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Chancery's Greatest Decision: Historical Insights on Civil Rights and the Future of Shareholder Activism

Omari Scott Simmons

Wake Forest University School of Law, simmonos@wfu.edu

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Chancery's Greatest Decision: Historical Insights on Civil Rights and the Future of Shareholder Activism

Omari Scott Simmons*

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* Howard L. Oleck, Professor of Business Law & Director, Business Law Program, Wake Forest University School of Law; LL.M., University of Cambridge; J.D., University of Pennsylvania; B.A., Wake Forest University. I wish to thank all student, staff, and faculty participants in the 2018–2019 Lara D. Gass Annual Symposium sponsored by the Washington and Lee Law Review. I wish to give a special thanks to Marsha Ambroise, Jasmine Burgess, Sally Irvin, Mary Susan Lucas, Lanie Summerlin, and Samantha Tracy for their valuable research assistance. Finally, I would like to express my gratitude to the late Louis L. Redding and the late Honorable Collins Seitz for their service to humanity.

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I. Introduction

Shareholder activism—using an equity stake in a corporation to influence management¹—has become a popular tool to effectuate social change in the twenty-first century. Increasingly, activists are looking beyond financial performance to demand better corporate performance in such areas as economic inequality, civil rights, human rights, discrimination, and diversity.² These efforts take many forms: publicity campaigns, litigation, proxy battles, shareholder resolutions, and negotiations with corporate management.³ However, a consensus on scope is lacking. Should

1. See James Chen, *Shareholder Activist*, INVESTOPEDIA, <https://www.investopedia.com/terms/s/shareholderactivist.asp> (last updated June 25, 2019) (last visited Sept. 23, 2019) (describing ways in which shareholders influence corporate behavior by exercising rights as partial owners) (on file with the Washington and Lee Law Review).

2. See *id.* (observing some shareholder activists call for social change by “requiring divestment from politically sensitive parts of the world . . . [,] greater support of workers’ rights[,] . . . [and] more accountability for environmental degradation”).

3. See, e.g., Courtenay Brown, *Wall Street Plays Nice with Shareholder Activists*, AXIOS (June 21, 2019), <https://www.axios.com/wall-street-activist-shareholders-pressure-b61aaf76-9442-40fc-a7df-c49132ce3b35.html> (last visited Sept. 23, 2019) (explaining the various public and private ways shareholder activists push for change within companies) (on file with the Washington and Lee Law Review).

corporations change their own operations to reflect a specific agenda or use their power to influence society on a much broader scale? Distinctions between private and public become blurred in light of the ubiquitous and inevitable influence corporations wield over third parties. Theoretical absolutes on the individualist-communitarian spectrum may underestimate the complex co-dependent and co-responsible interrelationship between corporations and modern society. Critics may fairly question why corporations, arguably society's most potent institutions, should sit idle on problems like civil rights.

In 1948, as part of the "Proxies Campaign," James Peck and Bayard Rustin each purchased a single share of Greyhound Corporation and proposed, albeit unsuccessfully, that Greyhound desegregate its bus lines.⁴ Rustin organized both the 1947 "Journey of Reconciliation" and the subsequent "Freedom Rides" to integrate interstate bus travel in the South; Peck participated in both.⁵ From 1948 to 1955, Peck and others attended the Greyhound Company's annual stockholder meetings to protest and to argue for desegregated busing.⁶ The shareholder activism of the "Proxies Campaign" was just one lever in a massive challenge to

4. See Sarah Haan, *Civil Rights and Shareholder Activism: SEC v. Medical Committee for Human Rights*, 76 WASH. & LEE L. REV. 1167, 1214 (2019); Richard Marens, *Inventing Corporate Governance: The Mid-Century Emergence of Shareholder Activism*, 8 J. BUS. & MGMT. 365, 371–72, 382 (2002) (chronicling and assessing shareholder activism from 1933 to 1953). For background on Bayard Rustin, see Eric Pace, *Bayard Rustin is Dead at 75; Pacifist and a Rights Activist*, N.Y. TIMES, Aug. 25, 1987, at A1 (obituary). For background on James Peck, see Eric Pace, *James Peck, 78, Union Organizer Who Promoted Civil Rights Causes*, N.Y. TIMES, July 13, 1993, at B7 (Peck obituary).

5. See DEREK CHARLES CATSAM, FREEDOM'S MAIN LINE: THE JOURNEY OF RECONCILIATION AND THE FREEDOM RIDES 13–46 (2009) (recounting the "Journey of Reconciliation," a four-state bus tour in which activists challenged discrimination in busing and other forms of public transportation); see also Interview with James Peck, *Eyes on the Prize: America's Civil Rights Years (1954–1965)*, WASH. U. FILM & MEDIA ARCHIVE (Oct. 26, 1979), <http://digital.wustl.edu/cgi/t/text/text-idx?c=eop;cc=eop;rgn=main;view=text;idno=pec0015.0499.082> (last visited Sept. 23, 2019) (discussing the origin of the Freedom Rides) (on file with the Washington and Lee Law Review).

6. See Marens, *supra* note 4, at 372, 382 (describing how James Peck sued Greyhound "to force it to include his resolution [on seating desegregation] in the company's proxy statement" and despite losing this lawsuit, "achieved his real goal of publicizing the issue of segregation").

Jim Crow segregation.⁷ Peck, however, is best known for more direct forms of nonviolent resistance and the price he paid in over sixty arrests and brutal beatings at the hands of segregationist thugs.⁸ In a sense, Peck's long legacy of activism reflects the virtues of mixed-methods in addressing meta-problems of racial segregation. He debated NAACP Director Roy Wilkins, arguing that direct action was just as critical as legal procedures in winning civil rights.⁹

Direct resistance, as exemplified in the Greensboro sit-in, and strategies like the "Proxies Campaign" coincided with civil rights litigation that would change the course of U.S. history and democracy.¹⁰ The 1954 decision in *Brown v. Board of Education*¹¹ declared the segregation of public schools unconstitutional,

7. See generally JOHN LEWIS & MICHAEL D'ORSO, WALKING IN THE WIND: A MEMOIR OF THE MOVEMENT (1998) (narrating pivotal events in the civil rights movement); CATSAM, *supra* note 5.

8. See Pace, *supra* note 4 (Peck obituary).

9. See YVONNE RYAN & ROY WILKINS, THE QUIET REVOLUTIONARY AND THE NAACP 58 (2014). Based on several letters between Wilkins and Peck, Ryan notes,

Peck argued that the court case [ruling state bus segregation was unconstitutional] "certainly was not the major [factor] in the Montgomery situation. Without the peoples' protest action, the buses would still be segregated, despite the court case—just as interstate buses in the South remain segregated despite the Supreme Court." Wilkins rejected Peck's argument: "Montgomery had a happy combination of elements that would make a boycott successful, and such a combination does not exist everywhere." Furthermore, Wilkins defended the Association's reliance on legal action as one of its primary means of agitation.

Id. Peck continued to pressure Wilkins to "take the initiative in pursuing boycotts and, more importantly, move to expand the sphere of NAACP activities outside of litigations and lobbying and embracing the nonviolent protest." *Id.* at 77. However, "Wilkins simply reiterated his belief that the success blacks had experienced in Montgomery was the result of the lawsuit, not the mass action, and argued that the threat of white reprisals . . . made the advocacy of actions such as boycotts wantonly dangerous." *Id.*

10. See ALDON MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE 13–16 (1984) (analyzing the NAACP's tactics, structure, and role in the civil rights movement); Aldon Morris, *Black Southern Student Sit-in Movement: An Analysis of Internal Organization*, 46 AM. SOC. REV. 744, 751 (1981) (analyzing Greensboro's role in catalyzing the sit-in movement across the southern United States).

11. 347 U.S. 483 (1954).

inspiring, in part, the civil rights movement demonstrations and marches of the 1950s and 1960s.¹² *Brown* was not an isolated event. It was the product of a “long range, carefully orchestrated legal strategy developed in the 1930s by lawyers associated with the NAACP.”¹³ Generally, the NAACP’s attack on segregation was two pronged: legal action and persuasion.¹⁴ Charles Hamilton Houston and Nathan Margold were the architects of the legal strategy to dismantle Jim Crow segregation in all aspects of American life.¹⁵ Litigation by the NAACP Legal Defense Fund (LDF) brought court victories but also served as a method of protest independent of court decisions.¹⁶

From a historical perspective, shareholder activism is best deployed as one tool among many to advance a modern civil rights agenda. The shareholder landscape and level of engagement have evolved considerably since the 1950s. The biggest transformation is the decline of individual or retail investors and the rise of institutional shareholders.¹⁷ Individual investors held

12. See Leland Ware, *Deliberate Speed: Implementing Brown’s Ambiguous Mandate*, DEL. LAW., Spring 2004, at 26, 26 (describing the role *Brown* played in inspiring future protests).

13. *Id.*

14. See *What Is the Mission of the NAACP?*, NAACP LEGAL DEF. & EDUC. FUND, INC., <https://www.naacpldf.org/about-us/> (last visited Sept. 23, 2019)

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is America’s premier legal organization fighting for racial justice. Through litigation, advocacy and public education, LDF seeks structural changes to expand democracy, eliminate disparities, and achieve racial justice in a society that fulfills the promise of equality for all Americans. LDF also defends the gains and protections won over the past 75 years of civil rights struggle and works to improve the quality and diversity of judicial and executive appointments.

(on file with the Washington and Lee Law Review); see also *Nation’s Premier Civil Rights Organization*, NAACP, <https://www.naacp.org/nations-premier-civil-rights-organization/> (last visited Sept. 23, 2019) (outlining the NAACP’s history) (on file with the Washington and Lee Law Review).

15. See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 451 (2004) (illustrating Margold’s strategy of attacking segregation “as practiced” rather than as a purely constitutional concept).

16. See MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 3–7 (2004) (describing victories and setbacks in disenfranchisement litigation).

17. See generally LISA M. FAIRFAX, *SHAREHOLDER DEMOCRACY: A PRIMER ON*

approximately ninety percent of the United States equity market in 1950.¹⁸ In 2009, they held thirty-six percent and the percentage continues to fall.¹⁹ The individual investor ownership level that coincided with Peck's efforts to influence Greyhound no longer exists.²⁰ Instead, institutional shareholders (e.g., mutual funds, pension funds, and hedge funds) dominate equity markets.²¹ For example, institutional investors held only six percent of the U.S. equity market in 1950²² and held thirty-seven percent by 1990.²³ Today, it is estimated that institutional investors hold over eighty percent of U.S. equity ownership.²⁴ This change helps to explain the transformation from the general passivity of the diffuse, rationally apathetic individual shareholders of the 1950s to the present-day activism of institutional investors who can surmount collective action challenges.²⁵ If willing, institutional investors can

SHAREHOLDER ACTIVISM AND PARTICIPATION (2011) (examining shareholder activism and analyzing the debate surrounding the propriety of increased shareholder power).

18. See Alicia J. Davis, *A Requiem for the Retail Investor?*, 95 VA. L. REV. 1105, 1105 (2009) (analyzing the modern domination of United States security markets by institutional investors).

19. See *id.* (adding that trades by individual investors represent less than two percent of NYSE trading volume).

20. See Donald C. Langevoort, *The SEC, Retail Investors, and the Institutionalization of the Securities Market*, 95 VA. L. REV. 1025, 1026 ("That the market for corporate securities traded on the New York Stock Exchange or the NASDAQ Global Market is no longer substantially retail in nature is now common knowledge.").

21. See Davis, *supra* note 18, at 1105 ("There is no question that U.S. securities markets are now dominated by institutional investors.").

22. See JANICE M. TRAFLET, *A NATION OF SMALL SHAREHOLDERS: MARKETING WALL STREET AFTER WORLD WAR II* 174 (2013) (chronicling the New York Stock Exchange's efforts to broaden the country's shareholder base during the Cold War).

23. See Brian Reid, *The 1990s: A Decade of Expansion and Change in the U.S. Mutual Fund Industry*, 6 INV. CO. INST. PERSP. 1, 15 (2000) (explaining institutional investor equity ownership).

