders?¹⁷²

170. See Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1309, 1309 (2021) (“Purpose is the hot topic in corporate governance. Not only are commentators demanding that corporations formally articulate a purpose, but they are also insisting that corporate purpose encompass the interests of nonshareholder stakeholders or society more generally.”).

171. This debate between shareholder and stakeholder interests in corporate governance has raged since at least the 1932 Berle-Dodd exchange in the pages of the Harvard Law Review. Compare Adolph A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931) (“[A]ll powers granted to a corporation or to the management of a corporation, or to any group within the corporation . . . [are] at all times exercisable only for the ratable benefit of all the shareholders as their interest appears.”) with E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1153–54 (1932) (“[C]orporate managers who control business should voluntarily and without waiting for legal compulsion manage it in such a way as to fulfill those responsibilities.”). Berle’s view enjoyed a period of dominance over the last few decades, but Dodd’s view has made serious inroads more recently. *Id.*

172. See generally, e.g., Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001) (observing that global governance systems were converging on a shareholder-primacy model that was unlikely to be challenged in the future); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 278 (1999) (theorizing the public company as “a team of people who enter into a complex agreement to work together for their mutual gain[,] including

Respondents resoundingly aligned with the latter view. For all treatment groups, respondents agreed that it is “always true” that firms may make business decisions with environmental, employee, community, or ethical concerns in mind, even if those decisions reduce profits. Notably, for these statements there were no significant differences between the “private” group and the “public,” “publicly traded,” or “public reporting” groups.

These results are broadly consistent with a public understanding that businesses have permissible ends beyond, and perhaps above, profit. It also appears to be consistent with other survey results finding that investors are willing to trade off between profits and other societal interests.¹⁷³ Although these results far from settle the corporate-purpose debate, they do add texture to it. Academics participate in this debate through a rich and continuing discourse and literature. For their part, in 2019, senior corporate leaders, speaking through the Business Roundtable, announced their own understanding that “[w]hile each of our individual companies serves its own corporate purpose, we share a fundamental commitment to all of our stakeholders”—including “customers, employees, suppliers, communities and shareholders.”¹⁷⁴ The

shareholders, employees, and perhaps other stakeholders such as creditors or the local community”); Edward B. Rock, *For Whom is the Corporation Managed in 2020?: The Debate Over Corporate Purpose* (ECGI L. Working Paper No. 515/2020, Nov. 6, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3589951 [<https://perma.cc/L7WK-P46P>]; FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 38 (1991):

Society must choose whether to conscript the firm’s strength (its tendency to maximize wealth) by changing the prices it confronts or by changing its structure so that it is less apt to maximize wealth. The latter choice will yield less of both good ends than the former. . . . [M]aximizing profits for equity investors assists the other ‘constituencies’ automatically. The participants in the venture play complementary rather than antagonistic roles. In a market economy each party to a transaction is better off.

173. See Caleb N. Griffin, *Humanizing Corporate Governance*, 75 FLA. L. REV. 689 (2023).

174. *Business Roundtable Redefines the Purpose of a Corporation to Promote ‘An Economy That Serves All Americans’*, BUS. ROUNDTABLE (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a->

question of public understanding perhaps complicates, or supports, that discourse.

Finally, there was a significant difference between the “public” and “private” groups on the government-ownership question, consistent with an understanding that public firms have at least some degree of public ownership.¹⁷⁵ This intuition finds support in the 2021 qualitative study.¹⁷⁶ If such a belief that public-company status implies at least some government ownership is widespread, the policy implications are considerable for a society that values property rights.¹⁷⁷ Citizens might thus view public companies not just in terms of their civic obligations to the societies in which they operate, but also in terms of a proprietary interest in them.

Table 6: Corporate-purpose statements.¹⁷⁸

Survey Statements	Y			
<i>Is the statement always true (0), sometimes true (1), or never true (2)?</i>	Public n = 105	Private n = 107	Publicly traded n = 100	Public reporting n = 95
26. A Y company is allowed to make business decisions that protect the environment, even if those decisions will reduce the profit it makes.	0.42	0.37	0.34	0.42

corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/T8JT-8347].

175. See *supra* notes 16–18 and accompanying text.

176. See *infra* Part II.B.2.

177. See J. Justin Wilson, *New Poll: 76% of Americans More Likely to Vote for Candidates Who Back Forfeiture Reform*, INST. FOR JUST. (Oct. 15, 2018), <https://ij.org/press-release/new-poll-76-of-americans-more-likely-to-vote-for-candidates-who-back-forfeiture-reform/> [https://perma.cc/5M9C-WCKY] (reporting polling results that 59% of Americans oppose the practice of civil forfeiture).

178. *Infra* App., tbl. 1.

27. A Y company is allowed to make business decisions that protect its employees, even if those decisions will reduce the profit it makes.	0.47	0.39	0.3	0.42
28. A Y company is allowed to make business decisions based on ethical concerns, even if those decisions will reduce the profit it makes.	0.36	0.28 n = 106	0.33	0.42
29. A Y company is allowed to make business decisions that protect its community, even if those decisions will reduce the profit it makes.	0.47	0.32	0.41 n = 99	0.53
30. Y companies are owned in whole or in part by the government.	1.29	1.58**	1.47	1.37

** $p < .01$

4. Gender and Ideology in Corporate Governance and Securities Regulation

Finally, I examined whether gender and ideology were significant variables in survey responses. Because differences between “public” and “private” companies are this Essay’s focus, for this part of the study, I examined only the “public” and “private” treatment groups.¹⁷⁹ Ordered logistic regressions were run for each of the thirty survey statements, controlling for self-reported gender, race, age, education, and ideology.¹⁸⁰

179. The “publicly traded” and “public reporting” treatments served largely as checks on how respondents were interpreting the “public” in “public company.”

180. Respondents who identified as female were coded as “female” in a gender indicator variable, and those who rated their political views as 5 to 7 on a seven-point Likert scale were coded as “conservative” in an ideology indicator variable. *See supra* Part II.A (discussing the methodology).

a. Gender

Scholars have increasingly scrutinized the role of gender in corporate law and governance and securities regulation.¹⁸¹ The public company community has turned to the question of gender equity in a focused way, especially when it comes to the need to achieve greater diversity on corporate boards.¹⁸² Given that body of scholarship and the real-world focus on gender in corporate governance, I tested for potential gendered effects in survey responses. Overall, I found only modest evidence of gendered differences: for 23 statements, gender was not a significant variable.

However, it was significant for the remaining seven statements. For these statements, women were more likely than men to assume the truth of statements aligned with publicness: employee involvement in selecting directors, transparency obligations to the press and government, respect for customer and employee free speech rights, and decision-making in favor of environmental interests. These results suggest that women intuited greater public obligations for firms than men did. But these results must be viewed in light of the fact that in 23 of 30 statements, there were no significant gendered differences.

Still, these results are consistent with other studies finding that women have more prosocial intuitions than men.¹⁸³ Thus, this part of the

181. See generally e.g., Afra Afsharipour & Matthew Jennejohn, *Gender and the Social Structure of Exclusion in U.S. Corporate Law*, 90 U. CHI. L. REV. 1819 (2023); Sarah C. Haan, *Corporate Governance and the Feminization of Capital*, 74 STAN. L. REV. 515 (2022) (observing that the intersection of gender and corporate governance remains understudied); Ann Lipton, *Capital Discrimination*, 59 HOUS. L. REV. 843 (2022); Anat Alon-Beck, Michal Agmon-Gonnen & Darren Rosenblum, *No More Old Boys' Club: Institutional Investors' Fiduciary Duty to Advance Board Gender Diversity*, 55 U.C. DAVIS L. REV. 445–46 (2021); Claire A. Hill, *#MeToo and the Convergence of CSR and Profit Maximization*, 69 CASE W. RESV. L. REV. 895 (2019); Jill Fisch & Steven Davidoff Solomon, *California's 'Women on Boards' Statute and the Scope of Regulatory Competition*, 20 EUR. BUS. ORG. L. REV. 493 (2019).

182. See *infra* note 189 (discussing a sampling of the largest institutional investors' voting policies on holding accountable governance committee chairs at companies that lack adequate board diversity).

183. See generally David G. Rand et al., *Social Heuristics and Social Roles: Intuition Favors Altruism for Women but Not for Men*, 145 J. EXPERIMENTAL PSYCH. GEN. 389 (2016) (offering a meta-analysis of 22 experimental studies on altruism); Rachel Carson

study presents some evidence for gendered intuitions around corporate governance, but more in-depth gender-focused study will be needed to support this possibility and its implications for corporate law and governance, and securities regulation.

Table 7: “Public” and “private” responses, by gender.¹⁸⁴

Survey Statements	Y			
	Public		Private	
	Female n = 47	Male n = 58	Female n = 47	Male n = 60
<i>Is the statement always true (0), sometimes true (1), or never true (2)?</i>				
2. Some of the members of a Y company’s board of directors are appointed by the government.	1.45	1.5	1.68*	1.4*
3. Some of the members of a Y company’s board of directors are elected by the company’s employees.	0.87*	1.16*	0.98	1
11. Y companies are required to provide internal documents if a journalist requests them.	1*	1.29*	1.48 n = 46	1.52
13. Y companies are required to provide internal documents if the government requests them.	0.38*	0.64*	0.55*	0.8*

& Uri Gneezy, *Gender Differences in Preferences*, 47 J. ECON. LITERATURE 1 (2009); see also Ann Senne, *As Women Gain Power, Interest in ESG Investing Grows*, RBC WEALTH MGMT. (Mar. 8, 2021), <https://www.rbcwealthmanagement.com/en-us/insights/as-women-gain-power-interest-in-esg-investing-grows> [https://perma.cc/TMP7-D49Z] (reporting that 55% of the investors who bought one of the investment firm’s three ESG portfolios were women); 2017 U.S. Trust Insights on Wealth and Worth, U.S. TRUST 66 (2017), www.pva-advisory.com/wp-content/uploads/2017/10/2017-US-Trust-Insights-on-Wealth-and-Worth.pdf [https://archive.ph/2Qmcf] (reporting survey results that 63% of female high-net-worth investors consider “impact important in investment decisions” to be somewhat or extremely important, compared to 50% of male high-net-worth investors).

184. *Infra* App., tbl. 1.

