

Kalven For Corporations: Should For-Profit Corporations Adopt Public Statement Policies?

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In the last few years, corporations have been called upon to take public positions on myriad issues unconnected to core business concerns. Demands for public statements may arise from various stakeholders, as well as from the general public and the media. Sometimes such statements are uncontroversial, but other times, firms find themselves in a no-win position, in which both silence and voice will offend some core constituency. Crafting meaningful public-facing statements becomes a major challenge.

In this article, we ask whether these corporations should adopt some form of express upfront policy on when they will and when they will not speak out. One place to start is to consider the approach of some universities, which have come to resemble large corporations in some ways. In particular, should for-profit corporations adopt something akin to the University of Chicago's 1967 Kalven Report on the University's Role in Political and Social Action? This report adopts the position that as a general matter the University will not speak on social and political issues of the day, with exceptions for those that directly affect the University's operations. In answering this question, we discuss the similarities and differences between publicly held for-profit corporations and universities and outline the factors that can guide these corporations in deciding whether to adopt such a policy, what such a policy would look like, and how it might differ from the Kalven Report.

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In the last few years, publicly held for-profit companies have been called upon to take public positions on myriad issues unconnected to core business concerns. Demands for public statements may arise from customers, employees, shareholders (large and small), the media, and others. In some cases, issuing a statement can be a sound business decision, but in others, firms find themselves in a no-win position, in which both silence and voice will offend some core constituency. Crafting meaningful public-facing statements becomes a major challenge.

Somewhat ironically, the demand for statements may reflect the increasing trust in business as compared to government, as well as its more prominent role in society.¹ It also reflects the long-standing debates between shareholder and stakeholder primacy as the predominant purpose of the public corporation. As the role of stakeholders receives more attention, demands for public statements may increase. For example, according to one recent poll, 54% of employees worldwide want CEOs to speak publicly on political and social issues, and 53% of consumers want brands to become involved in social issues that do not directly impact the business.²

Conflict between stakeholder and shareholder demands is not inevitable—a firm with a need for high-skilled scarce labor, for example, may be maximizing its shareholder value by issuing statements that attract talent. If consumers back up their expressed preference for brand activism with purchases, then owner and customer interests can be aligned. But there are also instances in which stakeholder and shareholder interests diverge. If employees, for example, want a firm to exit a market for political reasons, then customers and shareholders may suffer.

So, when should firms speak out on public issues? The October 7 Hamas massacre in Israel and subsequent events have brought this question to the fore. As CEOs and Boards grapple with what, if anything, to say, there is no universal answer, given the range of firm characteristics and operating environments.³ But stepping back from the current moment may provide opportunities for general principles to guide discussions when future

¹ 2022 Edelman Trust Barometer, EDELMAN (2022), <https://perma.cc/7837-7YK4>.

² Paul A. Argenti, *When Should Your Company Speak Up About a Social Issue?*, HARV. BUS. REV. (Oct. 16, 2020), <https://perma.cc/EMR9-S2WH>.

³ See Thomas A. Cole, *Business and Politics: When Should Companies Take a Public Position?*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 6, 2021), <https://perma.cc/H5YE-J8MT>.

demands for public statements arise. That is our goal in this article.

We approach the issue with a question: might corporations⁴ consider some form of express policy on when they will not speak out? One place to start is to consider the approach of some universities. In particular, we ask whether corporations ought to adopt something akin to the University of Chicago's 1967 Kalven Report on the University's Role in Political and Social Action. This report adopts the position that as a general matter the University will not speak on social and political issues of the day, with exceptions for those that directly affect the University's operations.