24. See Charles McGrath, *80% of Equity Market Cap Held by Institutions*, PENSIONS & INV. (Apr. 25, 2017, 11:45 AM), <https://www.pionline.com/article/20170425/INTERACTIVE/170429926/80-of-equity-market-cap-held-by-institutions> (last updated Apr. 25, 2017) (last visited Sept. 23, 2019) (analyzing institutional ownership of companies) (on file with the Washington and Lee Law Review).

25. See FAIRFAX, *supra* note 17, at 45–49 (discussing the shift to institutional

influence corporate activities and provide additional monitoring. However, not all engage in activism and, even when they do, they do not engage in the same way.

This essay offers a historical account of a seminal civil rights decision, *Belton v. Gebhart*,²⁶ in the Delaware Court of Chancery. The circumstances surrounding the *Belton* case illuminate the limits and potential of shareholder activism to bolster civil rights in the modern context. Examining a historical civil rights example is instructive for thinking about how shareholder activism might advance the modern civil rights agenda.

Few modern scholars of corporate law know that Delaware was an important battleground in the effort to advance educational opportunity for African Americans nationwide and the Delaware Court of Chancery's important role.²⁷ Scholars naturally gravitate to corporate cases (e.g., *Van Gorkum*,²⁸ *Disney*,²⁹ *Caremark*,³⁰ and *Revlon*³¹) without acknowledging the Court of Chancery's greatest decision, *Belton v. Gebhart*, which had a profound influence on American democracy and tells a story every generation of lawyers should learn. Two consolidated Delaware Chancery Court cases—*Belton v. Gebhart* and *Bulah v. Gebhart*—led to the desegregation of Delaware public schools and became part of the monumental *Brown v. Board of Education* decision.³² Notably, these Delaware cases were the *only Brown*-related cases where the

shareholder dominance).

26. 87 A.2d 862 (Del. Ch. 1952).

27. See Matthew Albright, *Wilmington Has Long, Messy Education History*, DEL. ONLINE (June 10, 2016), <https://www.delawareonline.com/story/news/education/2016/06/10/wilmington-education-history/85602856/> (last visited Sept. 23, 2019) (describing the history of school desegregation in Delaware) (on file with the Washington and Lee Law Review).

28. *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

29. *In re Walt Disney Co.*, 907 A.2d 693 (Del. Ch. 2005).

30. *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

31. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986). See also *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000); *Stone v. Ritter*, 911 A.2d 362 (Del. 2006).

32. See Steven J. Crossland, Note, *Brown's Companions: Briggs, Belton, and Davis*, 43 WASHBURN L.J. 381, 384–97 (2004) (surveying the pre-*Brown* companion cases).

NAACP won at the trial level.³³ The major protagonists in this rich historical narrative of minority education include the philanthropist Pierre S. du Pont, once President of E. I. du Pont Nemours and Company and General Motors; Louis Redding and Jack Greenberg, legendary NAACP lawyers; and Chancellor Collins Seitz, a distinguished jurist on the Delaware Court of Chancery.

Part II of this essay examines the Delaware Court of Chancery's greatest case, *Belton v. Gebhart*, in its contemporary context. Part III examines the key differences between past and present civil rights-related shareholder activism. Part IV concludes that *Belton v. Gebhart*, along with its surrounding circumstances and events, vividly illustrates that advancing civil rights requires a range of tactics that leverage public, private, and philanthropic resources. Shareholder activism works best as part of a multipronged activist strategy, not as a substitute for other types of activism. Recognizing the complex challenges associated with advancing civil rights, this essay raises key questions about the nascent environmental, social, and governance (ESG) framework³⁴ with which scholars, practitioners, and other observers must contend.

II. Chancery's Greatest Case: *Belton v. Gebhart*

A. Historical Background

Although a tiny state, Delaware is a microcosm of the national experience of class, race, and other concerns. It has both northern and southern sensibilities.³⁵ The city of Wilmington in the north is less than thirty miles south of Philadelphia and resembles other

33. See Albright, *supra* note 27 (“Alone among state judges involved in the case, Delaware’s Collins J. Seitz ruled in favor of the plaintiffs, finding that separate was inherently unequal after personally visiting many schools.”).

34. See *infra* Part III.B.1 (defining ESG framework).

35. See generally BRETT GADSDEN, BETWEEN NORTH AND SOUTH: DELAWARE, DESEGREGATION, AND THE MYTH OF AMERICAN SECTIONALISM (2013) (chronicling the three-decades-long struggle over segregated schooling in Delaware, a key border state and important site of civil rights activism and white reaction).

Rust Belt cities both aesthetically and culturally.³⁶ It is the professional and industrial center of the entire state: a hub for banks, chemical companies, and corporate lawyers.³⁷ By contrast, southern Delaware's local economy is dominated by agriculture and tourism near the coast.³⁸ It is small-town America. It has the look and feel of the rural American South.³⁹

Southern Delaware is part of the Delmarva Peninsula, a region encompassing parts of Delaware, Maryland, and Virginia and bordered by the Chesapeake Bay to the west and the Atlantic Ocean to the east.⁴⁰ In a sense, its towns, counties, and people have more in common with one another than with their respective states. James Michener's novel *Chesapeake* romanticizes the region, which was largely disconnected from the mainland until construction of the Chesapeake Bay Bridge in 1952.⁴¹ Today, its picturesque beaches, wetlands, farms, small towns with Victorian homes, and unique cultures make it a popular tourist destination.⁴² However, the local agricultural economy significantly restricts career options. Historically and now, Delaware's two southern counties, Kent and Sussex, have the

36. See *About Wilmington*, THE CITY OF WILMINGTON, <https://www.wilmingtonde.gov/about-us/about-the-city-of-wilmington> (last visited Sept. 23, 2019) (describing the geography and history of Wilmington, Delaware) (on file with the Washington and Lee Law Review).

37. See *id.* (noting that Wilmington is an economic, corporate, and governmental hub for the region).

38. See generally John A. Munroe & Carol E. Hoffecker, *Delaware*, ENCYCLOPEDIA BRITANNICA (June 13, 2019), <https://www.britannica.com/place/Delaware-state/Health-and-welfare> (last visited Sept. 1, 2019) (on file with the Washington and Lee Law Review).

39. *Id.*

40. See generally *Delmarva Peninsula*, ENCYCLOPEDIA BRITANNICA (Nov. 29, 2011), <https://www.britannica.com/place/Delmarva-Peninsula> (last visited Sept. 1, 2019) (on file with the Washington and Lee Law Review).

41. See generally JAMES A. MICHENER, *CHESAPEAKE* (1978); OMARI SCOTT SIMMONS, *POTENTIAL ON THE PERIPHERY: COLLEGE ACCESS FROM THE BOTTOM UP* (2018). See also KLUGER, *supra* note 15, at 426–27 (describing Delaware's geographic and political climate).

42. See generally *Southern Delaware*, SOUTHERN DEL. TOURISM, <https://visitsoutherndelaware.com/> (last visited Sept. 23, 2019) (on file with the Washington and Lee Law Review).

highest poverty levels in the state—often higher than the national average.⁴³

Although Delaware was a part of the Union during the Civil War, it remained a slaveholding state during the war.⁴⁴ Its voters registered a strongly pro-slavery preference in 1860, picking Breckinridge for President over Abraham Lincoln.⁴⁵ Upstate Delaware was dominated by the pre-eminent industrialist Henry du Pont, whose company aligned with the Union politically and economically, serving as a major supplier of explosives to the military effort.⁴⁶ Delaware's two southern counties (Kent and Sussex), which comprise three-quarters of the state, were slaveholding territory.⁴⁷ They also had enough votes to control the state legislature.⁴⁸ Ironically, the first state to ratify the U.S. Constitution refused to ratify the Reconstruction Amendments.⁴⁹

43. See CENTER FOR COMMUNITY RESEARCH & SERVICE, AN OVERVIEW OF POVERTY IN DELAWARE 2 (2015) (showing that Kent and Sussex Counties have higher poverty rates than New Castle County).

44. See Samuel B. Hoff, *Opinion: Delaware's Long Road to Ratification of the 13th Amendment*, DEL. ONLINE (Dec. 7, 2015, 12:44 am), <https://www.delawareonline.com/story/opinion/contributors/2015/12/07/delaware-s-long-road-ratification-13th-amendment/76782210/> (last visited Sept. 23, 2019) (chronicling Delaware history before and after the Emancipation Proclamation) (on file with the Washington and Lee Law Review).

45. See Meredith Hindley, *The Man Who Came in Second*, 31 HUMAN 6, 20 (2010) (tracing the career trajectory of American politician John C. Breckinridge to illuminate why his personal convictions regarding slavery lost him the 1860 presidential election); see also KLUGER, *supra* note 15, at 427 (illustrating Delaware's southern affinities).

46. See KLUGER, *supra* note 15, at 427 (calling du Pont “a strong Lincoln man”).

47. See *id.* (observing “the further south one traveled in Delaware, the deeper the allegiance to Dixie ways and attitudes one encountered”).

48. See Hoff, *supra* note 44 (discussing the General Assembly's rejection of emancipation).

49. See Hoff, *supra* note 44 (noting Delaware fought for the Union but refused to ratify the Civil War amendments until 1901); see also Justin Wm. Moyer, *Delaware Apologizes for Slavery and Jim Crow. No Reparations Forthcoming.*, WASH. POST (Feb. 11, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/02/11/delaware-apologizes-for-slavery-and-jim-crow-no-reparations-forthcoming/?utm_term=.e03b6ad708c4 (last visited Sept. 23, 2019) (describing how the “First State” did not formally apologize for slavery until 2016, after many other states had already done so) (on file with the Washington and Lee Law Review).

The state legislature declared its opposition to all “measures intended or calculated to equalize or amalgamate the Negro race with the white race, politically or socially . . . and to making Negroes eligible to public offices, to sit on juries, and to their admission to public schools where white children attend.”⁵⁰

After the Civil War, Quakers, Unitarians, and philanthropists such as Julius Rosenwald, Booker T. Washington, and George Peabody largely bypassed Delaware and concentrated their efforts, particularly to advance black education, further south.⁵¹ Blacks were basically on their own, except for lumber given by the short-lived Freedmen’s Bureau between 1866 and 1867⁵² and some modest private funding from philanthropic organizations.⁵³ There was no regular state support for black schools until 1918.⁵⁴ Following the Supreme Court’s decision in *Plessy v. Ferguson*,⁵⁵ Delaware amended its constitution in 1897 to require separate schools for white and black children,⁵⁶ but the state lacked both internal and external white financial support for black schools

50. KLUGER, *supra* note 15, at 427.

51. See Robert J. Taggart, *Philanthropy and Black Public Education in Delaware, 1918–1930*, 103 PA. MAG. OF HIST. & BIOGRAPHY 467, 474 (1979) (examining the impact of contributions from individual philanthropists like Rosenwald on Delaware’s school system); see also KLUGER, *supra* note 15, at 431 (describing Quaker involvement in black education).

52. See *Records of the Field Offices for the District of Columbia, Bureau of Refugees, Freedmen, and Abandoned Lands, 1865–1870*, NAT’L MUSEUM OF AFR. AM. HIST. & CULTURE, https://nmaahc.si.edu/object/sova_nmaahc.fb.m1902 (last visited July 16, 2019) (on file with the Washington and Lee Law Review). The Freedmen’s Bureau was established by Congress in 1865 to help former slaves and poor whites in the south by providing lumber and assistance in the construction of homes and schools in the Delmarva area. *Id.*

53. See Taggart, *supra* note 51, at 468 (mentioning that funding was provided by short-lived organizations like the Delaware Association for the Moral Improvement and Education of the Colored People, organized by whites in Wilmington in 1866 to provide schools for black students).

54. See *id.* (emphasizing the limited support for black education in Delaware).

55. 16 U.S. 537 (1896).