18. A Y company is required to respect its employees' constitutional right to freedom of speech.	0.40*	0.69*	0.47**	0.92**
19. A Y company is required to respect its customers' constitutional right to freedom of speech.	0.34**	0.72**	0.55	0.8
26. A Y company is allowed to make business decisions that protect the environment, even if those decisions will reduce the profit it makes.	0.26*	0.55*	0.36	0.38

* $p < .05$

** $p < .01$

b. Ideology

The role and power of business in American society is subject to intense ideological contention.¹⁸⁵ Skepticism of business might be stereotypically associated with the left. In contrast, conservatives could be framed as more solicitous of business. Recent years arguably represent some reversal from these traditional ideological corners.¹⁸⁶ Increased

185. Alan Palmiter argues that corporate governance should be understood not through law-and-economics or behavioral-economics lenses but rather through a moral-psychology lens. See Alan R. Palmiter, *Corporate Governance as Moral Psychology*, 74 WASH. & LEE L. REV. 1119, 1121 (2017) (“[T]he moral matrices—which in our political society have become molded into progressive, conservative, and libertarian camps—provide a powerful prism by which to understand decisions in the corporate context.”). This perspective aptly frames the potential for there to be ideological intuitions around corporate governance. See *id.*

186. See Thomas B. Edsall, *The Marriage Between Republicans and Big Business Is on the Rocks*, N.Y. TIMES (Apr. 14, 2021), <https://www.nytimes.com/2021/04/14/opinion/woke-capitalism-democratic-party-us.html> [<https://archive.li/9y82k>] (quoting conservative sociology Professor W. Bradford Wilcox):

The decades-long marriage between the G.O.P. and big business is clearly on the rocks. This is especially true because the G.O.P. is increasingly drawn to a pugnacious and populist cultural style that has more appeal to the working class, and Big Business is increasingly

societal and market focus on ESG issues have elevated those concerns among corporate decisionmakers. Public companies increasingly dedicate resources to producing ESG disclosures and satisfying the growing investor demand for companies to address systemic concerns like climate change and diversity, equity, and inclusion (“DEI”).¹⁸⁷ With the rise of the #MeToo and Black Lives Matter movements, DEI has gained increased urgency as an objective that boards and executives feel duty-bound to take seriously.¹⁸⁸ The nation’s largest investors have begun to demand as much.¹⁸⁹ These moves are largely consistent with the policy

inclined to support the progressive cultural agenda popular among the highly educated.

187. See McKinsey & Co., *The ESG Premium: New Perspectives on Value and Performance* 2 (Feb. 2020) (“58 percent of [corporate-executive and investor] respondents tell us the current political environment has increased the importance of ESG programs to meet stakeholder expectations. In addition, about four in ten say the political environment has increased the importance of ESG programs to shareholder value.”).

188. See, e.g., Amelia Miazad, *Sex, Power, and Corporate Governance*, 54 U.C. DAVIS L. REV. 1914, 1937–46 (2021) (accounting for increased pressure from institutional investors, pension funds, and shareholder activists on corporate gender equity); Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1641–55 (2018) (reviewing fiduciary violations resulting from workplace sexual harassment); Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV. 1, 25–26 (2022) (“[T]here are increasing calls by advocates and by corporate stakeholders themselves for corporations to address inequality by undertaking more assertive and more comprehensive DEI policies that address all the important ways in which corporations affect their workers, consumers, business partners, communities of operation, and society as a whole.”).

189. See Sarah Krouse, *BlackRock: Companies Should Have at Least Two Female Directors*, WALL ST. J. (Feb. 2, 2018), <https://www.wsj.com/articles/blackrock-companies-should-have-at-least-two-female-directors-1517598407> [<https://archive.li/kml6n>]; BlackRock, Inc., *BlackRock Investment Stewardship: Proxy Voting Guidelines for U.S. Securities*, at 6 (Jan. 2023), <https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf> [<https://perma.cc/2K65-L35Q>] (“In our experience, greater diversity in the boardroom contributes to more robust discussions and more innovative and resilient decisions. Over time, greater diversity in the boardroom can also promote greater diversity and resilience in the leadership team, and the workforce more broadly.”); State Street Corporation, *SSGA’s Guidance on Enhancing Gender Diversity on Boards*, at 2 (Mar. 7, 2017), <https://web.archive.org/web/20170409231526/https://www.ssga.com/investment-topics/environmental-social-governance/2017/guidance-on-enhancing-gender-diversity-on-boards.pdf> [<https://perma.cc/4RRL-GLHC>] (“In the event that companies fail to take

concerns most readily associated with political progressives. Thus, although they might not abandon a critical view of American business, progressives might nevertheless find some accord with the nation's public companies when it comes to ESG and DEI. In contrast, conservatives increasingly object to corporate emphasis on ESG and DEI.¹⁹⁰ In other words, conservatives might be discovering a skepticism of corporate power in American society¹⁹¹ just as progressives might have a newfound, if grudging, appreciation for it.¹⁹²

action to increase the number of women on their boards, despite our best efforts to actively engage with them, we will use our proxy voting power to effect change—voting against the Chair of the board's nominating and/or governance committee if necessary.”); An Open Letter to Directors of Public Companies Worldwide from F. William McNabb III, Chairman and Chief Executive Officer, The Vanguard Group, Inc., at 2 (Aug. 31, 2017), <https://www.wlrk.com/docs/2017VanguardOpenLettertoBoards.pdf> [<https://archive.ph/LPht7>] (“Gender diversity is one element of board composition that we will continue to focus on over the coming years.”); The Vanguard Group, Inc., *Vanguard Investment Stewardship Insights, A Continued Call for Boardroom Diversity*, at 1 (Dec. 2020), https://corporate.vanguard.com/content/dam/corp/advocate/investment-stewardship/pdf/perspectives-and-commentary/INVDEIS_052021.pdf [<https://archive.ph/dfcQv>] (“But when we see a lack of commitment to progress on diversity—for example, a board lacking any gender diversity or any racial or ethnic diversity—we become concerned that long-term shareholder returns may suffer.”); *id.* (“Beginning at 2021 annual meetings, the Vanguard funds may vote against directors at companies where progress on board diversity falls behind market norms and expectations. In such cases, we may hold nominating committee chairs or other relevant directors accountable.”).

190. See, e.g., Saijel Kishan & Danielle Moran, *Republicans Ramp Up Anti-ESG Campaign for 2023*, BLOOMBERG (Dec. 29, 2022), <https://www.bloomberg.com/news/articles/2022-12-29/republicans-prepare-to-ramp-up-their-anti-esg-campaign-in-2023> [<https://archive.ph/FsnNW>]; Rod Dreher, *Woke Capitalism Is Our Enemy*, THE AM. CONSERVATIVE (Apr. 22, 2019), <https://www.theamericanconservative.com/240reher/woke-capitalism-is-our-enemy/> [<https://archive.li/J0U3Z>] (likening DEI to a “religion” that “instructs employees to conduct struggle sessions within themselves to root out false beliefs that undermine Diversity and Inclusion”).

191. See, e.g., *supra* notes 47–54, 66–71; see *infra* note 258 and accompanying text.

192. But see Lindsay Singleton et al., *Across the Aisle: Unlocking the Bipartisan Power of ESG* (Oct. 2021) (on file with author) (conducting public-opinion polling in the summer of 2021):

A majority of survey respondents (76%) feel that companies should be held accountable for making a positive impact on the communities in which they operate. But perhaps more importantly, public opinion

Consider whether any ideological divergence would be captured by the survey instrument. For instance, to the extent that contemporary criticisms of corporate power over culture and speech have been most prominent among figures on the right, it might be expected that there would be ideological divergence on statements related to free speech and political discrimination.¹⁹³ Yet, the original 2020 study's greatest surprise is that non-conservative and conservative respondents had largely consistent responses. Ideology was not a significant variable in either the "public" and "private" groups for statements related to these issues; non-conservatives (those who identified as 1 through 4 on a liberal-to-conservative Likert scale) aligned with conservatives (those who identified as 5 to 7) on statements related to speech and political discrimination. These results suggest that a perspective associated with commentators, public figures, and individuals on the right could have a basis in broader public understanding.¹⁹⁴

The three statements in which ideology was a significant variable, as seen in Table 2, do not point to profound partisan divergence. In the "private" group, conservatives' mean response on whether firms are subject to government regulation approached "always true," whereas non-conservatives' mean approached "sometimes true." If it is assumed that conservatives are generally more likely to oppose business regulation,¹⁹⁵

on ESG is not nearly as polarized as popular narratives suggest - 79% of Democrats and 71% of Republicans feel that companies should be responsible for bettering society. In general, the majority of respondents tended to prioritize environmental (66%) issues such as climate change and social (67%) issues core to traditional American values. In addition to these issues, a majority of both Democrats (68%) and Republicans (52%) believe Diversity and Inclusion (D&I) should be a priority for companies, and consistently (71% of Republicans and 65% of Democrats) believe that company hiring and promotion practices should be merit based.

193. See Irvine, *supra* note 101, at 344 ("To speak very broadly: some legal facts are clearly specific to a particular time—the three-strikes rule, for example. Others are clearly less sensitive to temporal or cultural context, like a story about a dispute over a property line.").

194. See, e.g., *supra* notes 47–54, 66–71; see *infra* note 258 and accompanying text.

195. See *Views of Government Regulation*, PEW RSCH. CTR. (Feb. 23, 2012), [pewresearch.org/politics/2012/02/23/section-2-views-of-government-regulation/](https://www.pewresearch.org/politics/2012/02/23/section-2-views-of-government-regulation/) [<https://archive.li/SXNZm>] ("Fully 83% of conservative Republicans say regulation is

this result might be explained by greater conservative awareness of the regulatory obligations over private concerns. Non-conservatives, for their part, might be cynical about just how susceptible business really is to governmental regulation.

Second, in both the public and private groups, conservatives averaged in the “sometimes true” territory that companies must produce internal documents if requested by the government to do so. A notable difference between conservative and non-conservative respondents is that the latter, on average, rated Statement #13 closer to “always true” in the case of public companies.¹⁹⁶ This result would suggest that non-conservative respondents understand public status as making a firm more susceptible to government intervention. Finally, in the public group, non-conservatives had a mean response that was closer to “always true” whether public firms must provide products and services to all customers with the ability to pay, whereas conservatives averaged exactly in the middle with “sometimes true.” This result would, at first, seem inconsistent with criticisms over how large businesses deal with controversial customers as coming principally from conservatives.¹⁹⁷ But

harmful, up from 67% last year A majority of Democrats (57%) think government regulation of business is necessary to protect the public interest.”).

196. *Infra* App., tbl. 1.

197. Such criticisms are not limited to social media posts or cable news programs. In April 2021, Senate Minority Leader Mitch McConnell issued a warning to Corporate America:

From election law to environmentalism to radical social agendas to the Second Amendment, parts of the private sector keep dabbling in behaving like a woke parallel government. Corporations will invite serious consequences if they become a vehicle for far-left mobs to hijack our country from outside the constitutional order. Businesses must not use economic blackmail to spread disinformation and push bad ideas that citizens reject at the ballot box.