Contrasting the experiences of universities which have and have not adopted such policies can provide useful lessons for corporations. After all, universities are also large firms, rivalling some publicly traded corporations in scale and complexity.⁵ They also face competing demands from different stakeholders, including students, alumni, parents, donors, trustees, faculty, staff, and communities in which they are located. Like corporate directors and officers, academic leaders are also engaged in an extensive debate about when to speak out. The debate comes in response to a trend of universities issuing statements on Supreme Court decisions, racial hate crimes, and perhaps most bizarrely, faraway foreign conflicts with no direct effect on the university. These statements increasingly resemble those of corporate and political leaders. But recent events have highlighted a core problem with these statements: their inherent partiality in a pluralistic world. What possible statement on Israel and Palestine could a corporate leader issue that would be both impartial and non-vacuous? While corporate-speak has long been accused of banality, that is hardly a virtue to lean in to.

In the analysis below, we discuss the similarities and differences between publicly held for-profit corporations and universities, and outline factors to guide corporations in deciding whether to adopt such a policy on public statements. We identify challenges that corporations will face that are distinct from universities. Given the diversity of corporations, we recognize that the Kalven principle will not translate perfectly for every corporate

⁴ For the remainder of this Article, we will use the term "corporation" to refer to the publicly held for-profit corporations at the core of our analysis.

⁵ See James Rushing Daniel, *The Ever-More-Corporate University*, CHRON. OF HIGHER EDUC. (Nov. 6, 2023), <https://perma.cc/29VU-339T>.

setting. Some corporations will inevitably have to take positions favored by certain constituencies. But these considerations can be incorporated into a modified Kalven-like policy that still provides *ex ante* commitment and guidance to management about when they must speak and when they must remain silent. Such *ex ante* commitment and planning are features of good governance for both universities and corporations.

Our paper is structured as follows. First, we describe the trends in corporate speech and provide examples of recent controversies. Next, we trace the debate over the Kalven Report, at the University of Chicago and beyond, and note the remarkable shift in academic attitudes toward it in the last year, beginning with the debacle around Judge Kyle Duncan's appearance at Stanford Law School. We then discuss the similarities and differences between for-profit corporations and universities and outline a proposal for a principle of neutrality. The final part concludes.

I. CORPORATE SPEECH

Recent examples demonstrate how difficult it is for firms to take meaningful political positions without alienating one or more groups of stakeholders. We start by reviewing a few of these incidents as case studies.

Most notorious in recent years was Disney's handling of Florida's Parental Rights in Education Act (also known as the "Don't Say Gay" law).⁶ Waffling from silence, to explanation, to a firm statement of opposition, the company's approach to the issue alienated employees who opposed the bill and started a seemingly endless public feud with Florida Governor Ron DeSantis who supported it.⁷

When the law was first enacted, Disney CEO Bob Chapek chose silence.⁸ As pressure from employees began to grow, he sent a firmwide email. The email actually opened with comments on another topic of public discourse. Chapek opened by "acknowledging all those impacted by the invasion of Ukraine." He then went on to explain that he had met "with a small group Disney LGBTQ+ leaders" to discuss the Florida law. From there he

⁶ See Brooks Barnes & Jesus Jiménez, *What We Know About the DeSantis-Disney Dispute*, N.Y. TIMES (May 19, 2023), <https://perma.cc/H82X-S58P>.

⁷ *Id.*

⁸ See Brooks Barnes, *Disney C.E.O Says Company Is 'Opposed' to Florida's 'Don't Say Gay' Bill*, N.Y. TIMES (Mar. 9, 2022), <https://perma.cc/U2SM-RQUR>.

expressed his support for LGBTQ+ employees, before explaining his silence:

As we have seen time and again, corporate statements do very little to change outcomes or minds. Instead, they are often weaponized by one side or the other to further divide and inflame. Simply put, they can be counterproductive and undermine more effective ways to achieve change.⁹

The statement did not have the intended effect. Employees' complaints increased. Calls to boycott Disney spread on social media.¹⁰ Abigail Disney, a shareholder and frequent critic of management, took to Twitter to complain that the firm had chosen to "look the other way."¹¹ It didn't help that Chapek's predecessor (and later replacement), Bob Iger, had already taken to Twitter to announce his opposition to the law.¹²