56. See Robert L. Hayman, Jr., *A History of Race in Delaware: 1639–1950*, in CHOOSING EQUALITY: ESSAYS AND NARRATIVES ON THE DESEGREGATION EXPERIENCE 57–58 (Robert L. Hayman, Jr. & Leland Ware eds., 2009) (discussing Article X of the Delaware Constitution, which implemented *Plessy v. Ferguson*’s “separate but equal” mandate).

until 1918.⁵⁷ While at that time educational opportunity for Delaware youth of all races was scant, black students could attend only two secondary schools: Howard High School in Wilmington and Delaware State College in Dover.⁵⁸ The former was the only school offering a college preparatory curriculum; the latter was largely a grammar-level trade school.⁵⁹ Thus, to obtain a four-year, academic, secondary school education, black students had to travel to Wilmington in the northernmost part of the state.⁶⁰ This was an impossible task for many black students.⁶¹

Delaware did not have a genuine public school system until 1921, when a newly-passed education law required an “equivalent,” albeit segregated, education for white and black students.⁶² Desperate black residents “had to rely on . . . meager property taxes [for school funding that] were [wholly] segregated by race.”⁶³

The success of the effort to establish modern schools in Delaware was due in large part to the financial, philanthropic, and political efforts of Pierre S. du Pont, Delaware’s premiere industrialist.⁶⁴ A proponent of modern school buildings “as the key to a skilled, moral, and responsible citizenry,” du Pont founded the Delaware School Auxiliary Association (DSAA) to construct schools.⁶⁵ He contributed a total of \$10 million to improve

57. See Taggart, *supra* note 51, at 469 (speculating Delaware would have received greater investment in black education from northern philanthropic organizations following the Civil War had it joined the Confederacy).

58. See *id.* at 468 (indicating the two secondary institutions available to black students in Delaware); see also Hayman, *supra* note 56, at 60 (describing the underdeveloped school systems).

59. Taggart, *supra* note 51, at 468.

60. *Id.*

61. *Id.* See also Hayman, *supra* note 56, at 60 (noting that “high school remained a rare privilege” for black Delawareans).

62. See Hayman, *supra* note 56, at 61 (scrutinizing Delaware’s 1921 public school law).

63. Taggart, *supra* note 51, at 469. See also Hayman, *supra* note 56, at 60 (observing the state’s contribution to black education in 1890 amounted to “just over one dollar per child per year,” and that by 1917 black families paid school tax rates three times higher than those of white families and saw few results).

64. See Hayman, *supra* note 56, at 61 (highlighting du Pont’s efforts).

65. Taggart, *supra* note 51, at 470.

education throughout the state, and to silence public objections, he donated \$2.6 million for the construction of segregated schools for black students, at no taxpayer expense.⁶⁶ Du Pont “believed that he had stolen one of the most pervasive arguments whites had against using public monies for schools: that white money would be used for black children.”⁶⁷ His approach was rather successful. In essence, he built the entire black school system without state support, establishing over eighty black schools.⁶⁸ As a negative consequence, Delaware’s white citizens did not accept any accountability or responsibility for improving black education.⁶⁹ Yet without du Pont’s intervention, black citizens would have been unlikely to realize anything close to viable structures for decent schooling.⁷⁰ Ironically, these segregated schools would become the subject of the litigation in *Belton v. Gebhart*.

A major shortcoming of DSAA construction was the lack of desire and a plan to construct black secondary schools.⁷¹ This void in educational opportunity became relevant in *Belton v. Gebhart*. As late as 1950, no public black high school south of Wilmington offered a college preparatory curriculum.⁷²

Higher education among blacks and whites in Delaware similarly reflected a sobering pattern of inequity. In 1891, following the passage of the second Morrill Act—federal legislation to create land-grant colleges—Delaware chartered the State College for Colored Students, which eventually became Delaware State College.⁷³ Notably, the college did not offer a four-year degree

66. See Hayman, *supra* note 56, at 61 (describing du Pont’s many objectors, including those who did not want white taxes funding black education).

67. Taggart, *supra* note 51, at 479.

68. See *id.* at 482 (“Du Pont’s efforts . . . increased the likelihood that a black youth could become literate in a safe and sanitary school building, taught by a reasonably prepared and paid teacher.”).

69. See *id.* (noting that even before 1930 du Pont was complaining to state officials that the schools he had built for black students were not being properly maintained).

70. See *id.* (“Despite the unfortunate consequences for long-term integration, Du Pont’s contributions gave Delaware’s blacks hope for the future.”).

71. See *id.* at 477 (“[DSAA] trustees believed it impossible to build a system of high schools for black pupils extending over the entire state.”).

72. See *id.* at 468.

73. See *id.* at 477 (identifying Delaware State as one of the original

until 1932 and in 1950 was not nationally accredited.⁷⁴ Underfunding by the state was a continuing problem, despite contributions from du Pont for new campus buildings.⁷⁵ Disparities between Delaware State College and the University of Delaware would become the subject of litigation in *Parker v. University of Delaware*.⁷⁶

In 1919, du Pont resigned as president of the family business and devoted much of his time to the cause of education, including service on the State Board of Education. Prior to his school-building efforts between 1919 and 1928, E. I. du Pont de Nemours and Company was not associated with racial justice in Delaware. In 1926, when the editor of *The Afro-American* newspaper asked du Pont why he had funded these schools, he replied:

If the Delaware experiment proves satisfactory, which I am sure it will, it will be a great incentive to go ahead more quickly in other States The progress of Delaware schools will bear watching, for on their success must hang the fate of Negro public school education in the United States for many years.⁷⁷

E. I. du Pont de Nemours and Company influenced “Delaware as no other private enterprise controlled any other state in the Union.”⁷⁸ Nonetheless, in the 1950s, Delaware’s most liberal upstate community of Wilmington still resembled “Topeka, Kansas, but a bit worse” from a racial perspective.⁷⁹

Morrill-Nelson land grant black colleges).

74. See Hayman, *supra* note 56, at 62 (noting that although a large donation from du Pont had allowed the school to offer a four-year degree, by 1948 it was “so underfunded that it lost its accreditation”).

75. See Taggart, *supra* note 51, at 477–78 (describing du Pont’s contributions to the school).

76. 75 A.2d 225 (Del. Ch. 1950). *Parker* noted that the educational opportunities between the two schools were not equal. *Id.*

77. Letter from Pierre S. du Pont, Chairman, General Motors, to Carl Murphy, Editor, *The Afro-American* (Mar. 1, 1926) (on file with the Hagley Museum and Library, Wilmington, Delaware).

78. See KLUGER, *supra* note 15, at 429–30 (describing the extent to which du Pont created Delaware’s corporation-friendly climate).

79. *Id.* at 429.

B. Influential Delaware Lawyers Advancing Civil Rights: Louis L. Redding and Chancellor Collins Seitz

Despite the strong corporate influence in Delaware, two Delaware lawyers are most often credited with advancing the cause of racial justice.

1. Louis L. Redding

Louis Lorenzo Redding, a prominent Delaware civil rights attorney, represented the plaintiffs in *Parker v. University of Delaware* and *Belton v. Gebhart*.⁸⁰ His father, Lewis Alfred Redding, was born in rural Kent County, Delaware in 1869, attended Howard University, and had a distinguished career as a postal service mail carrier and clerk.⁸¹ Notably, he was the longtime secretary of the Wilmington branch of the NAACP.⁸² Louis L. Redding was a product of Delaware's segregated public school system, graduating in 1919 from Howard High School, the only college preparatory high school for African Americans at that time.⁸³ He subsequently attended and graduated from Brown University with honors in 1923 and attended Harvard Law School, where he was the only African American in the 1928 graduating class.⁸⁴ In 1929, he became the first African American admitted to

80. Redding also represented plaintiffs in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), another influential civil rights case.

81. See KLUGER, *supra* note 15, at 430–43 (reviewing Lewis Alfred Redding's career).

82. *Id.* at 430–31.

83. See *id.* (discussing Lewis Lorenzo Redding's schooling and early career); see also *Delaware: Conflict in a Border State, in Separate Is Not Equal: Brown v. Board of Education*, SMITHSONIAN NAT'L MUSEUM OF AM. HIST. BEHRING CTR. (2004), <https://americanhistory.si.edu/brown/history/4-five/delaware-2.html> (last visited Sept. 23, 2019) (chronicling the pre-Brown state of education in Wilmington) (on file with the Washington and Lee Law Review).

84. See Eric Pace, *L.L. Redding, 96, Desegregation Lawyer, Dies*, N.Y. TIMES, Oct. 2, 1998, at C19 (providing an obituary for Redding).

the Delaware Bar.⁸⁵ He remained its only African American member until 1956, nearly 27 years.⁸⁶

Serving black clients in Delaware during the 1950s won little prestige.⁸⁷ The top legal talent was hired by corporate interests, and white lawyers who represented black clients were known to charge “extortionate” fees.⁸⁸ Redding, a man of integrity, did not engage in such practices and used his superior training and energy to represent black clients. Black Delawareans desperately needed his services.⁸⁹ He fought tirelessly and basically alone to advance their civil rights and liberties.⁹⁰

2. Chancellor Collins Seitz

Like Louis Redding, Collins Seitz was a Wilmington native. Growing up in a Catholic household, he was a religious minority in his community.⁹¹ He attended the University of Delaware and the University of Virginia Law School before embarking on a distinguished legal career.⁹² He was appointed Vice Chancellor of the Delaware Court of Chancery in 1946 at age 31 and Chancellor in 1951 at the age of 39.⁹³ His ascendancy at such an early age to the country’s preeminent business court is a tribute to his legal

85. *Id.* See also Leonard L. Williams, *Louis L. Redding*, DEL. LAW., Summer 1998, at 10, 10 (summarizing Redding’s biography).

86. See Hayman, *supra* note 56, at 59–61 (providing details on Redding’s life); Pace, *supra* note 84 (same); Williams, *supra* note 85 (same).

87. Hayman, *supra* note 56, at 59. See also Frank H. Hollis, *My Memories of Law Practice in Wilmington, Delaware*, DEL. LAW., Summer 1998, at 22 (portraying the experience of black Delaware lawyers and clients).

88. See KLUGER, *supra* note 15, at 430–31 (describing Redding’s role in the Delaware Bar).

89. Williams, *supra* note 85, at 10 (noting that at the time Redding began practicing law in Delaware even the courtrooms were segregated).

90. See *id.* (explaining that Redding was not accepted into the Delaware State Bar Association until twenty years after he began practicing law and practiced his trade “to a large degree in isolation”).

91. *Id.*

92. See Wolfgang Saxon, *Judge Collins Seitz Dies at 84; Refuted Segregation in Schools*, N.Y. TIMES, Oct. 21, 1998, at C27 (providing Seitz’s obituary).

93. *Id.*

acumen.⁹⁴ During his twenty-year tenure, he rendered over 400 reported opinions and garnered national recognition as “pre-eminent among the state judges of the nation as the consummate arbiter of corporate law.”⁹⁵ Thereafter, he joined the United States Court of Appeals for the Third Circuit, eventually becoming chief judge and serving with distinction until his retirement.⁹⁶

A cursory look at Seitz’s background would not necessarily demonstrate a strong commitment to civil rights or “conviction that racial segregation violates our constitution,”⁹⁷ but a deeper look suggests otherwise. Collins Seitz “grew up in a wholly segregated world; he lived in a white neighborhood, went to segregated schools, worked in segregated workplaces, and lived a life without social relationships with black persons.”⁹⁸ According to former Chief Justice of the Delaware Supreme Court, E. Norman Veasey:

To say that Collins Seitz’s background was economically humble is an understatement. His father worked for the DuPont Company in Wilmington until he became ill in the late ’20s and died in 1929 just as the Great Depression hit. There were no benefits for his mother, the widow, and this was a harsh and bitter fact which partly shaped his approach to life. He felt the need to be sensitive to the underdog and often to revolt from conformity. So he lived a life where the principle of righting wrongs became a passion.⁹⁹

Seitz was also the first Catholic member of the Delaware state judiciary and was likely influenced by the anti-Catholic prejudice

94. See William J. Brennan, Jr., *Collins Jacques Seitz*, 132 U. PA. L. REV. 1279, 1279 (1984) (mentioning that Judge Seitz “crowded brilliant achievements in corporate law one upon another”).

95. KLUGER, *supra* note 15, at 432.

96. See William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 BUS. LAW. 351, 353–54 (1992) (describing Seitz’s accomplishments as Vice Chancellor and Chief Judge).