Press Release, Mitch McConnell, Corporations Shouldn't Fall for Absurd Disinformation on Voting Laws (Apr. 5, 2021), <https://www.republicanleader.senate.gov/newsroom/press-releases/mcconnell-corporations-shouldnt-fall-for-absurd-disinformation-on-voting-laws> [<https://perma.cc/FTB5-8AWY>].

it could also be explained in terms of conservative respondents reserving to business owners the right to opt out of serving some customers.¹⁹⁸

Overall, conservative responses did tend to align with free-speech/political-discrimination views that are prominent on the right.¹⁹⁹ That they also aligned with what might be viewed as more progressive understandings of corporate purpose could also be consistent with a conservative form of populism.²⁰⁰ Non-conservative and conservative respondents' responses had similar understandings of corporate obligations. Those understandings could flow, however, from different experiences and worldviews.²⁰¹ For example, populist criticisms of free trade and its impact on workers are prominent on both the left and the right,²⁰² and so it is no surprise that non-conservative and conservative

198. For example, one cake decorator refused, on religious grounds, to make a cake for a same-sex wedding. *See* *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018).

199. *See generally* Emily A. Vogels et al., *Americans and 'Cancel Culture': Where Some See Calls for Accountability, Others See Censorship, Punishment*, PEW RSCH. CTR. (May 19, 2021), <https://www.pewresearch.org/internet/2021/05/19/americans-and-cancel-culture-where-some-see-calls-for-accountability-others-see-censorship-punishment/> [<https://archive.li/Pxkf3>] (reviewing poll results showing great sensitivity among Republicans to policing or criticisms of online speech).

200. Stephen M. Bainbridge, *Corporate Purpose in a Populist Era*, 98 NEB. L. REV. 543, 577 (2020):

The right-of-center populist movement seems more likely to pursue changes in general regulation than in the legal rules governing corporate social responsibility. Moreover, as corporate social activism becomes more common it will likely trend towards support of progressive rather than populist policies, encouraging populist efforts to regulate corporations directly rather than encouraging them to rely on the good will of corporate managers.

201. *See* Christopher M. Wegemer & Deborah Low Vandell, *Parenting, Temperament, and Attachment Security as Antecedents of Political Orientation: Longitudinal Evidence from Early Childhood to Age 26*, 56 DEVELOPMENTAL PSYCH. 1 (2020).

202. *Compare* Bernie Sanders, U.S. Senator for Vt., Senate Speech by Sen. Bernie Sanders on Unfettered Free Trade (Oct. 12, 2011), <https://www.sanders.senate.gov/press-releases/senate-speech-by-sen-bernie-sanders-on-unfettered-free-trade/> [<https://archive.li/mJ0Yo>] ("Further, the Economic Policy Institute has also found that NAFTA (the North American Free Trade Agreement with Mexico and Canada) has led to the loss of over 680,000 jobs. We cannot keep outsourcing our future to low-

respondents understand corporate managers as being permitted to subordinate profit maximization to employee or community wellbeing.

Table 8: “Public” and “private” responses, by ideology (excerpt).²⁰³

Survey Statements	Y			
	Public		Private	
	Cons. n = 27	Non-Cons. n = 80	Cons. n = 25	Non-Cons. n = 84
<i>Is the statement always true (0), sometimes true (1), or never true (2)?</i>				
4. Y companies are subject to regulation by government agencies.	0.5	0.37	0.29*	0.65*
13. Y companies are required to provide internal documents if the government requests them.	0.80*	0.44*	0.79	0.66
21. A Y company must provide its products or services to any customer who has the ability to pay.	1*	0.66*	0.83	0.81

* $p < .05$

5. Pre-Knowledge and Terminology

In December 2021, I used the methodology from the 2020 Original Study to run further studies to test for two confounding possibilities. First, do respondents who have pre-knowledge of a technical definition of “public company” respond differently than those who do not? Second, does the use of the term “company” rather than “corporation” or “business” in survey statements influence responses?

wage countries by passing even more unfettered free trade agreements.”), *with* Donald Trump, U.S. President, Donald Trump’s Jobs Plan Speech (June 28, 2016), <https://www.politico.com/story/2016/06/full-transcript-trump-job-plan-speech-224891> [<https://archive.li/8wnbR>] (“Our politicians have aggressively pursued a policy of globalization - moving our jobs, our wealth and our factories to Mexico and overseas.”).

203. See *infra* App., tbl. 2 (displaying full results on which this excerpt is based).

a. Does Knowledge of the Black-Letter Meaning of “Public Company” Matter?

Do respondents who already know the black-letter definition of “public company” respond to the survey statements differently? In a study of 221 respondents, all respondents were given the “public company” version of the original survey instrument. Some respondents (n=105) were randomly assigned to be presented with the following definition before responding: “Public companies’ are corporations that have shares listed on a national securities exchange, like the New York Stock Exchange or the Nasdaq Stock Market.” This prompt meant that respondents had a black-letter definition of “public company” before responding, and thus their responses would not be influenced by mere technical misapprehension.

The remaining respondents were not prompted with this definition. There was a significant difference for only two (out of 30) statements between the “defined” and “undefined” groups.²⁰⁴ These statements bore on expressive nondiscrimination and corporate purpose—i.e., there were no differences in statements that relate directly to technical aspects of public-company status, like being traded on an exchange or producing public disclosures.²⁰⁵ Given these results, definitional pre-knowledge is likely not a driver of respondents’ choices.

b. “Company,” “Corporation,” or “Business:” Does Terminology Matter?

Do respondents import assumptions about the word “company” that might influence their substantive responses? “Company,” the term I used in the survey statements, is a generic word. The major technology firm Apple is a “company,” as is a local landscaping business. “Business” is

204. These differences were significant at the .05 level. They were Statement #18 (“A public company is required to respect its employees’ constitutional right to freedom of speech.”) and #29 (“A public company is allowed to make business decisions that protect its community, even if those decisions will reduce the profit it makes.”). The mean results for Statement #18 were 1.10 and 0.84 for the defined and undefined groups, and for #29 the mean results were 0.81 and 0.56.

205. See *supra* note 204 and accompanying text.

an even more generic term: the large investment bank Goldman Sachs is a business, but so too is mowing lawns. “Corporations,” however, are entities specifically formed under corporate statutes.²⁰⁶ Although most are closely held small businesses, the term “corporation” can summon negative impressions of big business interests.²⁰⁷ It is conceivable that the 2020 Original Study’s use of the word “company” rather than “corporation” could have led respondents to assume certain kinds of businesses—a small, local business versus a large, national concern, perhaps—that would in turn influence their responses.

To test for this possibility, 294 respondents were given the 2020 survey instrument. Respondents were randomly assigned to “company,” “corporation,” or “business” treatments (versus the “public company,” “private company,” “publicly traded company,” or “public reporting company” groups from the original study).²⁰⁸ There was a significant difference for only Statement #1—“[Companies][corporations] [businesses] are governed by a board of directors.”²⁰⁹ The board of directors is a hallmark of the corporate form but not of other business entities.²¹⁰ This result suggests that terminology matters only for the statement for which it really matters: is a given business entity governed by a board of directors?²¹¹ This result is consistent with choices in the 2020 Original Study and the 2021 Follow-Up not being influenced by external assumptions of the word “company,” as it is used in the survey statements.

206. For example, an entity formed under the Delaware General Corporation Law is a corporation. DEL. CODE ANN. tit. 8, § 101 (2023).

207. See Ted Van Green, *Republicans Increasingly Critical of Several Major U.S. Institutions, Including Big Corporations and Banks*, PEW RSCH. CTR. (Aug. 20, 2021), <https://www.pewresearch.org/fact-tank/2021/08/20/republicans-increasingly-critical-of-several-major-u-s-institutions-including-big-corporations-and-banks/> [<https://archive.li/dIBva>] (reporting public polling results that 68% of American adults have negative views of “large corporations,” including 67% of Republicans and Republican-leaningers and 70% of Democrats and Democratic-leaningers).

208. See *supra* Part II.A.

209. This statement was significant at the .05 level. The mean scores were 0.74 for “companies,” 0.58 for “corporations,” and 0.85 for “businesses.”

210. MODEL BUS. CORP. ACT § 8.01(a) (2016) (“[E]ach corporation shall have a board of directors.”).

211. The “corporations” level was closest of the three to “always true.” See *supra* note 209.

B. 2021 FOLLOW-UP STUDIES

I conducted the 2021 Follow-up Studies in summer 2021 to identify political—and event—driven shifts that may have occurred after the 2020 Original Study as a result of the 2020 presidential election, the January 6 attack on Congress, and the developments that followed. One study used the original survey instrument and methodology but focused on changes in ideological response between the “public” and “private” treatments only. Separately, I conducted a qualitative study of open-ended responses.

1. *Post-2020 Ideological Shifts*

Much changed after the original 2020 study. A new president was elected,²¹² Congress was attacked,²¹³ now-former President Donald Trump was banned from social media,²¹⁴ debates over public-health responses to COVID-19 and vaccination intensified,²¹⁵ and social controversies involving businesses erupted.²¹⁶ Keep in mind that in the

212. *But see No Consensus on Voting Rights vs. Filibuster*, MONMOUTH U. (Jan. 27, 2022), https://www.monmouth.edu/polling-institute/reports/monmouthpoll_us_012722/ [<https://archive.li/e6Tl5>] (presenting polling results that a third “of Americans continue to believe that Biden’s 2020 victory was the result of voter fraud” and that an eighth of Americans believe “there is still a chance to overturn the 2020 result”).

213. *Inside the Capitol Riot: An Exclusive Video Investigation*, N.Y. TIMES (Jan. 6, 2022), <https://www.nytimes.com/2021/06/30/us/jan-6-capitol-attack-takeaways.html> [<https://archive.li/eDIzs>].

214. *See supra* note 9 (reporting on then-President Trump’s ban from numerous online platforms).

215. Liz Hamel et al., *KFF COVID-19 Vaccine Monitor: June 2021*, KAISER FAM. FOUND. (June 30, 2021), <https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-june-2021> [<https://perma.cc/UXP9-S4RP>] (reporting polling results that about one-in-five American adults are resistant to being vaccinated against COVID-19); *see also* Jon Allsop, *How Culture War Is Impeding Necessary Scrutiny of ‘Vaccine Passports’*, COLUM. J. REV. (Apr. 6, 2021), https://www.cjr.org/the_media_today/vaccine_passports_culture_war.php [<https://perma.cc/RK7C-QG4G>] (collecting reporting on “culture war” aspects of COVID-19 response).

216. *See, e.g.*, Elizabeth Bruenig, *The Rise of ‘Woke Capital’ Is Nothing to Celebrate*, N.Y. TIMES (Apr. 29, 2021), <https://www.nytimes.com/2021/04/28/opinion/liberals-corporations-woke-capitalism.html> [<https://archive.li/SqKAA>]; Timothy Noah, *Republicans Are Too Subservient to Corporate America to Wage War on “Woke Capitalism”*, NEW REPUBLIC (Apr. 8, 2021), <https://newrepublic.com/article/161984/georgia-voting-republicans-woke-capitalism> [<https://archive.li/Mq73Z>].