Chapek subsequently made a firmer statement that Disney had been "opposed to the bill from the outset," but had thought it "could be more effective working behind the scenes."¹³ This statement did not satisfy those opposed to the bill, but it did set off a political war. Governor DeSantis wasted no time in issuing a statement as part of a fundraising message that "[i]f Disney wants to pick a fight, they chose the wrong guy."¹⁴ Under DeSantis' leadership, the Florida government took several retaliatory moves that were later the subject of a First Amendment lawsuit filed by Disney, though that lawsuit was dismissed in January 2024.¹⁵

Chapek's handling of the matter was widely criticized, and his public relations head was forced to depart in late April. Later,

⁹ Dawn Chmielewski, *Disney CEO, Responding to LGBTQ Employees, Says Company's Stories Promote Inclusion*, REUTERS (Mar. 7, 2022), <https://perma.cc/J5UX-ZBF2>.

¹⁰ Christopher Palmeri, *Disney Avoids Stance on Florida's 'Don't Say Gay' Measure*, BLOOMBERG (Mar. 7, 2022), <https://perma.cc/W8B2-LY8N>.

¹¹ Abigail Disney (@abigaildisney), TWITTER (Mar. 6, 2022, 6:12 AM), <https://perma.cc/3H35-AUCQ>.

¹² Robert Iger (@RobertIger), TWITTER (Feb. 24, 2024, 10:21 PM), <https://perma.cc/NEY8-SU7H>.

¹³ Frank Pallotta, *Disney CEO Says He Will Meet with Ron DeSantis to Oppose 'Don't Say Gay' Bill*, CNN BUS. (Mar. 9, 2022), <https://perma.cc/KQ6E-K8RJ>.

¹⁴ Barnes & Jiménez, *supra* note 6.

¹⁵ Mike Schneider, *Federal Judge Dismisses Disney's Free Speech Lawsuit Against DeSantis*, AP NEWS (Jan. 31, 2024), <https://perma.cc/4EJ6-Q8K8>.

the Board of Directors fired Chapek and rehired Iger.¹⁶ While there were many factors contributing to that decision, the DeSantis-Disney debacle was certainly part of the equation.¹⁷

Other firms have faced similar pressure to speak out from all directions. Anheuser-Busch became a target in response to Bud Light's marketing efforts that featured transgender social media influencer Dylan Mulvaney. As part of the campaign, Mulvaney, who had been very public about her transition to womanhood, posted an Instagram celebrating "day 365 of womanhood" with a Bud Light can displaying her image.¹⁸ The campaign led to a call for boycott from rightwing groups. Anheuser-Busch tried to remain silent, with its CEO ultimately issuing a statement declaring, "We never intended to be part of a discussion that divides people. We are in the business of bringing people together over a beer."¹⁹ Again, the statement did not have the intended effect. As Professor Daniel Kirshman told the *New York Times*, "Bud Light's missteps felt like a betrayal to both its liberal and conservative customers, and that trust is going to take months, if not years, to rebuild."²⁰ The incident led to Bud Light losing its position as the top-selling beer in the United States.²¹

Some companies have tried to navigate the difficult path of remaining silent on certain issues while taking positions on others. Consider the contrast between the National Basketball Association's (NBA)²² statements on China in 2019 and its statements on George Floyd's death in 2020. In 2019, after an official of the Houston Rockets posted a tweet in support for Hong Kong protesters and then deleted the tweet, the NBA found itself facing pressure to take a position on the situation.²³ China's state broadcaster threatened to suspend broadcasts of NBA games, and

¹⁶ Brooks Barnes, *Disney Brings Back Bob Iger After Ousting Chapek as C.E.O.*, N.Y. TIMES (Nov. 20, 2022), <https://perma.cc/BKR2-896D>.