97. Virginia Seitz, *Chancellor Seitz’s Perspective on Brown v. Board of Education*, DEL. LAW., Spring 2004, at 11, 11.

98. *Id.*

99. E. Norman Veasey, *Collins Jacques Seitz, Paradigm of Principle, Passion, Professionalism, and Persuasion*, 40 VILL. L. REV. 559, 559 (1995).

he encountered as a youth.¹⁰⁰ He had demonstrated a commitment to racial justice long before *Belton v. Gebhart*.

a. Foreshadowing Belton: Parker v. University of Delaware

In 1950, then-Vice Chancellor Seitz decided a case involving his undergraduate alma mater, the University of Delaware, that would foreshadow his later decision in *Belton v. Gebhart*. The state's flagship university did not admit blacks until his 1950 decision in *Parker v. University of Delaware*.¹⁰¹ The case was initiated when thirty black students at Delaware State College applied for admission to the University of Delaware and were rejected in 1950.¹⁰² Louis Redding of the NAACP represented the plaintiffs along with a young Jack Greenberg, who had recently joined Thurgood Marshall at the NAACP Legal Defense Fund's New York City office.¹⁰³ The *Parker* decision enjoined the University of Delaware from excluding black applicants under the separate-but-equal doctrine because Delaware State College and the University of Delaware failed to meet *Plessy v. Ferguson's* equivalency requirements.¹⁰⁴ Prior to ordering the University of Delaware to admit the black plaintiffs, Seitz personally visited the white-serving University of Delaware and black-serving Delaware State College and found the latter "grossly inferior."¹⁰⁵ These visits led to factual findings that vividly demonstrated opportunity discrepancies in terms of physical facilities, curriculum, and other crucial features.¹⁰⁶

100. See Seitz, *supra* note 97, at 12 (describing how Collins Seitz's childhood hardships shaped his attitude towards civil rights).

101. See *Parker v. U. of Del.*, 75 A.2d 225, 234 (Del. Ch. 1950) (holding that the university's refusal to consider black plaintiffs' applications violated the Equal Protection Clause).

102. See *id.* at 226 (noting that blacks were not allowed to apply to the University if another educational institution within the state offered the same course of study); see also KLUGER, *supra* note 15, at 431–32 (discussing *Parker*).

103. See KLUGER, *supra* note 15, at 431–32 (discussing NACCP staffing).

104. See *Parker*, 75 A.2d at 230 (explaining "separate but equal" requirements).

105. *Id.* at 231.

106. See *id.* at 230–33 (describing Delaware State College's capital assets per

With the *Parker* decision, Seitz became “the first state judge by court order to desegregate a state-financed university at the undergraduate level.”¹⁰⁷ He made this ruling in a contentious climate and could have hampered his professional advancement.¹⁰⁸ Many members of the State Senate disapproved of the “*Parker* decision but also of his many public statements which made known with clarity and directness his insistent support of desegregation movements.”¹⁰⁹ Years later, Seitz would call *Parker* “an easy case” because “to compare the University of Delaware with Delaware State College at that time was sort of ludicrous.”¹¹⁰

b. Public Statements Critiquing Injustice

Long before *Belton v. Gebhart*, Collins Seitz had made public statements, away from the bench, on contemporary moral issues, such as racial justice.¹¹¹ NAACP Legal Defense Fund lawyers, especially Louis Redding and Jack Greenberg, were aware of them. In the 1940s, Seitz worked with others to persuade the Catholic Church and Delaware society that “racial segregation and racial injustice should be anathema to the Church and to any person of faith and decency.”¹¹² He wrote for Catholic periodicals and performed broadcast editorials on local radio that directly confronted racial injustice. A March 5, 1947 editorial broadcast on WDEL on behalf of the National Conference of Christians and Jews captures Seitz’s commitment and clarity:

In connection with the Negro problem, can we of the white race analyze the reasons for some of the conditions extant among the Negroes without ourselves being seriously embarrassed? . . . To

capita, student-faculty ratio, and libraries as inferior to those of the University of Delaware).

107. Brennan, Jr., *supra* note 94, at 1279.

108. *See id.* (explaining that Seitz made his ruling shortly before the State Senate acted upon his nomination for Chancellor).

109. *Id.*

110. Edmund N. Carpenter II, *A Conversation with Judge Collins J. Seitz, Sr.*, DEL. LAW., Fall 1998, at 24, 29 (discussing *Parker*).

111. *See Seitz, supra* note 97, at 12 (describing the anti-segregation editorials and speeches Seitz made in the 1940s).

112. *Id.*

those who have studied the problem with a real desire to see that every individual in this country moves toward a realization of the fruits which grow from practicing our theory of democracy, the so-called Negro problem is the joint responsibility of all citizens who practice democracy and live the Ten Commandments. Lip service is not enough.¹¹³

In a March 31, 1948 editorial broadcast on WILM, Seitz unequivocally asserted his support for federal civil rights legislation:

All too often we use the excuse that the time is not ripe to justify ourselves for not taking some affirmative action requiring moral courage. The President's Committee [on Civil Rights] does not and need not apologize for recommending the enactment of specific legislation by the federal government for the protection of the civil liberties of all of its citizens. Such legislation will be tangible evidence to the oppressed that their government can—within the democratic framework—make the words “civil rights” a meaningful part of their daily lives—not just so many empty words.¹¹⁴

On June 4, 1951, Seitz's Salesianum High School commencement address directly critiqued the lack of moral clarity exhibited by societal institutions:

Many of us would become fighting mad were we told that we did not *really* believe in the great principles of the Declaration of Independence and the Constitution of the United States. Yet I submit that too many of us talk out of both sides of our mouths at the same time on this important subject. How can we say that we deeply revere the principles of our Declaration and our Constitution and yet refuse to recognize those principles when they are to be applied to the American Negro in a down-to-earth fashion? . . . A person has real moral courage when, being in a position to make decisions or determine policies, he decides that the qualified Negro will be admitted to a school of nursing; that the Negro, like the white, will receive a fair trial no matter what the public feeling may be; that every Catholic school, church and institution shall be open to all Catholics—not at some distant

113. *Id.*

114. *Id.*

future time when public opinion happens to coincide with Catholic moral teaching—but now.¹¹⁵

Seitz's commencement address challenged his young listeners to exhibit moral courage and acknowledge that the condition of black America was the "most pressing domestic issue today in Delaware, and in fact the United States generally."¹¹⁶ Calling attention to Delaware's racial injustice was courageous because the State Senate was to act upon his nomination for promotion to Chancellor within days.¹¹⁷ At that time, "the Senate remained, as it had historically been, in the grip of anti-black downstaters."¹¹⁸ Despite Seitz's firm stance, the Senate approved his nomination.¹¹⁹

These writings and speeches foreshadowing *Belton* leave little doubt about Seitz's position on racial segregation. For Chancellor Seitz, "racial and religious bigotry are foreign to our theory of democracy *not only before the law* but in our daily social and economic contacts."¹²⁰ According to Virginia Seitz, her father's perspective was also influenced by his legal training, as he revealed in a 1965 address to new members of Phi Beta Kappa:

We humans do not seem to come by an objective attitude naturally. For some psychological reason, once our mind has made a judgment or an evaluation, it tends to shield itself from ideas which unsettle it in such areas. Thus, true objectivity of mind must be consciously cultivated by young and old alike. It is a state of mind which welcomes new ideas or formulations. It does not raise barriers of intellectual self-contentment or fear of the unorthodox.¹²¹

115. *Id.*

116. KLUGER, *supra* note 15, at 431.

117. *See id.* at 434 (describing Seitz's confirmation to Chancellor).

118. *Id.* at 432.

119. *Id.* at 434.

120. Seitz, *supra* note 97, at 12.

121. *Id.* at 12–13.

For Seitz, clear principled thinking and justice are often byproducts of sound legal reasoning.¹²² As he would later say, “desegregation to me was easy.”¹²³

C. Belton v. Gebhart

Belton v. Gebhart was actually two, nearly-identical cases—the other was *Bulah v. Gebhart*.¹²⁴ These two cases, which illustrate the persistent educational inequities in Delaware, were consolidated into the landmark *Brown v. Board of Education* decision.¹²⁵ The NAACP brought these two separate Delaware cases to test the legality of the state’s segregated public school system.¹²⁶ Both plaintiffs brought suit because their African American children had to attend inferior schools¹²⁷—Ethel Belton in Claymont and Sarah Bulah in the town of Hockessin—but Sarah Bulah’s situation was unique because she was a white woman with an adopted black child.¹²⁸ Local attorney Louis Redding, who was Delaware’s only African-American attorney at the time, argued both cases in Delaware’s Court of Chancery with NAACP Legal Defense Fund attorney Jack Greenberg.¹²⁹

122. See *id.* at 12 (“He fully embraced the rigor of legal reasoning and the habits of mind that it engendered as pathways to the truth—more specifically the true meaning of the law.”).

123. Carpenter, *supra* note 110, at 31.

124. 87 A.2d 862 (Del. Ch. 1952).

125. See *Brown v. Board of Education*, 347 U.S. 483, 486 n.1 (1954) (consolidating *Belton v. Gebhart* (Delaware), *Brown v. Board of Education* (Kansas), *Bolling v. Sharp* (District of Columbia), *Briggs v. Elliot* (South Carolina), and *Davis v. County School Board of Prince Edward County* (Virginia)); see also Hayman, *supra* note 56, at 3–4 (Brown consolidation); Dolores K. Sloviter, *Tribute to Collins J. Seitz: A Kind Man*, 40 VILL. L. REV. 553, 553–54, 557 (1995) (remembering Seitz for his *Belton v. Gebhart* decision, which played “a persuasive role” in *Brown v. Board of Education*, and acknowledging his “enthusiasm for the law and his patience with human beings and their frailties”).

126. See *Belton*, 87 A.2d at 863–64 (stating Belton and Bulah’s claims).

127. KLUGER, *supra* note 15, at 434–36.

128. See *id.* (describing the Bulahs’ adoption of their daughter Shirley and their struggle to find her adequate schooling).

129. See *Belton*, 87 A.2d at 862 (naming attorneys).

The cases were originally filed in U.S. District Court in Wilmington but later transferred to the Court of Chancery. Delaware's Attorney General Hyman Albert Young asked that the cases be heard in state court because state law was involved.¹³⁰ Trying these cases before the Court of Chancery and its recently appointed Chancellor was a favorable venue for the NAACP, which had previously argued successfully before Seitz in *Parker v. University of Delaware*.¹³¹ Moreover, the NAACP was well aware of Seitz's public statements and that his decision in *Parker* had made him, according Louis Redding, "a lot of enemies."¹³² The NAACP assembled a strong panel of expert witnesses that included Frederic Wertham, a leading forensic psychiatrist, who, in essence, testified that segregation had ill effects on both black and white youth, creating a public health problem.¹³³

1. The Ruling

In *Belton*, Chancellor Seitz held that black schoolchildren suffered from state-imposed segregation.¹³⁴ Although he had no power to overrule the separate-but-equal doctrine established by the United States Supreme Court fifty-eight years earlier in *Plessy v. Ferguson*, he nonetheless found that the state was not providing equal facilities. Chancellor Seitz made the following factual finding:

I conclude from the testimony that in our Delaware society, State-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities

130. See KLUGER, *supra* note 15, at 436–37 (describing jurisdictional challenges).

131. See *supra* note 101 and accompanying text (describing the holding in *Parker*).

132. See KLUGER, *supra* note 15, at 436–37.

133. See *id.* at 441–46 (discussing Wertham's career and Parker testimony); *Belton*, 87 A.2d at 864 ("State-imposed school segregation produces in Negro children an unsolvable conflict which seriously interferes with the mental health of such children.").