2020 study, respondents were not asked for their normative views but rather to rate statements of fact as always true, sometimes true, or never true.²¹⁷ But normative beliefs can shape positive understandings.²¹⁸ Thus, all the change from summer 2020 to summer 2021 presented an opportunity to re-run the study and see if responses had shifted. For instance, compared to the year prior, would conservatives shift on statements aligned to corporate “censorship”? Would non-conservatives—especially given that the former president and his allies are often the implied protagonists of anticorporate censorship criticisms—shift *their* responses?²¹⁹

Similar to the respondents in the 2020 Original Study, the respondents in the 2021 Follow-up Studies self-identified their genders, racial backgrounds, ages, and educational achievement, as well as their ideologies (from very liberal to very conservative) along a seven-point Likert scale.²²⁰ In the 2021 quantitative study, respondents were 58.6% male, 74.2% white, and 63.3% holders of a bachelor’s degree or higher, whereas in 2020, those percentages in the general population were 49.2%, 60.1%, and 31.1%.²²¹ The mean respondent was 37.7 years old, whereas the 2019 national average was 38.4.²²²

Recall that in the 2020 Original Study, ideology was not a significant variable when it came to “censorship,” political-discrimination, or corporate-purpose statements.²²³ A lot happened after that.²²⁴ Did those changes affect responses on what it means to be a public company?²²⁵ In the follow-up study, the number of statements that had significant non-conservative/conservative differences, in either the “public” or “private”

217. See *supra* Part. II.A.

218. Cf. Michele Mangini, *Is the Reasonable Person a Person of Virtue?*, 26 RES PUBLICA 157 (2020) (considering the normative-descriptive connection).

219. See, e.g., *supra* notes 47–54, 66–71, 177 and accompanying text.

220. See Hinkin, *supra* note 104.

221. See U.S. Census Bureau, *65 and Older Population Grows Rapidly as Baby Boomers Age* (June 25, 2020), <https://www.census.gov/newsroom/press-releases/2020/65-older-population-grows.html> [<https://archive.li/vSUPT>].

222. *Id.*

223. See *supra* Part. II.A.

224. See *supra* notes 212–16 and accompanying text.

225. The 2021 Follow-up Study excluded MTurk workers who participated in the 2020 Original Study.

treatment groups, went up from three in 2020 to eight in 2021.²²⁶ There were no overlaps between 2020 and 2021 in statements with significant response differentials. This result suggests some potential group-to-group shift from 2020 to 2021. If there was a shift, its direction and causes are uncertain.

Beyond group-to-group comparisons, I was most interested in whether there was a shift among conservatives in responses from 2020 to 2021 in the “censorship”/political discrimination statements. Such a shift did not appear. I conducted equality-of-coefficient tests for the ideology coefficients from the ordered logistic regressions used in Part II.A.4 and this section.²²⁷ I found a significant difference (.05 level) in the ideology coefficients for only four statements, and only in the “public” group: Statement #3 (employee appointment of directors), #13 (the production of internal documents to the government), #16 (merit review of securities offerings), and #21 (direct corporate campaign contributions).²²⁸ None, however, directly related to the speech—or political—discrimination statements. One possible explanation for this lack of shift in the statements of interest is that already by 2020, respondents broadly assumed the truth of statements related to free-speech and political-nondiscrimination obligations. If the 2020 respondents were representative of the different 2021 respondents, then there would not have been much room to shift directionally on those statements.

There was, however, a significant difference between conservative and nonconservative respondents on three corporate-purpose statements whether private companies may privilege environmental, workforce, and ethical considerations over profit. That result represents a relative shift from the 2020 Original Study in which conservative and non-conservative respondents were more aligned. Recall that I coded “always true” as 0, “sometimes true” as 1, and “never true” as 2.²²⁹

226. Compare *infra* App., tbl. 2 with tbl. 3.

227. *Supra* Part II.A.4.; see generally Clifford C. Clogg et al., *Statistical Methods for Comparing Regression Coefficients Between Models*, 100 AM. J. SOCIO. 1261 (1995) (providing methods for comparing coefficients from two independent regressions); accord Raymond Paternoster et al., *Using the Correct Statistical Test for Equality of Regression Coefficients*, 36 CRIMINOLOGY 859 (1998) (applying the Clogg-Petkova-Haritou method in the criminology context).

228. *Infra* App., tbl. 3.

229. See *supra* note 110 and accompanying text.

In the 2020 study, mean responses of conservatives in the “private” group on Statements #26, #27, and #28 ranged from 0.38 to 0.42, whereas nonconservatives’ mean responses ranged from 0.26 to 0.41. These were not significant differences. In the 2021 Original Study, however, the ranges were 0.55 to 0.66 and 0.27 to 0.33.²³⁰ These 2021 “private” differences were significant; that same difference did not appear in the “public” group. But in no study or treatment did I find a significant difference for Statement #29, regarding business decisions that privilege community interests over profit.²³¹ This consistency between conservative and nonconservative respondents might follow if populism—and hence, a concern for the conservation of the community—is considered as part of conservative ideology.²³² By contrast, conservatives in the “public” groups in both 2020 and 2021 were aligned with nonconservatives on corporate-purpose statements, with mean responses consistent with stakeholder governance. These at-odds results could reflect potential publicness/privateness distinctions in the understandings of conservative respondents in the 2021 Follow-up Study, but more study will be needed before this possibility can be raised confidently.

Table 9: Follow-up “public” and “private” responses, by ideology (excerpt).²³³

Survey Statements	Y			
	Public		Private	
<i>Is the statement always true (0), sometimes true (1), or never true (2)?</i>	Cons. n = 37	Non-Cons. n = 66	Cons. n = 30	Non-Cons. n = 71
3. Some of the members of a Y company’s board of directors are elected by the company’s employees.	0.92	1.05	0.72*	1* n = 69

230. *Infra* App., tbl. 1.

231. *Compare infra* App., tbl. 2 with tbl. 3 (respecting Statement #29).

232. *See* Bainbridge, *supra* note 200.

233. *See infra* App., tbl. 3 (full results on which this excerpt is based).

7. If a Y company commits fraud related to investments in the company, the government can take action against it.	0.42	0.37	0.72*	0.34*
9. Y companies are required to publish their financial statements each year so that anyone who wants to see them can do so.	0.47*	0.28*	1.10	1.04
11. Y companies are required to provide internal documents if a journalist requests them.	1.19	1.2	1* n = 29	1.36*
20. A Y company is allowed to make campaign contributions to the campaign of a candidate for Congress or president.	0.64	0.8	0.90**	0.47**
26. A Y company is allowed to make business decisions that protect the environment, even if those decisions will reduce the profit it makes.	0.56	0.46	0.55*	0.33*
27. A Y company is allowed to make business decisions that protect its employees, even if those decisions will reduce the profit it makes.	0.5	0.49	0.55*	0.27*
28. A Y company is allowed to make business decisions based on ethical concerns, even if those decisions will reduce the profit it makes.	0.5	0.45	0.66**	0.3**

* $p < .05$

* $p < .01$

2. *What Do “Public Company” and “Private Company” Mean?:
Open-Ended Responses*

The limited response options discussed up to this point enable comparability between respondents and treatments, but they might fail to capture a more textured view of what “public company” means to respondents. As a further follow-up, in early July 2021, I asked 50 MTurk respondents to state in their own words what the difference between a public and private company is. All responses are reported verbatim in Table 4 of the Appendix.²³⁴ I stressed to respondents that they were not to research the question but rather to respond based on their existing knowledge or belief.

In Part I.A, I questioned, rather rhetorically, “what are the chances” that members of the public answer the public/private company question “with Section 12 of the Exchange Act in mind.”²³⁵ It turns out a decent number do. I reviewed the respondents’ free responses on a pass/fail basis,²³⁶ with a “pass” being a response that hit one of the three Section 12 triggers.²³⁷ Sixty-eight percent of respondents passed. However, this pass rate might mask a selection effect. Another 23 respondents began the survey but abandoned it without responding to the question. If it is assumed that they abandoned the survey because they did not have an answer to give, then the pass rate would drop to 47%. Many responses focused on the distinctions in share ownership and trading between public and private companies. For example:

- A public company has sold shares to the general public with whom it shares ownership of the company and splits the company’s profits. Private companies are owned by a single person/family who is able to keep all of its profits.
- A public company sells shares on a stock market, so anyone who buys those shares technically owns a piece of the

234. See *infra* App., tbl. 4.

235. See *supra* Part I.A.

236. The study marked respondents as passing or failing based on whether their understandings of what it means to be a “public company” included at least one of the Exchange Act triggers.

237. See 15 U.S.C.A. § 78l(a) (West); see also *supra* notes 24–26 and accompanying text.

company. A private company doesn't sell shares publicly, although it may sell shares privately.

- A private company is owned by an owner or owners. The company's shares do not trade in the stock market. A public company has shares being traded in public stock markets. The difference is the ownership.²³⁸

Others emphasized greater decisional freedom for the management of private companies. For example:

- A private company has more freedom to do things however they want. A public company has shareholders and they seem like they just try to make profits without taking risks.
- Public company would be a very large well established and usually successful company that has public stocks. They would have shareholders to answer to and be pressured to make lots of profits and care only about the bottom line. An example would be United Airlines. A private company is usually smaller and usually has less profits than a public company. They would be more flexible in their goals and don't need to answer to shareholders.²³⁹

And a small number shared the intuition that the "public" in "public company" is like the "public" in public park, public road, public school, or public record—relating to public governmental functions. For example:

- I would say that a public one is either government-owned or publicly-funded. A private company is owned by a non-government entity.²⁴⁰

Although the qualitative responses broadly align with the quantitative responses from the 2020 Original Study and the 2021 Follow-Up Study, none make the kinds of politically laden social-media statements I sample in Part I.B.²⁴¹ These qualitative results suggest that although respondents might understand public and private firms as

238. See *infra* App., tbl. 4.

239. See *id.*

240. See *infra* App., tbl. 4; see also *supra* note 64 and accompanying text.

241. See *supra* Part I.B.

exhibiting publicness, first thoughts about public/private status tend toward more workaday considerations. These considerations include who owns shares in a given company and how those shares are traded.

It also helps explain why respondents for the studies' three "public" treatments often had similar responses to their respondents assigned the "private" treatment.²⁴² It suggests that respondents had some understanding of "public" status as turning on technical features that do not matter much to the bigger concepts around power and purpose raised by the survey statements.

III. IMPLICATIONS FOR CORPORATE GOVERNANCE, POWER, AND PURPOSE

Part II provided evidence that respondents expect certain things from public companies.²⁴³ These expectations include respecting customers' and employees' speech rights and accepting that business leaders may make decisions that privilege employee, environmental, community, or ethical interests over profit maximization.²⁴⁴ Those expectations do not change all that much when it comes to private companies.²⁴⁵ These results flag that public understanding is a missing, but critical, consideration in debates over corporate governance, power, and purpose.

Part III considers the implications of Part II's results for two high-profile issues within those broader questions. The first is what obligations, if any, do public or private companies have to respect expressive and political freedoms? The second is whether the corporation is to be run solely for the profit of its shareholders, or whether it is to account for the interests of other stakeholders?