¹⁷ *See id.*

¹⁸ Dylan Mulvaney (@dylanmulvaney), INSTAGRAM (Apr. 1, 2023), <https://perma.cc/MQE3-GH5G>.

¹⁹ Press Release, Anheuser-Busch, *Our Responsibility to America* (Apr. 14, 2023), <https://perma.cc/4FAK-9JUR>.

²⁰ J. Edward Moreno, *Bud Light Is No Longer America's Top-Selling Beer After Boycott*, N.Y. TIMES (June 14, 2023), <https://perma.cc/U4KA-MYEY>.

²¹ *Id.*

²² The NBA is not technically a corporation but rather an association of corporations (the teams). The distinction does not affect our analysis.

²³ Alfred Cang & Derek Wallbank, *How a Quickly-Deleted Tweet About China Got Pretty Much Everyone Mad at the NBA*, TIME (Oct. 7, 2019), <https://perma.cc/2TWT-4N2L>.

Chinese sponsors “paused their deals with the Rockets.”²⁴ On the other side, Senator Josh Hawley called for the NBA to “apologize for groveling to Chinese Communist party.”²⁵ Beto O’Rourke joined in tweeting, calling for an apology for “blatant prioritization of profits over human rights.”²⁶

Ultimately, the NBA navigated its way through the situation, with Commissioner Adam Silver issuing a statement that did not take a position on the underlying issue—“[i]t is not the role of the NBA to adjudicate those differences”—but strongly affirmed the speech rights of its employees and team owners. As he put it: “the NBA will not put itself in a position of regulating what players, employees and team owners say or will not say on these issues. We simply could not operate that way.”²⁷ In contrast, in 2020, the NBA commissioner took a strong position in response to George Floyd’s death, writing to employees:

Like you I spent the weekend watching the protests around the country over the deaths of George Floyd, Ahmaud Arbery and Breonna Taylor. As a league, we share the outrage and offer our sincere condolences to their families and friends. Just as we are fighting a pandemic, which is impacting communities and people of color more than anyone else, we are being reminded that there are wounds in our country that have never healed.²⁸

There are counter-examples, in which corporations took strong positions on social issues without facing significant backlash. In 2015, Apple’s CEO wrote an op-ed in the *Washington Post* blasting Indiana and other states for passing religious freedom legislation, which he described as allowing discrimination against same-sex couples. The statement was unequivocal:

²⁴ Daniel Victor, *Hong Kong Protests Put N.B.A. on Edge in China*, N.Y. TIMES (Oct. 7, 2019), <https://www.nytimes.com/2019/10/09/learning/lesson-of-the-day-hong-kong-protests-put-nba-on-edge-in-china.html>.

²⁵ Josh Hawley (@HawleyMO), TWITTER (Oct. 7, 2019, 12:59 PM), <https://perma.cc/DXA5-H4XZ>.

²⁶ Beto O’Rourke (@BetoORourke), TWITTER (Oct. 6, 2019, 8:22 PM), <https://perma.cc/4N5V-7ZXW>.

²⁷ Statement, Nat’l Basketball Ass’n, Adam Silver’s Statement on NBA and China (Oct. 8, 2019), <https://perma.cc/W6ZK-BPQP>.

²⁸ Memorandum, Nat’l Basketball Ass’n, Memo from NBA Commissioner Adam Silver to League Employees, (May 31, 2020), <https://perma.cc/5MWV-8THX>.

These bills rationalize injustice by pretending to defend something many of us hold dear. They go against the very principles our nation was founded on, and they have the potential to undo decades of progress toward greater equality.²⁹

It does not appear that Apple—or the several other corporations who issued similar statements in 2015—faced major backlash.