134. See *Belton*, 87 A.2d at 864 ("[V]iewed against the social background of the Delaware community, . . . the Negro child [feels] that he is inferior because, in an indirect fashion, the State has said so.").

which are substantially inferior to those available to white children otherwise similarly situated. . . . I believe the “separate but equal” doctrine in education should be rejected, but I also believe its rejection must come from [the Supreme] Court.¹³⁵

Seitz’s opinion quoted and paraphrased the expert testimony of Wertham, concluding that racial separation “creates a mental health problem in many Negro children with a resulting impediment in their educational progress.”¹³⁶ The opinion leaves little doubt regarding his belief that segregation per se created inequality. However, Chancellor Seitz acknowledged the legal limits of his decision and suggested that the U.S. Supreme Court re-examine the separate but equal doctrine:

I, therefore, conclude that while State-imposed segregation in lower education provides Negroes with inferior educational opportunities, such inferiority has not yet been recognized by the United States Supreme Court as violating the Fourteenth Amendment. On the contrary, it has been by implication excluded as a Constitutional factor. It is for that Court to re-examine its doctrine in the light of my finding of fact. It follows that relief cannot be granted plaintiffs under their first contention.¹³⁷

On appeal, *Belton* influenced the *Brown* Court’s ultimate decision concerning the constitutionality of segregated schooling. The following passage from U.S. Supreme Court’s *Brown* opinion bears a striking resemblance to language found in the Court of Chancery’s *Belton* opinion:

We conclude that in the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.¹³⁸

In *Belton*, Chancellor Seitz, although upholding the separate-but-equal standard in *Plessy v. Ferguson*, ordered the

135. *Id.* at 865.

136. *Id.* at 864.

137. *Id.* at 866.

138. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

immediate desegregation of two public schools in 1952, and the Delaware Supreme Court affirmed this ruling.¹³⁹ Seitz's order was eventually affirmed by the U.S. Supreme Court in *Brown*.¹⁴⁰ Notably, *Belton v. Gebhart* was the only *Brown* case in which the NAACP prevailed at the trial level.¹⁴¹ The Delaware Court of Chancery, known for its corporate prowess, made a major contribution to the cause of American democracy.

2. *The Remedy*

Seitz used the broad, equitable powers of the Court of Chancery when he "ordered the immediate admission of black children to the white elementary and secondary schools that he had found superior in quality."¹⁴² It "was the first time, after a finding of inequality, that blacks were admitted at once to white schools at the elementary and secondary levels."¹⁴³ Seitz would later reflect that he "found it inexcusable that the state would lend its support to dividing its citizens this way."¹⁴⁴ He rebuked the defendant's position that the state was not ready for desegregated education:

Defendants say that the evidence shows that the State may not be "ready" for non-segregated education, and that a social problem cannot be solved with legal force. Assuming the validity of the contention without for a minute conceding the sweeping factual assumption, nevertheless, the contention does not answer the fact that the Negro's mental health and therefore, his educational opportunities are adversely affected by State-imposed segregation in education. The application of Constitutional principles is often distasteful to some citizens,

139. See *Gebhart v. Belton*, 91 A.2d. 137, 172 (Del. 1952) (affirming Seitz's order).

140. See *Brown*, 347 U.S. at 495 (concluding that "[s]eparate educational facilities are inherently unequal").

141. See Seitz, *supra* note 97, at 13 (noting the groundbreaking nature of Seitz's ruling).

142. *Id.*

143. *Id.*

144. KLUGER, *supra* note 15, at 448.

but that is one reason for Constitutional guarantees. The principles override transitory passions.¹⁴⁵

Seitz's clear and fair remedy exhibited both legal and moral clarity:

It seems to me that when a plaintiff shows to the satisfaction of a court that there is an existing and continuing violation of the "separate but equal" doctrine, he is entitled to have made available to him the State facilities which have been shown to be superior. To do otherwise is to say to such a plaintiff: "Yes, your Constitutional rights are being invaded, but be patient, we will see whether in time they are still being violated." If, as the Supreme Court has said, this right is personal, such a plaintiff is entitled to relief immediately, in the only way it is available, namely, by admission to the school with the superior facilities. To postpone such relief is to deny relief, in whole or in part, and to say that the protective provisions of the Constitution offer no immediate protection.¹⁴⁶

As mentioned, this ruling was the first time a court had ordered a segregated white public school in the United States to admit black children.¹⁴⁷ Thurgood Marshall asserted: "This is the first real victory in our campaign to destroy segregation of American pupils in elementary and high schools."¹⁴⁸ Chief Justice William Rehnquist stated: "In the eyes of many, Chancellor Collins Seitz's 1952 decision in *Belton v. Gebhart* is the Court of Chancery's 'proudest accomplishment.'"¹⁴⁹

Although the U.S. Supreme Court affirmed *Belton v. Gebhart* in *Brown v. Board of Education*, it took a different direction in fashioning a remedy in *Brown II*.¹⁵⁰ After ordering additional briefing and argument on the appropriate remedy for segregation, it ultimately ordered only that desegregation take place "with all deliberate speed" rather than immediately, deviating from the approach taken in *Belton*.¹⁵¹ Specifically, the Supreme Court

145. *Belton*, 87 A.2d at 864–65.

146. *Id.* at 869–70.

147. See KLUGER, *supra* note 15, at 450–51 (evaluating Parker's impact).

148. *Id.*

149. Rehnquist, *supra* note 96, at 353–54.

150. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (*Brown II*).

151. Seitz, *supra* note 97, at 13.

asserted the cases be “remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.”¹⁵² This controversial and ambiguous language “was used as a device to maintain the [racial] status quo.”¹⁵³ Ultimately, it set back desegregation progress for over a decade.¹⁵⁴ Ten years after the *Brown* decision, only 1.2% of black students attended schools with whites.¹⁵⁵ In five states (Alabama, Florida, Georgia, Mississippi, and South Carolina), no black students attended white schools.¹⁵⁶ In *Griffin v. County School Board of Prince Edward County*,¹⁵⁷ Justice Hugo Black concluded that “[t]here has been entirely too much deliberation and not enough speed in enforcing constitutional rights which we held in *Brown v. Board of Education*.”¹⁵⁸ Many southern states did not make serious efforts to desegregate until the 1970s.¹⁵⁹ *Brown II* also stalled desegregation in Delaware school districts where resistance was massive.¹⁶⁰

III. Shareholder Activism: Past and Present

A. The Past: Corporate Reticence and Separatism

During the Civil Rights Era, “corporations played the roles of passive supporting character, active protagonist, and defiant antagonist.”¹⁶¹ Passive support reflected acquiescence to Jim Crow

152. *Brown II*, 349 U.S. at 301.

153. Seitz, *supra* note 97, at 13.

154. See Ware, *supra* note 12, at 28 (describing white southerners’ campaign of “massive resistance” against desegregation).

155. *Id.*

156. *Id.*

157. 377 U.S. 218 (1964).

158. See *id.* at 229 (involving a school board from the original *Brown* cases which closed all of its schools to avoid desegregation).

159. See Ware, *supra* note 12, at 30 (describing delay tactics by southern states).

160. See *id.* (lingering impact of resistance to desegregation in Delaware).

161. Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1539

and segregationist forces.¹⁶² Active companies supported civil rights through financial assistance to advocacy organizations such as the NAACP, as well as *sua sponte* desegregation by rejecting tradition and accepting African American employees and customers.¹⁶³ Defiant antagonism opposed social activism, actively worked against certain groups and causes, and rejected or circumvented civil rights legislation and court rulings.¹⁶⁴

For the first half of the twentieth century, most major corporations passively acquiesced to Jim Crow segregation, avoiding direct engagement with major political and social issues.¹⁶⁵ However, corporate managers with philanthropic interests in black education worked outside of the corporate context in a way that resembles modern-day “philanthrocapitalism.”¹⁶⁶ These managers may have believed that

(2018); see also Joseph Luders, *The Economics of Movement Success: Business Responses to Civil Rights Mobilization*, 111 AM. J. SOC. 963, 965–70 (2006) (examining shifting relationships between business interests and civil rights activists and highlighting role of disruption costs in social movements); Mary-Hunter McDonnell, *Radical Repertoires: The Incidence and Impact of Corporate-Sponsored Social Activism*, 27 ORG. SCI. 53, 55 (2016) (arguing that “overt corporate-sponsored activism is inherently riskier than evasive, diversionary, or covert tactics”); MARK PRENDERGRAST, FOR GOD, COUNTRY AND COCA-COLA: THE UNAUTHORIZED HISTORY OF THE WORLD’S MOST POPULAR SOFT DRINK 280–87 (2000) (scrutinizing Coca-Cola’s evolving positions on desegregation during the Civil Rights Era).

162. See Lin, *supra* note 161, at 1541 (describing how many businesses “served as passive characters reluctantly thrust into the history books” during the civil rights movement).

163. See *id.* at 1542 (describing large corporations and smaller black-owned businesses that spearheaded integration efforts).

164. See *id.* at 1542–43 (businesses undermining integration).

165. See *id.* at 1541 (“Rather than explicitly support or oppose the Civil Rights Movement, . . . many businesses of the time . . . simply decided to passively uphold the misguided, inhumane ways of the Jim Crow South.”).

166. See TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–1963 32–33, 395 (1989) (highlighting the role corporations played in the Civil Rights Act’s passage); CLAY RISEN, THE BILL OF THE CENTURY: THE EPIC BATTLE FOR THE CIVIL RIGHTS ACT 63–73, 247 (2014) (considering Southern businesses’ role in demanding an end to the Jim Crow Era). For a discussion of philanthrocapitalism, see Aaron K. Chatterji & Barak D. Richman, *Understanding the “Corporate” in Corporate Social Responsibility*, 2 HARV. L. & POL’Y REV. 33, 34 (2008) (discussing corporate decisionmaking in advancing progressive causes); Janie A. Chuang, *Giving as Governance? Philanthrocapitalism and Modern-Day Slavery Abolitionism*, 62 UCLA L. REV.

taking unpopular public positions would alienate customers impacting the bottom line. For example, Julius Rosenwald, longtime president of Sears & Roebuck Company, engaged in significant philanthropic efforts to promote the cause of black education in the first half of the twentieth century in the South.¹⁶⁷ But his efforts remained largely unknown to Sears customers and the public at large.¹⁶⁸ His name was never prominently featured in the famed Sears catalog during his tenure as president, and although he and Aaron Nusbaum acquired a significant stake in the company, they retained the Sears & Roebuck name.¹⁶⁹ This name remained intact long after Rosenwald and Sears bought out Nusbaum in 1903 and Sears' retirement from the company in 1908.¹⁷⁰ Some observers speculate that Rosenwald's reluctance to become a more public face at Sears was a response to the anti-Semitism potentially harbored by the company's midwestern farmer customer base.¹⁷¹ Irrespective of the reasons, corporations favored passivity and separatism, and this stance greeted shareholder activist demands regarding civil rights in the first half of the twentieth century.¹⁷²

1516, 1518 (2015) (exploring the rise of philanthrocapitalism in addressing antitrafficking policymaking).

167. See PETER M. ASCOLI, JULIUS ROSENWALD: THE MAN WHO BUILT SEARS, ROEBUCK AND ADVANCED THE CAUSE OF BLACK EDUCATION IN THE AMERICAN SOUTH 93–96 (2006) (memorializing Rosenwald's philanthropic efforts, including the construction of 5,300 "Rosenwald schools" for black children in the rural South). See generally STEPHANIE DEUSTCH, YOU NEED A SCHOOLHOUSE: BOOKER T. WASHINGTON, JULIUS ROSENWALD, AND THE BUILDING OF SCHOOLS FOR THE SEGREGATED SOUTH (2011) (chronicling Rosenwald's partnership with Washington in the era preceding the civil rights movement).

168. See ASCOLI, *supra* note 167, at 74–75 (speculating that few Sears customers knew much about Rosenwald).

169. See *id.* at 74 (observing that Rosenwald's name did not appear on the Sears catalog from 1909 to 1924).

170. See *id.* ("[Rosenwald] wisely realized that to tamper with the name of the company . . . would be a serious marketing mistake.").

171. See *id.* (explaining that while Rosenwald's name and Jewish identity was frequently mentioned in news stories, Rosenwald may have believed that his rural customers would not see those publications).

172. See *id.* at 74–84 (describing Rosenwald's extensive philanthropy campaign and how it was carried out separately from the Sears, Roebuck brand); see also Lisa M. Fairfax, *From Apathy to Activism: The Emergence, Impact, and Future of Shareholder Activism as the New Corporate Governance Norm*, 99 B.U.