Earlier, I mentioned that one might define "public company" by reference to Section 12 of the Exchange Act, although doing so would gloss over a deeper point about corporate publicness.²⁴⁶ Part II's results suggest similar comparisons around the First Amendment, civil-rights, and employment-law issues raised by the survey statements might be

242. See generally *supra* Part II.A.

243. See *supra* tbl. 2 and accompanying text.

244. *Id.*

245. *Id.*

246. See *supra* Part I.A.

worthwhile.²⁴⁷ How does the black-letter law in those areas compare to the broad public obligations suggested by the results in Part II?

In sum, it is narrower. First, nongovernmental entities, with few exceptions, are not subject to the First Amendment.²⁴⁸ As for private-sector employers, the First Amendment does not itself apply, nor do the employment-discrimination protections found in Title VII of the Civil Rights Act of 1964 (the “Civil Rights Act”) cover political affiliations.²⁴⁹ Second, the public-accommodation protections found in Title II of the Civil Rights Act do not prohibit discrimination against customers on account of their politics,²⁵⁰ nor do they totally disturb the ability of businesses to decide with whom to deal.²⁵¹

But beyond these black-letter points, Part II’s results raise broader implications. For instance, just as “public company” can take on greater meaning than Section 12 of the Exchange Act would suggest, there is more to speech than the First Amendment.²⁵² Although the First Amendment “dominates” the discourse on expressive and conscientious freedoms, freedom of speech is a distinct social value affirmed and expanded through a myriad of federal, state, and local laws.²⁵³

247. See *supra* Part II.

248. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019) (“[W]hen a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor. The private entity may thus exercise editorial discretion over the speech and speakers in the forum.”).

249. See 42 U.S.C. § 2000e–2(a)(1).

250. 42 U.S.C. § 2000a(a); see generally Suja A. Thomas, *The Customer Caste: Lawful Discrimination by Public Business*, 109 CAL. L. REV. 141 (2021) (observing that many discriminatory practices against customers, including some based on protected statuses like race, remain lawful).

251. See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985) (expressing “high value” for a qualified right to refuse to deal).

252. See *supra* Part I.A for a discussion of Exchange Act meaning of “public company.” The survey design does pin freedom of speech to the First Amendment. See, e.g., *supra* Table 3 (referring to the “constitutional right to freedom of speech”) (emphasis added). By using the word “constitutional,” it is possible that the results were biased toward “sometimes true” because a “constitutional right” could have been viewed by respondents as an especially impressive entitlement. However, if respondents’ conceptions of freedom of speech assume it is constitutional in nature, then there likely would be no such bias.

253. See Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2300–05 (2021).

Meanwhile, although it is true that private businesses may generally decide with whom and how to deal, common carriers—like interstate-bus or telephone companies—must “serve all customers alike, without discrimination.”²⁵⁴ As for employees, three jurisdictions—California, the District of Columbia, and New York—prohibit political-affiliation discrimination in employment.²⁵⁵ More, a few states, like Connecticut, do incorporate First Amendment protections into their employment laws, subject to capacious exceptions.²⁵⁶

This *mélange* of statutory law, coupled with Part II’s findings, points to even private companies exhibiting some of the textured “publicness” that Hillary Sale attributes to public companies.²⁵⁷ Thus, regardless of a firm’s securities-law status, the brouhaha of recent years around corporate censorship or political discrimination requires looking past black-letter rules. Controversy has arguably been loudest in the case of social-media companies, which offer digital platforms for the public to create and share content and communicate with each other one-on-one, in groups, or en masse.²⁵⁸ In contemporary American society, those excluded from these platforms might subjectively believe that their First Amendment liberties cannot be effectively practiced.²⁵⁹ Those concerns, of course, do not constrain social-media firms’ decisions.

254. *Primrose v. W. Union Tel. Co.*, 154 U.S. 1, 14 (1894); *see also* 47 U.S.C. § 202(a) (prohibiting common carriers from “subject[ing] any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage”).

255. *See e.g.*, CAL. LAB. CODE § 1101; D.C. CODE § 2-1402.11; N.Y. LAB. L. § 201-d.

256. *E.g.*, CONN. GEN. STAT. ANN. § 31-51q (protecting an employee’s First Amendment exercises but excepting exercises that “substantially or materially interfere with the employee’s bona fide job performance or the working relationship between the employee and the employer . . .”).

257. *Cf. supra* Sale, note 41, at 148 and accompanying text.

258. *See* Emily A. Vogels et al., *Most Americans Think Social Media Sites Censor Political Viewpoints*, PEW RSCH. CTR. (Aug. 19, 2020), <https://www.pewresearch.org/internet/2020/08/19/most-americans-think-social-media-sites-censor-political-viewpoints> [<https://perma.cc/Q8BQ-9GES>].

259. *See* *Prager Univ. v. Google, LLC*, 951 F.3d 991, 999 (9th Cir. 2020) (“PragerU prophesizes living under the tyranny of big-tech, possessing the power to censor any speech it does not like Because the state action doctrine precludes constitutional scrutiny of YouTube’s content moderation . . . we affirm the district court’s dismissal of PragerU’s First Amendment claim.”); *see also* Complaint, *Trump v. Facebook, Inc.*,

In an interview, Parag Agrawal—Twitter’s last CEO before it was acquired by Elon Musk—rejected the idea that its platform is an open public forum:

Our role is not to be bound by the First Amendment, but our role is to serve a healthy public conversation and our moves are reflective of things that we believe lead to a healthier public conversation. The kinds of things that we do about this [are], focus less on thinking about free speech, but thinking about how the times have changed.²⁶⁰

Now in the private hands of Elon Musk, the company’s controlling shareholder, has extolled the virtues of free speech on the platform, although his management decisions banning journalists and critical accounts have led to questions about his commitment to such principles.²⁶¹ In any case, although social-media firms do not “lose [their] private character merely because the public is invited to use [their products] for designated purposes,”²⁶² a large contingent of citizens who impute a degree of publicness to them could nevertheless make for a potent political force.

Consider Part I’s example of the city park.²⁶³ If citizens understand that they have entitlements to the park—to bring their own food rather than to buy from a concessioner—they will turn to elected representatives

1:21-cv-22440 (S.D. Fla. July 7, 2021) (asserting that Facebook’s ban of Trump from its platform violated the First Amendment); Complaint, *Trump v. Twitter, Inc.*, 1:21-cv-22441 (S.D. Fla. July 7, 2021) (asserting that Twitter’s ban of Trump from its platform violated the First Amendment).

260. Jennifer Strong & Emma Cillekens, *EmTech Stage: Twitter’s CTO on Misinformation*, MASS. INST. TECH. REV. (Nov. 18, 2020), <https://www.technologyreview.com/2020/11/18/1012066/emtech-stage-twitters-cto-on-misinformation/> [<https://archive.li/JQ2cu>]. After Elon Musk offered to buy Twitter, he stated that he did so based on his belief in Twitter’s “potential to be the platform for free speech around the globe” *Twitter Inc.*, Amendment No. 2 to Schedule 13D/A, Ex. B (Apr. 13, 2022), https://www.sec.gov/Archives/edgar/data/1418091/000110465922045641/tm2212748d1_sc13da.htm [<https://archive.li/kJzc5>].

261. Michael M. Grynbaum, *In Suspending Journalists on Twitter, Musk Flexes His Media Muscle*, N.Y. TIMES (Dec. 16, 2022), <https://www.nytimes.com/2022/12/16/business/media/elon-musk-twitter-journalist-suspension.html> [<https://archive.li/exBxr>].

262. See *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972).

263. See *supra* Part I.B.

to secure that entitlement.²⁶⁴ This dynamic appears now in the context of social-media firms. For example, in 2021, Florida and Texas enacted legislation purporting to prohibit social-media platforms from censoring or deplatforming political candidates residing in those states.²⁶⁵

Similar bills have been introduced in other states.²⁶⁶ Although such laws are “so obviously unconstitutional, you wouldn’t even put [them] on an exam,”²⁶⁷ a panel of the Fifth Circuit has found otherwise.²⁶⁸ Justice Clarence Thomas has suggested that social-media companies might be regulated as common carriers, raising the prospect of corporate open-

264. An entrepreneurial politician might even seize the opportunity. *See generally* Schiller, *supra* note 15 (analyzing institutional and political constraints on political entrepreneurship by U.S. senators); *see also* KINGDON, *supra* note 5 (“Public opinion can have either positive or negative effects. It might thrust some items onto the governmental agenda because the vast number of people interested in the issue would make it popular for vote-seeking politicians.”).

265. FLA. STAT. § 106.072 (2021).

266. *See, e.g.*, H.B. 602, 2021 Leg. (La. 2021); H.B. 832, Gen. Assemb., Reg. Sess. (N.C. 2021); H.B. 20, 87th Sess. (Tex. 2021).

267. Gilad Edelman, *Florida’s New Social Media Law Will be Laughed Out of Court*, WIRED (May 24, 2021), <https://www.wired.com/story/florida-new-social-media-law-laughed-out-of-court> [<https://archive.li/IS09F>] (quoting Professor Michael Froomkin of the University of Miami School of Law). Indeed, soon after Governor Ron DeSantis signed this legislation into law, two technology trade associations sued, asserting First and Fourteenth Amendment and federal preemption claims. Complaint, *NetChoice, LLC v. Moody*, No. 4:21-cv-00220-RH-MAF (N.D. Fla. May 27, 2021). The Northern District of Florida preliminarily enjoined enforcement of the law, finding that it violated the First Amendment and was preempted by federal statute. Preliminary Injunction, *NetChoice, LLC v. Moody*, No. 4:21-cv-00220-RH-MAF (N.D. Fla. June 30, 2021); *see also* Preliminary Injunction, *NetChoice, LLC v. Paxton*, No. 1:21-CV-840-RP (W.D. Tex. Dec. 1, 2021) (preliminarily enjoining enforcement of H.B. 20, an analogous Texas statute), *vacated by*, *NetChoice, LLC v. Paxton*, 49 F.4th 439 (2022).

268. *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022) (holding the Texas social-media statute to be constitutional), *cert. granted*, 601 U.S. __ (Sept. 29, 2023); *but see* *NetChoice, LLC v. Moody*, 34 F.4th 1196 (5th Cir. 2022) (holding Florida’s social-media statute to be unconstitutional), *cert. granted*, 601 U.S. __ (Sept. 29, 2023).

access obligations that do not sound in the First Amendment.²⁶⁹ Scholars are pondering this and similar possibilities.²⁷⁰

Although Part II's results do not reveal significant differences between nonconservative and conservative respondents regarding corporate speech and political nondiscrimination, objections on this front do appear to be most prominent on the political right.²⁷¹ Right-of-center corporate critics thus might find affirmation in this Essay's results. But the results also support a cross-ideological understanding of corporate decision making as "always" accommodating employee, environmental, community, and ethical non-shareholder interests.²⁷² To the extent that corporate social responsibility is most associated with left-of-center views and policy preferences, this Essay's results offer something for the left of the ideological spectrum as well.²⁷³

269. *Biden v. Knight First Amend. Inst. at Colum. Univ.*, 141 S. Ct. 1220, 1223–24 (mem.) (2021) (Thomas, J., concurring):

Internet platforms of course have their own First Amendment interests, but regulations that might affect speech are valid if they would have been permissible at the time of the founding The long history in this country and in England of restricting exclusion rights of common carriers and places of public accommodation may save similar regulations today from triggering heightened scrutiny—especially where a restriction would not prohibit the company from speaking or force the company to endorse the speech.