And what happens if corporations remain totally silent, even when a statement would be the cheapest of talk? Unfortunately, a herd mentality forms and those who deviate can be punished severely. In April 2021, a long list of corporations, law firms, and even more CEOs, took out a two-page advertisement in the *Wall Street Journal* and *New York Times* declaring, “We Stand for Democracy,” noting a responsibility “to defend the right to vote and to oppose any discriminatory legislation or measures that restrict or prevent any eligible voter from having an equal and fair opportunity to cast a ballot,” and “call[ing] upon all Americans to join us in taking a nonpartisan stand for this most basic and fundamental right of all Americans.”³⁰

Those who didn’t sign were singled out in media coverage in the *New York Times*, the *Washington Post*, *Forbes*, and other outlets. The *New York Times DealBook* ran a piece entitled, “The C.E.O.s Who Didn’t Sign a Big Defense of Voting Rights: Hundreds of leaders and companies signed a letter opposing strict limits. They did not.”³¹ The article called out Coca-Cola and Delta, noting that they were “perhaps fearing more blowback for earlier statements and also not feeling the need to speak again.” Walmart was also called out for not signing. Their CEO explained the abstention to his employees, “We are not in the business of partisan politics.” But he still felt compelled to add “we do want to be clear that we believe broad participation and trust in the election process are vital to its integrity.”³²

Finally, like universities, for-profit businesses have faced recent pressure to take a position on Israel and Palestine. Some of

²⁹ Tim Cook, Opinion, *Pro-Discrimination ‘Religious Freedom’ Laws Are Dangerous*, WASH. POST (Mar. 29, 2015), <https://perma.cc/8R7F-AQUQ>.

³⁰ *We Stand for Democracy*, WASH. POST (Apr. 14, 2021), <https://perma.cc/2JZ7-S7P5>.

³¹ Andrew Ross Sorkin, et al., *The C.E.O.s Who Didn’t Sign a Big Defense of Voting Rights*, N.Y. TIMES (Apr. 14, 2021), <https://perma.cc/3XKV-9WDY>.

³² *Id.*

this preceded the current Israel-Gaza war. For example, when the ice cream maker Ben & Jerry's announced that it was no longer selling its products in the Occupied Palestinian Territories, its parent company Unilever faced a lawsuit from a pension fund on the grounds that the boycott had not been disclosed.³³ Once the latest war began, the company called for a ceasefire.³⁴ North Carolina later responded by blacklisting the company and divesting from Unilever, in accordance with the state's law opposing BDS (Boycott, Divestment and Sanctions against Israel).³⁵

While Ben & Jerry's has been engaged in this issue for some time, other companies face new challenges. Nearly every news outlet has published essays and articles exploring the dilemma businesses face in deciding how to respond.³⁶ As one journalist put it, "there is clear pressure to say something, partly because of the precedent set over the last several years, when many executives established a pattern of weighing in on social and political upheaval."³⁷ According to one source tracking such statements, over a thousand corporations have condemned Hamas or expressed support for Israel.³⁸ Some made statements immediately. Others

³³ Jody Godoy, *Unilever Beats Shareholder Lawsuit over Ben & Jerry's Israel Boycott*, REUTERS (Aug. 29, 2023), <https://www.reuters.com/legal/unilever-beats-shareholder-case-over-ben-jerrys-israel-boycott-2023-08-29/>.

³⁴ *Ben & Jerry's Board Calls for Israel Ceasefire*, BBC (Jan. 17, 2024), <https://perma.cc/5S8F-XQWG>.

³⁵ Peter Castagno, *NC Prohibits Investments in Ben & Jerry's over Position in Israel*, PORTCITY DAILY (Dec. 27, 2023), <https://portcitydaily.com/latest-news/2023/12/27/nc-prohibits-investments-in-ben-jerrys-for-position-on-israel/>.