*B. Modern Times: The Rise of Institutional Shareholders
and Activism*

Since the Civil Rights Era of the 1950s and 1960s, domination of the equity ownership landscape has been transferred from diffuse, rationally apathetic individual investors to institutional investors, who have greater capacity to influence civil rights.¹⁷³ The big question is willingness.

Today, in wealthy capitalist societies, “[t]he public corporation is usurping the state’s role as [perhaps] the most important institution in wealthy capitalist societies” through which “the vast majority of economic activity is organized.”¹⁷⁴ This emergence has coincided with a greater role in social activism. New information technology and social media amplify activist demands and engage businesses whether they like it or not.¹⁷⁵ Now more people expect businesses and executives, particularly at public companies, to engage with critical social issues, and corporate executives are more exposed to public view.¹⁷⁶ A range of external threats,

L. REV. 1301, 1311 (2019) (“Directors and officers clearly viewed shareholder apathy as preferable to shareholder activism or influence.”).

173. See Davis, *supra* note 18, at 1105 (tracing how institutional investors have come to dominate the market); see also Fairfax, *supra* note 172, at 1314 (“[I]ndividual shareholders . . . have continued to be apathetic even as institutional shareholder activism has increased significantly.”).

174. Gabriel Rauterberg, *The Corporation’s Place in Society*, 114 MICH. L. REV. 913, 913 (2016); see also C. A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77, 139 (2002) (“Corporations remain today, as they were in the 1920s, the most powerful nongovernmental institutions in America. In innumerable ways they shape the nation’s politics and culture, and the lives of their employees and consumers.”).

175. See Lin, *supra* note 161, at 1545–46 (recognizing social media’s power to affect companies’ branding and stock prices while noting that “a bad viral video or negative trending hashtag” may also draw the attention of regulators).

176. See *id.* at 1546

The days of simply ignoring social issues or writing a check are gone for many large businesses. Corporations are now frequently expected to engage in social issues through public statements, sponsorships, partnerships, and policies supporting a position or a cause. Increasingly, businesses are expected by their communities, consumers, employees, and executives to engage in social activism on issues directly or indirectly related to their core operations.

(footnotes omitted).

including political intervention and public opinion, conspire to influence corporate actions.¹⁷⁷

1. Environmental, Social, and Governance (ESG) Factors

In socially responsible or impact investing, environmental, social, and governance (ESG) factors guide decisionmaking. ESG concerns, such as human rights and climate change, have a non-shareholder constituency character, but, as a practical matter, they are not divorced from traditional corporate metrics and shareholder value because these criteria may also have financial relevance.¹⁷⁸ Although initially resisted by investors, ESG investment is estimated at twenty trillion dollars in assets under management (AUM), or one-quarter of all AUM worldwide.¹⁷⁹ Forbes Magazine describes the growing importance of ESG:

In 2018, thousands of professionals from around the world hold the job title “ESG Analyst” and ESG investing is the subject of news articles in the financial pages of the world’s leading newspapers. Many investors recognize that ESG information about corporations is vital to understand corporate purpose,

177. See DAVID VOGEL, *LOBBYING THE CORPORATION: CITIZEN CHALLENGES TO BUSINESS AUTHORITY* 225–26 (1978) (describing the combined impact of public opinion and government action).

There is a way in which corporations can be forced to make decisions not dominated by the logic of capital accumulation, but it cannot be achieved through “corporate accountability.” It requires the direct intervention of the government. At best, corporate activists can supplement government regulation; what they cannot do is substitute for it. . . . The corporate challenge movement has not and, indeed, cannot adequately address these fundamental issues because they can only be addressed through the governmental process.

Id.

178. See George Krell, *The Remarkable Rise of ESG*, FORBES (July 11, 2018, 10:09 AM), <https://www.forbes.com/sites/georgkrell/2018/07/11/the-remarkable-rise-of-esg/#40d82d851695> (last visited July 16, 2019) (noting corporate response to ESG factors like climate change, water conservation, worker protection, and supply chain management have direct financial relevance) (on file with the Washington and Lee Law Review).

179. *Id.*

strategy and management quality of companies. It is now, quite literally, big business.¹⁸⁰

The new wave of corporate social activism is influenced by three forces: convergence of the public-private spheres, evolution of corporate social responsibility efforts, and expansion of corporate political rights.¹⁸¹ An array of mechanisms is used to lobby corporations: impact investors, social impact ratings, regulators, customers, social media, and public demands.¹⁸² In this climate, corporations are also choosing direct action. They are assessing their own ESG profiles and considering risks alongside other traditional performance metrics. Savvy corporate managers exercising their responsibilities must consider how ESG factors fit into business strategy and respond to pleas from impact investors and the public to engage with them.¹⁸³ They can communicate through annual reports, proxy statements, ESG-based reports, and branding campaigns. Ignoring ESG could lead to negative business outcomes in the current environment.

Critics contend ESG factors are too ambiguous or insubstantial and camouflage empty corporate promises, cosmetic actions, and routine disclosures.¹⁸⁴ However, state corporate law

180. *Id.*

181. *See* Lin, *supra* note 161, at 1558 (analyzing the roots of new corporate social activism).

182. *See id.* at 1544 (“[N]ew social media and financial technologies have dramatically changed the means and ends of corporate social activism in ways previously unimaginable.”).

183. *See* J. P. Dallmann, *Impact Investing, Just a Trend or the Best Strategy to Help Save Our World?*, FORBES (Dec. 31, 2018, 7:49 AM), <https://www.forbes.com/sites/jpdallmann/2018/12/31/impact-investing-just-a-trend-or-the-best-strategy-to-help-save-our-world/#e670c1875d11> (last visited July 5, 2019) (“[I]mpact investors are far more proactive in their intention for positive impact as opposed to merely avoiding the negative impacts.”) (on file with the Washington and Lee Law Review).

184. *See, e.g., ESG Beyond Greenwashing*, CITYWIRE (Sept. 6, 2018), <https://citywire.co.uk/wealth-manager/news/esg-beyond-greenwashing/a1152166> (last visited July 16, 2019) (“Today greenwashing [falsely touting a company’s products or policies as environmentally-friendly] has become more sophisticated, aided by the lack of a universal definition over what constitutes good corporate behavior and consequently, what are eligible investments. This ambiguity plays into the hands of companies purporting to exhibit ESG-friendly practices.”) (on file with the Washington and Lee Law Review).

remains steadfast in terms of its own priorities. The Honorable Leo E. Strine, Jr. makes clear that:

[d]espite attempts to muddy the doctrinal waters, a clear-eyed look at the law of corporations in Delaware reveals that, within the limits of their discretion, directors must make stockholder welfare their sole end, and that other interests may be taken into consideration only as a means of promoting stockholder welfare.¹⁸⁵

Decisions pertaining to ESG do not differ much from other decisions subject to the business judgment rule,¹⁸⁶ provided some impact on, or link to, shareholder value is identifiable. Such decisions “might include how corporations respond to climate change, how good they are with water management, implementing effective health and safety policies to protect against accidents, managing supply chains, [and] how they treat their workers.”¹⁸⁷

185. Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 768 (2015). States have created social enterprises such as public benefit corporations to better address stakeholder concerns. See, e.g., Omari Scott Simmons, *Judging the Public Benefit Corporation*, in THE CAMBRIDGE HANDBOOK OF SOCIAL ENTERPRISE LAW 354 (Benjamin Means & Joseph W. Yockey eds., 2018).

186. Robert Clark describes the business judgment rule as the principle that “the business judgment of the directors will not be challenged or overturned by courts or shareholders, and the directors will not be held liable for the consequences of their exercise of business judgment—even for judgments that appear to have been clear mistakes—unless certain exceptions apply.” ROBERT CHARLES CLARK, CORPORATE LAW § 3.4, at 124 (1986); see also FRANKLIN A. GEVURTZ, CORPORATION LAW 278–79 (2000) (“The idea underlying the rule is that courts should exercise restraint in holding directors liable for . . . business decisions which produce poor results or with which reasonable minds might disagree. This seems to be a sensible notion. After all, business decisions typically involve taking calculated risks.”).

187. Krell, *supra* note 178. See also Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005) (arguing corporate social responsibility initiatives are permitted pursuant to the broad discretion under Delaware law); Aronson v. Lewis, 473 A.2d 805 (Del. 1984), *overruled by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000) (analyzing the business judgment rule’s protections).

2. Corporate Power and Accountability

In their seminal book *The Modern Corporation and Private Property*, Adolf Berle and Gardiner Means “addressed two dimensions of corporate power: (i) the internal minimization of agency costs resulting from the separation of ownership and control between diffuse shareholders and executives; and (ii) the external abuse of corporate power at the expense of society at-large.”¹⁸⁸ The first dimension has dominated the corporate governance debate in the United States, whereas the latter has received less acceptance from U.S. scholars.¹⁸⁹ It reflects a populist uneasiness with concentrations of corporate power coupled with a lack of accountability for negative externalities and broader stakeholder concerns.¹⁹⁰ Overall, accountability remains the

188. Omari Scott Simmons, *Taking the Blue Pill: The Imponderable Impact of Executive Compensation Reform*, 62 SMU L. REV. 299, 333 n.199 (2009); see also ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 11–13, 17–18 (1932) (examining the consequences of separation of corporate ownership and control).

189. See, e.g., Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439–41 (2001) (asserting the most prominent global corporate governance paradigm is shareholder wealth maximization). But see FAIRFAX, *supra* note 17, at 680 (defining “stakeholder” as any group of individuals impacted by corporate actions, regardless of whether such group desires corporate profit maximization); Jonathan R. Macey, *Fiduciary Duties as Residual Claims: Obligations to Nonshareholder Constituencies from a Theory of the Firm Perspective*, 84 CORNELL L. REV. 1266, 1274 (1999) (asserting corporate decisions often implicate non-shareholder concerns); Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 716 (2002).

The progressive alternative, which is derived from the stakeholder theory of the corporation, suggests that corporate managers’ underlying social obligations are more extensive than maximizing shareholders’ wealth within the confines of the law. Specifically, progressive scholars contend that directors . . . ought to consider the implications of their actions on employees, consumers, suppliers (in some cases), the community, and the environment.

190. See Simmons, *supra* note 188, at 333. Historically, the scholarly discussion of the role of the corporation in society can be traced to the Berle–Dodd debate of the 1930s. See generally BERLE, *supra* note 188, at 11–13, 17–18; E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); see also Wells, *supra* note 174, at 78 (“Legal debates over corporate social responsibility stretch from the 1930s to the twenty-first century.”).

threshold issue in corporate governance, encompassing both internal and external dimensions.¹⁹¹

“For Adolf Berle, checks on a corporation’s economic power include[d] competition, profits, political intervention, and public consensus or sentiment.”¹⁹² He observed:

[A] modern American corporation understands well enough that it has a “constituency” to deal with. If its constituents—notably its buyers—are unsatisfied, they will go to the political state for solution. Hardly any present-day board of directors or corporation management would take the position that it could afford to disregard public opinion—or would last very long if it did.¹⁹³

He further notes that “[t]he corporation is now, essentially, a nonstatist political institution, and its directors are in the same boat with public office-holders. If ever corporate managers base their continued tenure on power and not on reason, the end is disaster.”¹⁹⁴ His characterization of corporate power as the primary issue in corporate governance raises questions concerning who is and who should be a corporation’s targeted audience.

“Adolph Berle and other commentators described the modern corporation as a major social institution rivaling government[s].”¹⁹⁵ Without question, it “touches virtually every aspect of contemporary life,” yet it does not necessarily reflect the accountability and democratic procedures that most citizens expect

191. See *supra* note 189 and accompanying text.

192. Simmons, *supra* note 188, at 330; see also ADOLF A. BERLE, JR., *THE 20TH CENTURY CAPITALIST REVOLUTION* 39, 54, 58 (1954) (arguing that public opinion is a check on the power of corporations).

193. See BERLE, *supra* note 192, at 56–57 (arguing that public opinion is a check on the power of corporations).

194. *Id.* at 60.