But see Ashutosh Bhagwat, *Why Social Media Platforms Are Not Common Carriers*, 2 J. FREE SPEECH L. 127 (2022) (responding to Justice Thomas's concurrence).

270. *See, e.g.*, Evelyn Atkinson, *Telegraph Torts: The Lost Lineage of the Public Service Corporation*, 121 MICH. L. REV. 1365 (2023); Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377 (2021); Adam Candeub, *The Common Carrier Privacy Model*, 51 U.C. DAVIS L. REV. 805 (2018); Daniel Deacon, *Common Carrier Essentialism and the Emerging Common Law of Internet Regulation*, 67 ADMIN. L. REV. 133 (2015); Frank A. Pasquale, *Internet Nondiscrimination Principles Revisited* (Brook. L. Sch., Working Paper No. 655, Jan. 21, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3634625 [<https://archive.li/FP4at>]; The Federalist Society, *Is Common Carrier the Solution to Social-Media Censorship?*, YOUTUBE (Feb. 9, 2021), <https://www.youtube.com/watch?v=AaW282wxZ3s> [<https://archive.li/4zdmL>].

271. *See, e.g., supra* notes 66–74 & 77–82 and accompanying text.

272. *See supra* tbl. 3.

273. *See* Bainbridge, *supra* note 200.

Indeed, it has been suggested that lawyers and businesspeople learn corporate purpose through a shareholder-primacy lens, directly or indirectly, from corporate-finance and corporate-law faculties. In contrast, the naïve understanding is one of a more publicly oriented corporate purpose.²⁷⁴ This Essay does not resolve the shareholder-versus-stakeholder debate. But it does offer some explanation why stakeholder governance has enjoyed policy ascendance over the last decade, as exemplified by the passage of benefit-corporation laws²⁷⁵ and the rise of ESG.²⁷⁶

Although public understanding might help drive recent trends favorable to stakeholder governance, public policy is partly residual of election results and thus might not be durable.²⁷⁷ For example, in 2020, the U.S. Department of Labor (“DOL”) under the Trump administration adopted new rules that would curtail the ability of retirement-plan fiduciaries to consider nonpecuniary ESG factors²⁷⁸ when making

274. See DUFF McDONALD, *THE GOLDEN PASSPORT* 369 (2017) (citing studies that show “when students enter business school, they believe that the purpose of a corporation is to produce goods and services for the benefit of society” and that “[w]hen they graduate, they believe that it is to maximize shareholder value”); see also Pollman, *supra* note 16, at 1434 (observing that corporations in the early republic “were generally understood, or at least justified, in terms of serving public or quasi-public purposes” such as providing public infrastructure).

275. David A. Katz & Laura A. McIntosh, *The Corporate Form for Social Good*, HARV. L. SCH. FORUM CORP. GOVERNANCE (May 24, 2019), <https://corpgov.law.harvard.edu/2019/05/24/the-corporate-form-for-social-good> [<https://perma.cc/UEU8TRC7>] (discussing the rise of benefit corporations).

276. See Virginia Harper Ho, *Modernizing ESG Disclosure*, 2022 U. ILL. L. REV. 277, 289 (noting that although voluntary ESG disclosures are less common at smaller public companies, 90% of larger firms produce ESG reports).

277. But see Larry Fink’s 2022 Letter to CEOs: *The Power of Capitalism*, BLACKROCK (Jan. 17, 2022), <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter> [<https://archive.li/0WlnF>] (“Stakeholder capitalism is not about politics. It is not a social or ideological agenda. It is not ‘woke.’ It is capitalism, driven by mutually beneficial relationships between you and the employees, customers, suppliers, and communities your company relies on to prosper. This is the power of capitalism.”).

278. See Witold Henisz et al., *Five Ways that ESG Creates Value*, MCKINSEY Q. (Nov. 2019) (identifying research suggesting that ESG considerations can lead to revenue growth, cost reductions, fewer regulatory and legal interventions, increased productivity, and allocative investment optimization).

investment decisions.²⁷⁹ Now under the Biden administration, the DOL has reversed itself to affirmatively permit consideration of ESG factors by fiduciaries.²⁸⁰ Had the 2020 presidential election swung toward the incumbent, the prior rule would remain in force, with a shareholder-primacy effect, today.

Recent policy success of stakeholder governance is not totally attributable to election outcomes, however. For example, since Maryland adopted the first benefit-corporation law in 2010,²⁸¹ another 36 jurisdictions (including the District of Columbia) have adopted similar statutes.²⁸² They include states politically dominated by Democrats (e.g., California, Hawaii, Illinois)²⁸³ as well as those dominated by Republicans (e.g., Idaho, South Carolina, and Texas).²⁸⁴ In other words, although given policy manifestations of stakeholder governance might tend to receive support from the ideological left and opposition from the right,²⁸⁵ there is still a broad constituency for the idea that corporate purpose accommodates public, not just shareholder, interests.

After all, this is an age in which the shareholders of Exxon Mobil elected directors in a contested race who ran on a platform of moving beyond fossil fuels.²⁸⁶ Whether the shareholder or stakeholder schools

279. See U.S. DOL, Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72,846 (Nov. 13, 2020).

280. U.S. DOL, Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73,822 (Dec. 1, 2022).

281. 97 S.B. 690 (Md. 2010) (adopting the first benefit-corporation statute).

282. DAN BROWN ET AL., GRUNIN CTR. FOR L. & SOC. ENTREPRENEURSHIP, THE STATE OF SOCIAL ENTERPRISE AND THE LAW 2019-2020 7 (2020), https://socontlawtracker.org/wp-content/uploads/2021/02/ICBRSEL21.1-Grunin-Tepper-Report_Web.pdf [<https://perma.cc/9DLL-QY6R>].

283. CAL. CORP. CODE § 2500; 23 HAW. REV. STAT. § 420D; 805 ILL. COMP. STAT. 40.

284. IDAHO CODE ANN. § 30-2001; S.C. CODE ANN. § 33-38-110; TEX. BUS. ORGS. CODE § 21.951.

285. For example, Republican ranking members of the U.S. Senate's Committees on Health, Education, Labor and Pensions; Finance; and Banking, Housing, and Urban Affairs wrote a letter to the DOL urging that it reverse course on not enforcing the Trump administration's anti-ESG rules. Letter from U.S. Senators Richard Burr, Mike Crapo & Pat Toomey to Al Stewart, Acting Sec'y, U.S. DOL (Mar. 18, 2021), <https://www.banking.senate.gov/imo/media/doc/RM%20Letter%20to%20DOL%203.18.21%20FINAL.pdf> [<https://perma.cc/HD7P-HCT3>].

286. Kevin Crowley & Scott Deveau, *Exxon CEO Is Dealt Stinging Setback at Hands of New Activist*, BLOOMBERG (May 26, 2021), <https://www.bloomberg.com>

have the better case, the latter, perhaps buoyed by the public's understanding of corporate purpose, appears ascendant. That does not mean ESG is unchallenged, however. A number of states with conservative-leaning governments have adopted investment policies for their own funds pushing back against the use of ESG factors.²⁸⁷

Normative policy agendas backed by public understanding can lead to substantial social, economic, and policy outcomes. The last decade of stakeholder governance's maturation as an economic and policy force is a fine example.²⁸⁸ It could also portend future success for those motivated by what they perceive as political discrimination and censorship by corporate America. This Essay finds a broadly stakeholder-centric understanding among survey respondents. It also identifies an understanding of public, and even private companies, as having public obligations far greater than they do as a matter of law.

In this light, the first generation of state laws purporting to ban "censorship" by social-media firms might have fatal constitutional flaws, but they ought not be dismissed. They represent a political impulse that could mature into an effective policy agenda. After all, a decade ago the idea that Exxon Mobil shareholders would elect climate-activist directors in a proxy battle would have been risible.²⁸⁹ Indeed, Exxon management dismissed the possibility just a month before losing the vote.²⁹⁰ That new obligations and constraints sought by actors on the right could be imposed on firms—especially if those obligations are consistent with a public understanding of corporate publicness—is a real possibility. Parts I and II provide evidence that technical meanings of "public company" do not

/news/articles/2021-05-26/tiny-exxon-investor-notches-climate-win-with-two-board-seats [https://archive.li/WIEbY].

287. See Kishan & Moran, *supra* note 190 (showing a breakdown of states that use their heft as large pension-fund investors to support or oppose ESG).

288. Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 104 (2020) (using extensive interviews to demonstrate ESG's effects "on the ground").

289. Scott Deveau et al., *Exxon Mobil's Last-Ditch Attempt to Stave Off a Climate Coup*, BLOOMBERG (May 29, 2021), <https://www.bloomberg.com/news/articles/2021-05-29/exxon-mobil-s-last-ditch-attempt-to-stave-off-a-climate-coup> [https://archive.li/q8VDt].

290. *Id.*

always align with public understanding.²⁹¹ More, they show that public understanding should be actively engaged in debates around corporate governance, power, and purpose. Scholars and others who focus on these issues should be ready to teach, be in dialog with, and learn from the broader public.

This Essay is not the final word on that front. It is necessarily limited in temporal and topical scope, whereas how the public understands the role and purpose of business in American society is a complex of times, places, and subject matters. How individuals understand these issues will be shaped by their experiences, education, backgrounds, social and economic status, and so on. This Essay has just scratched the surface of corporate public understanding; more work is needed. As between corporate academics and practitioners on one hand and lay people and policymakers on the other, the former are the ones who have the expertise needed to bridge gaps in understanding. Whatever they would have the public understand about public companies, or about companies generally, the onus is theirs to patiently and persuasively teach it.

CONCLUSION

Public understanding of concepts like “public company” or “private company” can easily diverge from their black-letter-law meanings. This Essay evidences that respondents, across multiple studies, understand all firms to have greater public obligations—such as obligations to respect employee and customer speech rights—than they do as a matter of positive law. It also evidences that respondents’ understandings align with stakeholder governance. These results directly bear on a broad range of issues, including the regulation of “BigTech,” competition policy, ESG and corporate social responsibility, campaign finance, and more. The results also suggest that understandings of what it means to be a “public company” that today might be labeled as naïve misapprehensions could become black-letter law in the future. Public understanding can help catalyze such transitions in corporate governance, power, and purpose, and thus its place in these debates must be constantly considered and reckoned with.