³⁶ Emma Jacobs & Anjali Raval, *Business In a Bind over Messaging on Israel-Hamas War*, FIN. TIMES (Oct. 21, 2023), <https://perma.cc/5VS3-QTRM>; Te-Ping Chen, Chip Cutter & Lindsay Ellis, *Bosses Are Trying to Keep the Israel-Hamas War Out of the Office. It Isn't Working*, WALL ST. J. (Nov. 1, 2023), <https://perma.cc/D99Y-KB5W>; Jeffrey Sonnenfeld & Steven Tian, *These CEOs Are Rising to the Occasion-and Condemning the Brutal Hamas Attack on Israel. The Rest of Civil Society Is MIA*, FORTUNE (Oct. 18, 2023), <https://perma.cc/57KT-J2AE>; Alexandra Olson, Haleluya Hadero & Anne D'Innocenzio, *Company Bosses and Workers Grapple with the Fallout of Speaking Up About the Israel-Hamas War*, AP NEWS (Oct. 21, 2023), <https://perma.cc/F4C9-P9KD>; Eleanor Hawkins, *CEOs Struggle to Respond to the Israel-Hamas War*, AXIOS (Oct. 19, 2023), <https://www.axios.com/2023/10/19/ceos-struggle-to-respond-to-the-conflict-in-israel>; Max Zahn, *Companies from Starbucks to McDonald's Face Controversy amid Israel-Hamas War*, ABC NEWS (Oct. 23, 2023), <https://perma.cc/A4KX-VUVZ>; Daren Fonda, *First Outrage, Then Silence: Inside Corporate America's Dilemmas Over the Israel-Hamas War*, BARRON'S (Nov. 16, 2023), <https://perma.cc/F2ZG-FX8H>; Andrew Ross Sorkin et al., *Companies Are Caught in the Israel-Hamas War's Crossfire*, N.Y. TIMES (Oct. 23, 2023), <https://perma.cc/B2NF-5QJP>.

³⁷ Emma Goldberg, *Does the Boss Need to Weigh In on the War in the Middle East*, N.Y. TIMES (Nov. 8, 2023), <https://perma.cc/7NSM-59NL>.

³⁸ Jeffrey Sonnenfeld, *List of Companies That Have Condemned Hamas' Terrorist Attack on Israel*, YALE SCH. MGMT. (Jan. 28, 2024), <https://perma.cc/JD9M-WLCM>.

only stepped in after pressure mounted. As the conflict has gone on and the human toll in Gaza grows, some are asking why so-far-silent corporations have not issued similar statements.

These stories illustrate the role of the intense media environment that shapes corporate decision-making. One might characterize waves of statements as a virtue-cascade, in which costs and benefits change over time. Issuing statements may be risky for the first company on a particular controversy. But remaining silent becomes more costly if others quickly follow the leader and create a herd dynamic. The first companies in these cascades of virtue signaling are taking a risk, with high risk and high reward. The positive value of the signal, however, likely declines as more and more companies join the cascade. At the same time, the negative cost of remaining silent rises. The result is a “pooling equilibrium” in which all firms say more or less the same thing. The calculus is a dynamic one, as views of various stakeholders can change rapidly. The challenges to corporate leaders are obvious, and the amount of leadership time taken up in deliberations over statements is non-trivial.

II. UNIVERSITY SPEECH

Recent years have seen a similar propensity for university speech, again accelerating after the murder of George Floyd by Minneapolis police officers in May 2020. While we know of no systematic study, some evidence comes from the University of California, which in 2022 considered and adopted a policy allowing political statements by departments within the university.³⁹ In its internal report, it identified about half of externally facing departmental and campus political statements as concerning race; the other half were Palestine solidarity statements, mainly by departments of ethnic studies and women’s studies. This reflects a well-coordinated lobbying effort within progressive disciplines: one campaign got dozens of women’s studies departments to declare “Palestine is a feminist issue.”⁴⁰ There are also statements made in the aftermath of Supreme Court decisions, such as *Dobbs v. Whole Women’s Health* and *Students for Fair Action v.*

³⁹ Letter from Robert Horwitz, Acad. Council Chair, U.C., Acad. Senate, to Acad. Senate Div. Chairs, U.C., (June 2, 2022), <https://perma.cc/XDQ6-2E3H>.