195. Simmons, *supra* note 188, at 337 n.224; see also Norton E. Long, *The Corporation, Its Satellites, and the Local Community*, in *THE CORPORATION IN MODERN SOCIETY* 202, 202 (Edward S. Mason ed., 1959)

The large corporation takes its place along with the church and the armed services as an organization that transcends the local territory and cuts across political boundaries, at times even those of the nation and state. For some of the members at least, the corporation represents a value-laden institution that outranks the local community as a focus of loyalty and a medium for self-realization.

from government.¹⁹⁶ In light of its complexity, modern corporate study should not be limited to legal analysis, but rather embrace the social sciences—politics, economics, history, sociology—to capture the full scope of its impact.¹⁹⁷

Modern society is witnessing a public-private convergence blurring traditional lines and spheres of influence between the private sector and government.¹⁹⁸ As these lines collapse, activists seek influence beyond avenues of government and public policy to include business and corporate policy.¹⁹⁹ Despite growing citizen demands for public accountability, commentators argue this perspective is problematic:

The notion of the corporation as a public institution or private government is both informative and misleading. It is informative in that it illuminates the extent to which the social impact of the corporation does resemble that of a government. But it is deceptive to the extent that it obscures the inability of the corporation to command compliance with its decisions. The reason that a corporation, unlike a democratically elected government, cannot be politically accountable to those affected by its decisions, is because the most important decisions made

196. Simmons, *supra* note 188, at 337. Berle's observations were not unique:

The corporate accountability movement represents an attempt to realize in practice what scholars such as Latham, Dahl, and others have argued in theory—namely that corporations wield the power of governments and should, therefore, be treated like governments. The movement is accurately described as a movement for corporate accountability because its basic thrust is to make corporate officials as responsive to those affected by their decisions as are elected officials. By reviving the symbols and mechanisms of corporate governance—the annual meeting, the annual report, the proxy resolutions, the board of directors—the advocates of corporate accountability are attempting to make the relationship between the officials of the private sector and the public resemble more closely that between government officials and their constituencies.

VOGEL, *supra* note 177, at 6–7 (1978).

197. Simmons, *supra* note 188, at 337 n.226. See Adolf A. Berle, Jr., *Foreword*, in *THE CORPORATION IN MODERN SOCIETY*, *supra* note 195, at ix, ix–xi.

198. See Lin, *supra* note 161, at 1558–59 (considering the corporate adoption of government objectives once believed to be beyond the reach of markets).

199. See *id.* at 1561 (arguing that activists will seek to change not only laws and public policies, but also “institutional practices and priorities at major corporations”).

by any firm are out of the control of those who govern it; they are dictated by the imperatives of a market economy.²⁰⁰

Another observer elaborates on the public-private distinction:

Shareholders frequently choose to be part of a corporation; many citizens do not choose to be part of a country. Shareholders in a corporate democracy that disagree with the corporation's actions and values can readily sell their shares; citizens of a democratic society cannot readily leave their countries without incurring significant costs. Given the differences between political democracies and corporate democracies, democratic moral values should not be supplanted by corporate market values.²⁰¹

Despite blurred lines between the public and private spheres, certain distinctions remain and should be considered when assessing the efficacy of shareholder activism in advancing civil rights. Ideally, the public, private, and nonprofit sectors operate in a mutually reinforcing state of symbiosis rather than antagonism.

C. Efficacy of Shareholder and Corporate Activism Versus Other Democratic Mechanisms in Protecting Minority Rights

The enthusiastic embrace of shareholder activism as a tool to bring about broad social change is a welcome development. It reflects a trend of outsourcing public functions and values to private actors²⁰² and stems in part from a frustration with interest group politics and existing democratic processes in the public context.²⁰³ However, overreliance on shareholder activism and similar private tactics may lead to an expectations gap; they are not an effective surrogate for persistent, organized, mobilized

200. VOGEL, *supra* note 177, at 225.

201. Lin, *supra* note 161, at 1592.

202. See Sidney A. Shapiro, *Outsourcing Governmental Regulation*, 53 DUKE L.J. 389, 434 (2003) (presenting instances where government regulators have outsourced the implementation of regulatory policy and the provision of public services).

203. See Douglas G. Smith, *A Comparative Analysis of the Proxy Machinery in Germany, Japan, and the United States: Implications for the Political Theory of American Corporate Finance*, 58 U. PITT. L. REV. 145, 224 (1996) (asserting that interest group politics are a primary force shaping United States proxy rules).

social movements that employ diverse tactics in traditional democratic venues.²⁰⁴ Lessons from the civil rights movement suggest broader systemic change will require sustained, combined pressure from other institutional, social, and public actors. Shareholder activist attempts by Bayard Rustin and James Peck to change Greyhound's segregative practices were not successful.²⁰⁵ Court victories that gave plaintiffs a legal hook reflect how democratic institutions—judicial, legislative, executive—may broadly signal social change and inspire greater activism.²⁰⁶

1. Modern ESG Activism Compared to Past Civil Rights Movement Activism

What does civil rights activism look like in the modern era? How does the earlier Civil Rights Era compare with today's ESG landscape? While civil rights fall under the umbrella of human rights, today's ESG landscape is much more expansive, extending to economic rights,²⁰⁷ voting rights, housing,²⁰⁸ jobs, and healthcare²⁰⁹ and encompassing discrimination based on gender, sexual orientation, disabilities, and immigration status.²¹⁰

204. See Lin, *supra* note 161, at 1540–44 (explaining how, despite some shareholder activism successes, corporations often tend to passively ignore or actively oppose the goals of social activism).

205. See *supra* Part I (describing Peck's efforts); Marens, *supra* note 4, at 382 (describing Peck's unsuccessful push to desegregate Greyhound).

206. See *supra* Part II (employing *Belton* as an example of activism by an institutional actor, namely the Delaware Court of Chancery).

207. See Kate Sablosky Elengold, *Consumer Remedies for Civil Rights*, 99 B.U. L. REV. 587, 640 (2019) (advocating economic consumer protection as a tool for civil rights).

208. See Richard A. Epstein, *Property as a Fundamental Civil Right*, 29 CAL. W. L. REV. 187, 207 (1992) (endorsing housing as a civil right).

209. See David Barton Smith, *Healthcare's Hidden Civil Rights Legacy*, 48 ST. LOUIS U. L.J. 37, 60 (2003) (examining the desegregation of healthcare facilities during the Civil Rights Era).

210. See *generally* KING IN THE WILDERNESS (HBO 2018) (chronicling the last years of Martin Luther King, Jr.'s life, from his role in the Voting Rights Act of 1965 to his assassination in 1968). A strong argument can also be made that the aims of the civil rights movement and the later Black Power movement were not limited to traditional civil rights such as voting and participation, but extended

Shareholder activism is largely a top-down, indirect approach, whereas Civil Rights Era activism reflected bottom-up tactics with persistent demands and protests to effectuate change throughout society.²¹¹ Tactics included litigation,²¹² education,²¹³ direct protest, civil disobedience,²¹⁴ shareholder activism,²¹⁵ self-defense,²¹⁶ and other spontaneous and planned individual and group initiatives.²¹⁷ Activists executed a multipronged attack on all aspects of segregation in every aspect of life: public accommodations, education, housing, and employment.²¹⁸ Civil rights advocacy organizations like the Congress of Racial Equality (CORE), Southern Christian Leadership Conference (SCLC), Student Nonviolent Coordinating Committee (SNCC), and the NAACP LDF developed ambitious long-term strategies,

to economic rights. *Id.*

211. See generally MORRIS, *supra* note 10 (challenging the assumption that the civil rights movement was driven by national leadership as opposed to grassroots efforts).

212. See, e.g., *supra* Part II.C (highlighting the litigation surrounding *Brown v. Board of Education*); Brent E. Simmons, *Charles Hamilton Houston*, 69 NAT'L LAW. GUILD REV. 178, 181–83 (2012) (canvassing the career of civil rights lawyer Charles Hamilton Houston, whose desegregation cases successfully established binding national precedent).

213. See generally MORRIS, *supra* note 10 (discussing civil rights leaders' efforts to promote quality African American education to produce a generation of strong African American leaders).

214. See, e.g., Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1002 n.27 (1989) (discussing King's civil disobedience); Interview with James Peck, *supra* note 5.

215. See *supra* notes 4–16 and accompanying text (examining Peck's "Proxy Campaign").

216. See generally CHARLES E. COBB, JR., THIS NONVIOLENT STUFF'LL GET YOU KILLED: HOW GUNS MADE THE CIVIL RIGHTS MOVEMENT POSSIBLE (2014) (describing the role that armed self-defense played in the survival and liberation of black communities).

217. See generally MORRIS, *supra* note 10 (arguing the activities of "local movement centers" were responsible for the rapid emergence of sustained civil rights victories in southern communities during the Civil Rights Era); Stephen Zunes & Jesse Laird, *The U.S. Civil Rights Movement (1942–1968)*, INT'L CTR. ON NONVIOLENT CONFLICT (2010), <https://www.nonviolent-conflict.org/wp-content/uploads/2016/02/The-US-Civil-Rights-Movement-1942-1968.pdf> (describing how Civil Rights leaders purposefully used mass media, poetry, visual arts, and music to promote social change).

218. See generally Zunes & Laird, *supra* note 217.

coordinated efforts, and amplified the demands of marginalized minority groups.²¹⁹ Such strategies and tactics have served as blueprints for advancing other movements.²²⁰ By contrast, the question remains whether impact-investor activism and the ESG emphasis will engender an enduring commitment to civil rights and inspire significant ground-level and broader public changes beyond the corporations themselves.

Another important question concerns who has the responsibility to ensure whether corporations implement social aims internally and externally. Who assesses the quality and effectiveness of execution? Who follows up over time? Should these tasks rest with the corporations themselves via private ordering, or is more robust outside oversight needed to achieve ESG aims? The systemic societal impacts of shareholder ESG activism are uncertain because the ESG framework operates largely within a paradigm that relies on the private market to right public wrongs.²²¹ It tilts largely toward private autonomy versus public accountability. Some critics might argue that overemphasizing shareholder activism, within this context, actually weakens demands for government solutions and limits government accountability for correcting major social problems like civil rights injustices.²²² At the extreme, it may decrease public spending on services and divert resources from vulnerable groups.²²³

219. See *supra* notes 4–16 and accompanying text (articulating the NAACP LDF’s litigation strategy); see also CATSAM, *supra* note 5, at 13–46 (describing CORE and SNCC’s role in organizing the Freedom Rides).

220. See, e.g., PAUL LE BLANC & MICHAEL D. YATES, A FREEDOM BUDGET FOR ALL AMERICANS: RECAPTURING THE PROMISE OF THE CIVIL RIGHTS MOVEMENT IN THE STRUGGLE FOR ECONOMIC JUSTICE TODAY (2013) (interpreting Martin Luther King, Jr.’s “Freedom Budget”—a proposal to provide jobs and basic welfare to all Americans—as an economic blueprint for the modern labor movement); Odeana R. Neal, *The Limits of Legal Discourse: Learning from the Civil Rights Movement in the Quest for Gay and Lesbian Civil Rights*, 40 N.Y.L. SCH. L. REV. 679, 718 (1996) (adopting civil rights movement strategies in the fight for LGBTQ rights).

221. See *supra* Part III.B.1 and accompanying text (analyzing the modern ESG framework).

222. See generally Chatterji & Richman, *supra* note 166 (warning against progressive overreliance on corporate social responsibility efforts to achieve agendas).

223. See Michele Giddens, *Demographic Trends are Driving Demand for Impact Investment—And the Industry is Starting to Adapt*, FORBES (July 5, 2018),

Shareholder activism as a form of civil rights advocacy is perhaps a symptom of an illness—declining state support, political gridlock, and voter disenfranchisement. In an environment of deregulation, privatization, and political gridlock, people may look toward corporations for quicker answers and greater agency.²²⁴ Recognizing the influence of corporations, shareholder demands are a pragmatic strategy, yet without other approaches they will have limited systemic impact on such meta-problems as civil rights.²²⁵

2. Ownership and Representativeness

Roughly fifty percent of U.S. citizens do not own a single share in a company, directly or indirectly.²²⁶ Equity ownership may not reflect preferences of non-equity holders and the public. Activist investors, largely composed of labor unions, mutual funds, individuals, pension funds, and hedge funds (in which pension funds are often invested) may reflect more affluent and elite preferences.²²⁷ Further, one scholar suggests that “because the

7:49 AM), <https://www.forbes.com/sites/michelegiddens/2018/07/05/demographic-trends-are-driving-demand-for-impact-investment-and-the-industry-is-starting-to-adapt/#163144434264> (last visited July 16, 2019) (“[T]o truly democratize impact investing, we need to make it more accessible to ordinary savers.”) (on file with the Washington and Lee Law Review).