291. See *supra* Parts I & II.

APPENDIX

Table 1. Statement responses for control and treatments, by gender.

Survey Statements	Y			
	Public		Private	
	Female n = 47	Male n = 58	Female n = 47	Male n = 60
1. Y companies are governed by a board of directors.	0.57	0.55	0.96	0.8
2. Some of the members of a Y company's board of directors are appointed by the government.	1.45	1.5	1.68*	1.4*
3. Some of the members of a Y company's board of directors are elected by the company's employees.	0.87*	1.16*	0.98	1
4. Y companies are subject to regulation by government agencies.	0.38	0.41	0.64	0.52
5. Y companies are subject to inspection by government agencies.	0.40	0.34	0.51	0.68
6. Y companies are required to have an independent auditor audit their books each year.	0.68	0.66	0.74	1.03
7. If a Y company commits fraud related to investments in the company, the government can take action against it.	0.21	0.26	0.34	0.47
8. If a Y company commits fraud related to investments in the company, individual investors can sue the company.	0.43	0.40	0.47	0.47
9. Y companies are required to publish their financial statements each year so that anyone who wants to see them can do so.	0.36	0.31	1.11	1.13

10. When a Y company seeks more money from investors, it must publish a disclosure document about the investment and anyone who wants to see it may see the document.	0.51	0.55	0.79	0.85
11. Y companies are required to provide internal documents if a journalist requests them.	1*	1.29*	1.48 n = 46	1.52
12. Y companies are required to provide internal documents if an investor requests them.	0.62	0.81	0.74	1.03
13. Y companies are required to provide internal documents if the government requests them.	0.38*	0.64*	0.55*	0.8*
14. If someone sues a Y company and requests copies of internal company documents related to the lawsuit, the company must provide the documents to that person.	0.53	0.72	0.62	0.8
15. The shares of a Y company are traded on an exchange like the New York Stock Exchange or Nasdaq.	0.34	0.26	1.23	1.23
16. Before a Y company can sell shares, the government first examines the company to make sure its stock is a safe investment for investors.	1.11	0.98	1.23	1.03
17. Before a Y company can sell shares, the government first examines the company to make sure it has a profitable business.	1.21	1.22	1.28	1.23
18. A Y company is required to respect its employees' constitutional right to freedom of speech.	0.40*	0.69*	0.47**	0.92**
19. A Y company is required to respect its customers' constitutional right to freedom of speech.	0.34**	0.72**	0.55	0.8

20. A Y company is allowed to make campaign contributions to the campaign of a candidate for Congress or president.	0.79	0.55	0.60	0.52
21. A Y company must provide its products or services to any customer who has the ability to pay.	0.66	0.81	0.79	0.83
22. A Y company must refrain from discriminating against its customers on account of their race, gender, religion, national origin, or disability.	0.17	0.16	0.32	0.43
23. A Y company must refrain from discriminating against its employees on account of their race, gender, religion, national origin, or disability.	0.21	0.31	0.24 n = 46	0.32
24. A Y company must refrain from discriminating against its customers on account of their political beliefs.	0.40	0.52	0.57 n = 46	0.8
25. A Y company must refrain from discriminating against its employees on account of their political beliefs.	0.47	0.34	0.49 0.7	0.7
26. A Y company is allowed to make business decisions that protect the environment, even if those decisions will reduce the profit it makes.	0.26*	0.55*	0.36	0.38
27. A Y company is allowed to make business decisions that protect its employees, even if those decisions will reduce the profit it makes.	0.38	0.53	0.28	0.48

28. A Y company is allowed to make business decisions based on ethical concerns, even if those decisions will reduce the profit it makes.	0.32	0.33	0.28	0.29
29. A Y company is allowed to make business decisions that protect its community, even if those decisions will reduce the profit it makes.	0.51	0.43	0.26	0.37
30. Y companies are owned in whole or in part by the government.	1.23	1.33	1.72	1.47

* $p < .05$

** $p < .01$

Table 2: Statement responses for “public” and “private,” by ideology.²⁹²

Survey Statements	Y			
	Public		Private	
	Cons. n = 27	Non-Cons. n = 80	Cons. n = 25	Non-Cons. n = 84
<i>Is the statement always true (0), sometimes true (1), or never true (2)?</i>				
1. Y companies are governed by a board of directors.	0.46	0.59	0.92	0.86
2. Some of the members of a Y company’s board of directors are appointed by the government.	1.38	1.51	1.5	1.53
3. Some of the members of a Y company’s board of directors are elected by the company’s employees.	1.23	0.96	1	0.99

292. Respondents were coded as “conservative” if they self-selected five or above on a seven-point Likert scale of political ideology. “Cons.” columns refer to responses for respondents who reported being “conservative” whereas “Non-Cons.” columns refer to all other responses.

4. Y companies are subject to regulation by government agencies.	0.5	0.37	0.29*	0.65*
5. Y companies are subject to inspection by government agencies.	0.38	0.37	0.58	0.61
6. Y companies are required to have an independent auditor audit their books each year.	0.77	0.63	0.92	0.90
7. If a Y company commits fraud related to investments in the company, the government can take action against it.	0.23	0.24	0.58	0.36
8. If a Y company commits fraud related to investments in the company, individual investors can sue the company.	0.46	0.39	0.38	0.49
9. Y companies are required to publish their financial statements each year so that anyone who wants to see them can do so.	0.30	0.35	1.25	1.08
10. When a Y company seeks more money from investors, it must publish a disclosure document about the investment and anyone who wants to see it may see the document.	0.54	0.53	0.71	0.86
11. Y companies are required to provide internal documents if a journalist requests them.	1.15	1.16	1.74 n = 24	1.43
12. Y companies are required to provide internal documents if an investor requests them.	0.85	0.68	0.96	0.89
13. Y companies are required to provide internal documents if the government requests them.	0.80*	0.44*	0.79	0.66

14. If someone sues a Y company and requests copies of internal company documents related to the lawsuit, the company must provide the documents to that person.	0.62	0.65	0.83	0.69
15. The shares of a Y company are traded on an exchange like the New York Stock Exchange or Nasdaq.	0.31	0.29	1.33	1.20
16. Before a Y company can sell shares, the government first examines the company to make sure its stock is a safe investment for investors.	1.31	0.95	1.04	1.14
17. Before a Y company can sell shares, the government first examines the company to make sure it has a profitable business.	1.19	1.23	1.21	1.27
18. A Y company is required to respect its employees' constitutional right to freedom of speech.	0.46	0.59	0.83	0.69
19. A Y company is required to respect its customers' constitutional right to freedom of speech.	0.46	0.58	0.67	0.70
20. A Y company is allowed to make campaign contributions to the campaign of a candidate for Congress or president.	0.62	0.67	0.58	0.54
21. A Y company must provide its products or services to any customer who has the ability to pay.	1*	0.66*	0.83	0.81
22. A Y company must refrain from discriminating against its customers on account of their race, gender, religion, national origin, or disability.	0.12	0.18	0.35	0.39

23. A Y company must refrain from discriminating against its employees on account of their race, gender, religion, national origin, or disability.	0.31	0.25	0.33	0.27
24. A Y company must refrain from discriminating against its customers on account of their political beliefs.	0.54	0.44	0.83	0.66
25. A Y company must refrain from discriminating against its employees on account of their political beliefs.	0.58	0.34	0.05	0.64
26. A Y company is allowed to make business decisions that protect the environment, even if those decisions will reduce the profit it makes.	0.38	0.43	0.42	0.36
27. A Y company is allowed to make business decisions that protect its employees, even if those decisions will reduce the profit it makes.	0.38	0.49	0.33	0.41
28. A Y company is allowed to make business decisions based on ethical concerns, even if those decisions will reduce the profit it makes.	0.31	0.38	0.38	0.26
29. A Y company is allowed to make business decisions that protect its community, even if those decisions will reduce the profit it makes.	0.65	0.41	0.29	0.33
30. Y companies are owned in whole or in part by the government.	1.23	1.30	1.58	1.58

* $p < .05$

Table 3: June 2021 Follow-up Study to Table 2.²⁹³

Survey Statements	Y			
	Public		Private	
	Cons. n = 37	Non-Cons. n = 66	Cons. n = 30	Non-Cons. n = 71
<i>Is the statement always true (0), sometimes true (1), or never true (2)?</i>				
1. Y companies are governed by a board of directors.	0.39	0.54	0.93 n = 28	0.76 n = 69
2. Some of the members of a Y company's board of directors are appointed by the government.	1.31	1.43	1.17	1.45 n = 70
3. Some of the members of a Y company's board of directors are elected by the company's employees.	0.92	1.05	0.72*	1* n = 69
4. Y companies are subject to regulation by government agencies.	0.28	0.37	0.79	0.46 n = 70
5. Y companies are subject to inspection by government agencies.	0.61	0.42	0.75 n = 29	0.5
6. Y companies are required to have an independent auditor audit their books each year.	0.56	0.63	1	0.87
7. If a Y company commits fraud related to investments in the company, the government can take action against it.	0.42	0.37	0.72*	0.34*
8. If a Y company commits fraud related to investments in the company, individual investors can sue the company.	0.33	0.48	0.68	0.54

293. See *id.*

9. Y companies are required to publish their financial statements each year so that anyone who wants to see them can do so.	0.47*	0.28*	1.10	1.04
10. When a Y company seeks more money from investors, it must publish a disclosure document about the investment and anyone who wants to see it may see the document.	0.53	0.48	0.83	0.71
11. Y companies are required to provide internal documents if a journalist requests them.	1.19	1.2	1* n = 29	1.36*
12. Y companies are required to provide internal documents if an investor requests them.	0.67	0.69	0.72	0.94
13. Y companies are required to provide internal documents if the government requests them.	0.36	0.43	0.66	0.49
14. If someone sues a Y company and requests copies of internal company documents related to the lawsuit, the company must provide the documents to that person.	0.58	0.68	0.90	0.76
15. The shares of a Y company are traded on an exchange like the New York Stock Exchange or Nasdaq.	0.5	0.34	1.10	1.17 n = 70
16. Before a Y company can sell shares, the government first examines the company to make sure its stock is a safe investment for investors.	0.92	1.12	1.07	0.87
17. Before a Y company can sell shares, the government first examines the company to make sure it has a profitable business.	1.11	1.22	1.14	1.13

18. A Y company is required to respect its employees' constitutional right to freedom of speech.	0.67	0.80	0.79 n = 29	0.81 n = 70
19. A Y company is required to respect its customers' constitutional right to freedom of speech.	0.81	0.58	0.69	0.84
20. A Y company is allowed to make campaign contributions to the campaign of a candidate for Congress or president.	0.64	0.8	0.90**	0.47**
21. A Y company must provide its products or services to any customer who has the ability to pay.	0.78	0.88	1 n = 29	1.13
22. A Y company must refrain from discriminating against its customers on account of their race, gender, religion, national origin, or disability.	0.39	0.43	0.59	0.43
23. A Y company must refrain from discriminating against its employees on account of their race, gender, religion, national origin, or disability.	0.42	0.31	0.66	0.44
24. A Y company must refrain from discriminating against its customers on account of their political beliefs.	0.64	0.54	0.75 n = 29	0.71
25. A Y company must refrain from discriminating against its employees on account of their political beliefs.	0.58	0.48	0.79	0.61
26. A Y company is allowed to make business decisions that protect the environment, even if those decisions will reduce the profit it makes.	0.56	0.46	0.55*	0.33*

27. A Y company is allowed to make business decisions that protect its employees, even if those decisions will reduce the profit it makes.	0.5	0.49	0.55*	0.27*
28. A Y company is allowed to make business decisions based on ethical concerns, even if those decisions will reduce the profit it makes.	0.5	0.45	0.66**	0.3**
29. A Y company is allowed to make business decisions that protect its community, even if those decisions will reduce the profit it makes.	0.56	0.54	0.62	0.36 n = 70
30. Y companies are owned in whole or in part by the government.	1.25	1.34	1.24	1.43

* $p < .05$ ** $p < .01$

Table 4: July 2021 Qualitative Study (verbatim responses).