224. See Lin, *supra* note 161, at 1559 (“[C]ontemporary political gridlock and obstructionist partisanship have made these corporate channels of social change more appealing relative to the traditional public channels of government.”).

225. See *id.* at 1562 (emphasizing the importance of promoting social change through both public government and private business channels).

226. See Christopher Ingraham, *For Roughly Half of Americans, the Stock Market’s Record Highs Don’t Help at All*, WASH. POST (Dec. 18, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/12/18/for-roughly-half-of-americans-the-stock-markets-record-highs-dont-help-at-all> (last visited July 6, 2019) (reporting fewer than half of American households indirectly own stock via retirement accounts and similar vehicles, while “[f]ewer than 14 percent of American households directly own stock in any company”) (on file with the Washington and Lee Law Review).

227. See Yuliya Ponomareva, *Shareholder Activism Is on the Rise: Caution Required*, FORBES (Dec. 10, 2018, 12:27 PM), <https://www.forbes.com/sites/esade/2018/12/10/shareholder-activism-is-on-the-rise-caution-required/> (last visited July 16, 2019) (defining shareholder activism and describing various types of shareholder activists) (on file with the Washington and Lee Law Review).

distribution of popular ownership of corporations over-represents wealthier and higher income households, decisions made through shareholder voting may be less reflective of social welfare than decisions made through more broadly democratic bodies, and therefore likely to be only a second-best solution.”²²⁸ Many institutional investors engage in tepid to moderate social activism. The impact investor community is smaller and ostensibly acts as a proxy for broader interests,²²⁹ but its composition is overwhelmingly homogenous from a race and class perspective.²³⁰ The lack of representativeness and diversity inevitably creates blind-spots.²³¹ Planning for vulnerable groups is not the same as planning with them.

3. Majoritarian Politics Disfavors Vulnerable Minorities

Context matters, and the status of majoritarian politics can influence the success of shareholder activism in the civil rights arena. In theory, highly polarized majoritarian politics that overwhelmingly disfavor minority rights may render shareholder civil rights activism less effective.²³² Greyhound and other companies during the Civil Rights Era did not immediately change their policies in response to the Proxies Campaign.²³³ Common

228. Scott Hirst, *Social Responsibility Resolutions*, 43 J. CORP. L. 217, 242 (2018).

229. See JP Dallman, *Impact Investing, Just a Trend or the Best Strategy to Help Save Our World?*, FORBES (Dec. 31, 2018, 7:49 AM), <https://www.forbes.com/sites/jpdallmann/2018/12/31/impact-investing-just-a-trend-or-the-best-strategy-to-help-save-our-world/> (last visited July 16, 2019) (describing those interests as financial as well as social and environmental) (on file with the Washington and Lee Law Review).

230. See, e.g., Andy Kiersz & Portia Crowe, *These Charts Show Just How White and Male Wall Street Really Is*, BUS. INSIDER (Aug. 25, 2015, 9:40 AM), <https://www.businessinsider.com/wall-street-bank-diversity-2015-8> (last visited July 16, 2019) (finding in 2015 that “80% of executives at Goldman Sachs, Wells Fargo, JPMorgan, Bank of America, Citigroup, and Morgan Stanley were white”) (on file with the Washington and Lee Law Review).

231. *Id.*

232. See Lin, *supra* note 161, at 1585 (discussing how unpopular issues will likely be ignored as a corporation “picks and prioritizes social-political causes”).

233. See *supra* notes 4–16 and accompanying text (noting the campaign’s origin and strategy).

excuses for certain businesses and municipalities' acquiescence to segregation were economic; that is, lost revenues and alienation of their white customer base.²³⁴ They were effectively claiming that they were not racist, but a majority of their customers and constituents were. And they often discounted the power of the black purse. Charles Hamilton Houston of the NAACP Legal Defense Fund thought economics and financial strain would eventually aid the cause because public actors might go bankrupt when forced to meet the equalization requirements of *Plessy v. Ferguson*.²³⁵ The impact of the Montgomery Bus Boycott, which brought Martin Luther King, Jr. to national prominence, was economic²³⁶—about 70% of Montgomery bus passengers were African American²³⁷—and James Peck argued that segregation had negative economic consequences because Greyhound customers, who experienced segregation, would bring expensive lawsuits.²³⁸ Civil rights activists were right about both the economic and societal costs. Segregation was neither rational, morally justified, nor economically sensible.

4. *Mixed Motives*

Impact investors still want financial returns along with their social influence.²³⁹ These mixed motives reflect conflicts. The basic formula—shareholder return on investment equals financial return plus social impact—hides complications. How much

234. See Lin, *supra* note 161, at 1541 (explaining it was common for corporations to engage in segregation “out of ‘local custom’”).

235. See Simmons, *supra* note 212, at 181–82 (describing the successful economic argument for desegregation that Houston pioneered).

236. See Kennedy, *supra* note 214, at 1054 (describing the boycott’s economic pressure on local businesses, which quickly “broke ranks” with segregative policies).

237. See *id.* at 1020, 1022 (during the Montgomery Bus Boycott “[u]pwards of ninety percent of the black, bus-riding population—some 40,000 Negroes—honored the plea to stay off the buses”).

238. See Marens, *supra* note 4, at 382 (examining Peck’s economic arguments for desegregation).

239. See Lin, *supra* note 161, at 1585–86, 1589 (“While many corporations have become more socially responsible, corporations and the laws that govern them do not focus on social externalities but on profits for shareholders. This focus will naturally constrain some of their most noble social impulses.”).

financial return do investors want and are they willing to tolerate: one percent, five percent, ten percent? Should businesses prioritize social impact or financial concerns? An intertemporal perspective, allowing companies to prioritize financial concerns at one time and social concerns at another, may be prudent. The former may potentiate the latter.

5. *Definitional and Measurement Challenges*

Despite desiring a social impact, investors may have difficulty defining and measuring it. For example, what does social impact related to civil rights look like? Does it change representation at a specific company or industry-wide, including directors, the c-suite, employees, suppliers, products, and advertising? Alternatively, is it about company financial support or sponsorship for advocacy organizations that work to advance minority rights? Methodologies for determining social impact and ESG ratings are emerging but without a consensus.²⁴⁰ Perhaps a preferred standard will emerge from proxy advisers like Institutional Shareholder Services (ISS) and Glass Lewis.²⁴¹ However, advisory

240. See Adam Bendell, *Impact Investors Fail to Measure Negative Outcomes: A "Positive Net Impact" Approach Would Take Account of Inevitable Unwanted Effects*, FIN. TIMES (May 12, 2019), <https://www.ft.com/content/8ffb4e56-546d-11e9-8b71-f5b0066105fe> (last visited Sept. 23, 2019) (emphasizing the need for impact investment rhetoric separating "values alignment" (assets reflecting shareholder values) from "impact creation" (deploying assets to solve global issues)) (on file with the Washington and Lee Law Review); *Global Launch: Operating Principles for Impact Investment*, WBG INT'L FIN. CORP. (Apr. 12, 2019), [http://www.ifc.org/wps/wcm/connect/76e6607a-11a4-4ae-a36c-7116b3dab3/impactprinciples_booklet_final_web_4-12-19.pdf?mod=aj\[eres](http://www.ifc.org/wps/wcm/connect/76e6607a-11a4-4ae-a36c-7116b3dab3/impactprinciples_booklet_final_web_4-12-19.pdf?mod=aj[eres) ("The question for many investors is how to grow the level of investments targeting impact. Despite the increased interest in and number of product launches claiming to be impact investments, there is no common discipline for how to manage investments for impact and the systems needed to support this.").

241. See CTR. ON EXEC. COMP., A CALL FOR CHANGE IN THE PROXY ADVISORY INDUSTRY STATUS QUO: THE CASE FOR GREATER ACCOUNTABILITY 15 (2011), <http://online.wsj.com/public/resources/documents/ProxyAdvisoryWhitePaper02072011.pdf> (describing the development of ISS and Glass Lewis). Compare Ike Brandon & Jared Whitley, *Corporate Governance Oversight and Proxy Advisory Firms*, 41 REG. 18, 20 (2018) (arguing that proxy advisors wield too much power, especially through their "[e]fforts to push environmental, socially responsible, and good governance priorities via proxy battles"), with George W. Dent Jr., *A Defense*

firm guidance and ratings have been criticized for their sometimes tenuous link to corporate performance,²⁴² and these critiques are likely to intensify in the context of ESG questions.²⁴³

IV. Implications

The Civil Rights Era legacy of *Belton v. Gebhart* and the noble efforts of Louis Redding, Jack Greenberg, Chancellor Collins Seitz, Pierre S. du Pont, Bayard Rustin, and James Peck illustrate that advancing civil rights requires a range of tactics that leverage public, private, and philanthropic resources. Shareholder activism will work best as part of a multipronged strategy, not as a substitute for other types of activism. It is certainly bold in the sense that it seeks a recalibration of corporate institutional arrangements and priorities. It is prudent in recognizing corporate power and its ability to influence society as well as the limitations of other advocacy venues. On the other hand, even if shareholder activists *can* help to advance the modern civil rights agenda, their willingness to do so remains uncertain.

The history and legacy of *Belton v. Gebhart* reveal the complex challenges associated with advancing civil rights. Modern scholars, practitioners, stakeholders, and observers must consider

of Proxy Advisors, 2014 MICH. ST. L. REV. 1287, 1307 (2014) (arguing that claims of proxy advisor power are exaggerated and that limiting the current powers of proxy advisors would have several negative consequences).

242. See CTR. ON EXEC. COMP., *supra* note 241, at 58–59 (describing the prevalence of inaccuracies in proxy advising firms' reports); Robert M. Daines et al., *Rating the Ratings: How Good are Commercial Governance Ratings?*, 98 J. FIN. ECON. 439, 439 (2010) ("Commercial ratings do not predict governance-related outcomes with the precision or strength necessary to support the bold claims made by most [proxy advisory and corporate governance rating firms].").

243. See Jennifer Thompson, *'Green' Funds Can Fall Short of Buyers' Expectations: Investors Call for Greater Clarity on Products' Credentials*, FIN. TIMES (May 12, 2019), <https://www.ft.com/content/644c1ec4-39d9-11e9-9988-28303f70fcff> (last visited July 16, 2019) ("Investors often raise an eyebrow when looking at a fund's marketing blurb and underlying assets side by side. . . . [S]ome suggest [greenwashing] will become more prevalent as managers come under pressure to take advantage of surging interest in investing sustainably, or to adhere to more stringent [ESG] principles.") (on file with the Washington and Lee Law Review).

key questions about shareholder activism and civil rights, particularly with respect to the ESG movement:²⁴⁴

1. Who measures ESG impact and how?
2. Is the desired impact related to a specific corporation's operations or broader systems or both?
3. Is ESG largely a disclosure-based regime, consistent with the market paradigm?
4. Is ESG simply one activist tool among many?
5. Do we want greater public accountability through traditional democratic bodies than shareholder activism offers?
6. Does ESG as presently conceived downplay or enhance the importance of democratic venues for activism?

Future research on these important questions and others will deepen our understanding of ESG-related shareholder activism and its potential to advance civil rights in the contemporary context.

244. See generally Peter Adkins, Marc Gerber & Richard Grossman, *Making Sense of the Current ESG Landscape*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Oct. 18, 2018), <https://corpgov.law.harvard.edu/2018/10/18/making-sense-of-the-current-esg-landscape/> (last visited Aug. 21, 2019) (emphasizing the need for boards of directors and management of public companies to understand and adapt to the increasing prominence of ESG factors) (on file with the Washington and Lee Law Review).