Prompt	
<p><i>If someone were to ask you “what is the difference between a public and a private company,” what would you say?</i></p> <p><i>Why would you answer that way? What would you base your answer on?</i></p> <p><i>Please explain your answer fully, but DO NOT do outside research. Answer only based on what you already know or believe to be true.</i></p>	Pass/ Fail ²⁹⁴
1. The difference is who owns the company. A public company deals with schools and government while private is about shareholders and such.	Fail
2. A public company has sold shares to the general public with whom it shares ownership of the company and splits the company's	Pass

294. See *supra* Part II.B.2. (describing the pass/fail standard applied).

profits. Private companies are owned by a single person/family who is able to keep all of its profits.	
3. A public company has stock traded on stock exchanges, a private company does not. This is the easiest way to explain it. I base it on my personal knowledge, assuming it's correct.	Pass
4. I would say that a public company has stocks that are publicly traded while a private company does not publicly trade stocks that are instead owned by members of the company. I would answer that way because that's how I've heard those terms used. I would base my answer on what I've heard from other people.	Pass
5. I think a public company is run by the public and might be a non-profit or a volunteer center or shelter or something. A private company might be owned and ran by one person for profit and provide a good or service of some sort that usually costs money.	Fail
6. I public company has shares denoting ownership that can be bought by anybody. A private company does not have shares that are traded by the public and ownership is held by private individuals or groups just like ownership of any other asset like a house. I'm basing my answers on my own understanding from reading newspapers.	Pass
7. As far as I know a public company is one that is listed on the stock market where anyone can buy in. A private company is privately owned and not listed. I answer that way because I think it's correct. I base this on what I've heard on the internet.	Pass
8. I would say a public company is on the stock market and has outstanding shares owned by the public while a private company is not listed on the stock exchange.	Pass
9. I'd say a public company is one that is listed on the stock exchange and has regular people investing in it. I'd say this because that's what I learned in business school.	Pass
10. A public company sells shares on a stock market, so anyone who buys those shares technically owns a piece of the company. A private company doesn't sell shares publicly, although it may sell shares privately. I'd answer like that because I'm pretty sure that's the right answer. I based my answer on my limited knowledge of business and the stock market.	Pass
11. A private company is owned by an owner or owners. The company's shares do not trade in the stock market. A public company has shares being traded in public stock markets. The	Pass

difference is the ownership. This answer is based on my knowledge and should explain the difference in an understandable way.	
12. A public company is open for trading stock. All background information is known to the public. A private company is not available for trading stock and doesn't provide details.	Pass
13. I would say that a public company is a company that works with the general public whereas a private company probably works with VIPs or other companies instead of general public. I'm answering this way due to the fact that usually public spaces are for everybody whereas private areas are only for a select few.	Fail
14. That stock is available to be purchased by the public. It's just a guess as I have heard of companies going public and at that point their stock is on the market along with earnings and such are available to be seen. Whereas having tried looking up a private company to see how they are performing I never had luck doing so.	Pass
15. public company have a minimum work and high income then private company have large amount of work and low pay	Fail
16. If someone asked me what the difference between a public and private company is, I would say that a public company has many owners, those being shareholders, while a private company usually has only a few owner, those being restricted shareholders. I would answer this way because that is my general understanding of how businesses and corporations work.	Pass
17. A public company refers to a company that is listed on a recognized stock exchange and its securities are traded publicly and work for the development of the country. A private company is one that is not listed on a stock exchange and its securities are held privately by its members and they help the country for self-dependent.	Pass
18. The performance between those two companies are very different. Their work of style and salary so much differ.	Fail
19. I think a private company is privately owned, whereas a public company is owned by shareholders or government agencies of some sort.	Fail
20. A public company is a company that is traded on the stock market. A private company is a company that is privately owned and is not owned by shareholders. I would answer this way because it's based on the knowledge I know to be the truth.	Pass

21. A private company has more freedom to do things however they want. A public company has shareholders and they seem like they just try to make profits without taking risks.	Fail
22. A public company has shares which are traded on the open market, and the market determines the value of the shares. Anyone is eligible to buy shares of these companies. There are laws concerning reporting financial stats, earnings, and the health of the company to the public. A private company is normally closely held, and does not have to report earnings to the public. Sales of these companies or a portion of them are normally private transactions between the two parties.	Pass
23. private company is not permanent but the public company gives you a permanent job.	Fail
24. I would assume a public company is owned by shareholders that can be anyone anywhere And a private company is one owned by a person or family only. I base this in instinct and no actual knowledge on my part.	Pass
25. The difference between a public and private company has to do with shareholders. A public company, anyone with money can invest in and buy a share/stock into the company. A private company does not allow the public ownership of its stock. I answered this way because I've been following the NASDAQ, futures etc. more now then I ever have so this was the first definition that came to mind. The market definition is what I based this definition on.	Pass
26. I public company answers to public shareholders and makes their income statements public because of that. Private companies can also have shareholders, but it's a smaller group with income statements that are more private.	Pass
27. A public company is a company who has stocks available to the public and anyone can become shareholders. A private company only makes shares available to a private group of individuals. This is just what I think from what I think I have heard over the years.	Pass
28. A public company deals with consumers but doesnt make profit, whereas a private company makes profit. I would answer this way because that is what I know from experience and since I have worked for both a public and private company. I would bae my answer on what I have learned about private and public companies so far.	Fail

29. A private company does not have to report earnings to shareholders. A public company has a board of directors.	Pass
30. A public company is traded on the stock exchange. A private company does not.	Pass
31. A public company is transparent about their profits. A private company keeps their profits a secret	Pass
32. I'd say a private company does not have any public shares one can buy. Their funds are private, and they are not seeking investors from the stock market. A public company, in contrast, has gone public with its shares and investors, so you could go on the stock market and buy some shares. I'd answer this way because it's roughly an explanation I can come up with based on tidbits of information I've seen in the past. It's a very simple explanation, so I think it's a good introductory explanation to someone. My answer would be based off this information I've seen in the past. An amalgamation of several pieces of information I've seen from various sources in the past.	Pass
33. There is more benefit in public company. Part of the salary will come up within the period after retirement from work. This is a great benefit.	Fail
34. A private company is one that has no shares or has shares that are not traded in public markets. I answer this way because I believe that this is the definition and that I am correct. I can't reference it off the top of my head.	Pass
35. A public company is traded on the stock market. A private company is owned by individuals and don't have to follow the same rules as a public company. This is based on general knowledge.	Pass
36. A private company is owned by the founders/owners of the company. I think a public company has public shareholders.	Pass
37. public companies are companies that sell shares and stuff of it. private companies are owned by a team, managers, etc. this is how i was taught in school and that is what i base my answer on.	Pass
38. Private company owned by individuals or group of peoples. Public company will be maintained by the government. Private sectors rules will be strict. Public sectors rules will be somewhat liberal. Private company had facing difficult to buy and sell shares. Public sectors it will be easier.	Fail

39. A public company is a company you can buy stocks in. A private company you cannot buy stocks and they do everything on their own.	Pass
40. I would say that a public one is either government-owned or publicly-funded. A private company is owned by a non-government entity. I would base these answers on my previous understanding of just how companies are run. I would answer that way because I have learned in school what company types are.	Fail
41. Public company would be a very large well established and usually successful company that has public stocks. They would have shareholders to answer to and be pressured to make lots of profits and care only about the bottom line. An example would be United Airlines. A private company is usually smaller and usually has less profits than a public company. They would be more flexible in their goals and don't need to answer to shareholders. I answer this way because this is what I've learned before.	Pass
42. For me, a public company is one whose shares, ownership, profit and liabilities are opened/held to/by the general public, while a private company is mainly owned by an individual or an exclusive set of individuals. The individual(s) who own a private company solely bears its liabilities and profit. I answered this way because I feel this is the simplest way I could define the difference. My answer is based on my basic understanding of the two!	Pass
43. I basically use government venture as a public company and Individual business as a private company. Sometimes I also use the structure of the company like public or private limited liability.	Fail
44. private is a company privately owned by a person/persons, public is government owned (some reason i think this is backwards) i answered like this because this is what i believe it is to be	Fail
45. A public company is owned by many people and institution. Normally they have a stock that trades on the market. A private company is own by a few select people and are normally not traded on the stock market.	Pass
46. Public sectors are works for public service and the private sector works for the individual benefits that is for their own profits and business. I answered this way, because they ask only about the difference. So only I answered like that. This answer based on my knowledge gained by my institutions.	Fail

<p>47. I would say that a public company is a company that is traded on the NY stock exchange and doesn't have an owner but rather CEOs and C-suite employees. A private company is owned by a person or persons, etc. and is not publicly traded. My answer is based on my own knowledge of what different types of companies exist in the US and my own experience from reading the news and working in different companies.</p>	Pass
<p>48. A public company has issued stock and is owned by the stockholders while a private company has no stock and is owned by either an individual or a small group of people.</p>	Fail
<p>49. I would say the difference is that a public company is listed on a stock exchange, or who offers a to sell shares of their company to the public. I'd answer this way because that's what I'm pretty sure the difference is. I'd base that on my previous experience with ETFs, Cryptocurrency, and investing - for instance, many people hear the acronym IPO, and most know that stands for Initial Public Offering - just by thinking about this term, you can see Public is in the title - and so if the term for a company starting to offer shares is an IPO, that must mean selling shares makes your company a public company.</p>	Pass
<p>50. The primary advantage of a publicly- traded company is that it can tap into the selling more shares. The primary advantage of a privately traded company is need to answer to any stockholders and there's no need for disclosures as well traded companies are big companies.</p>	Pass