⁴⁰ Elizabeth Redden, *An ‘Unprecedented Wave’ of Palestine Solidarity Statements*, INSIDE HIGHER ED (June 1, 2021), <https://perma.cc/FVH4-MBLP>.

Harvard, neither of which had an immediate legal effect in California.⁴¹

Not all schools joined the fray. From very early on, the University of Chicago has adopted a different stance. While the Kalven Report, adopted in 1967, is well known for its insistence on university neutrality, the principle actually dates to 1899. In that year, a body called “the Congregation” of the University, composed of senior faculty, administrators, and all holders of the PhD degree, issued a statement defining free speech as a fundamental principle of the University, and stating that “the University, as such, does not appear as a disputant on either side upon any public question.”⁴² The motive was to distinguish between the University as such and “the utterances which any professor may make in public.”⁴³ It followed incidents in which donors complained to the founding president, William Rainey Harper, about progressive economic thought among some members of the faculty. The idea of neutrality as insulation begins at that point. By the time the Kalven committee convened to discuss pressure to divest from the Vietnam war, the principle had apparently been well established, even if not formally articulated. Kalven thus represents a kind of constitutional principle for the University.⁴⁴

To be sure, there have been exceptional cases when leaders have felt the need to speak out. The Kalven Report itself allows for exceptions in two instances:

From time to time instances will arise in which the society, or segments of it, threaten the very mission of the university and its values of free inquiry. In such a crisis, it becomes the obligation of the university as an institution to oppose such measures and actively to defend its interests and its values. There is another context in which questions as to the appropriate role of the university may possibly arise, situations involving university ownership of property, its receipt of funds, its awarding

⁴¹ Robert Post, *The Kalven Report, Institutional Neutrality, and Academic Freedom*, 1, 12 (Keith E. Whittington & John Tomasi, eds., Johns Hopkins Press, forthcoming), <https://perma.cc/4JDU-KWVD>.

⁴² THE CHICAGO CANON ON FREE INQUIRY AND EXPRESSION 29 (Tony Banout & Tom Ginsburg, eds., 2023).

⁴³ *Id.*

⁴⁴ See Tom Ginsburg, *A Constitutional Perspective on Institutional Neutrality* (Keith E. Whittington & John Tomasi, eds., Johns Hopkins Press, forthcoming), <https://perma.cc/8QT8-BNGW>.

of honors, its membership in other organizations. Here, of necessity, the university, however it acts, must act as an institution in its corporate capacity. In the exceptional instance, these corporate activities of the university may appear so incompatible with paramount social values as to require careful assessment of the consequences.

Notwithstanding the vagueness of the language, leaders have from time to time used it to justify statements. For example, when former President Trump issued a new set of immigration restrictions early in his tenure, the University leadership criticized them, deciding that the restrictions directly affected the ability of the University's students and faculty to return to campus, and prospectively interfered with recruitment.⁴⁵ In some other instances, there has been pushback when university officials issued statements. The exception requires careful decision-making, and leaders will not always get it right, but the overall thrust is towards a stance of neutrality, which saves administrative time and provides principled justification for silence. This position is increasingly influencing other institutions of higher education and beyond.

In the aftermath of October 7, Kalven has been mentioned hundreds of times in the national media. Many other institutions have cited it and tried to adopt it, including Stanford, Northwestern, and others, while Harvard has adopted it in substance. It has been endorsed by institutions like the Heterodox Academy and TheFIRE.org.⁴⁶ Mayor Bloomberg has praised it.⁴⁷ Perhaps other universities will change their direction.

Of course, a shift to neutrality at this moment is problematic. It might fairly be as self-interested rather than principled—being forced to make a statement about a matter as contested as Israel and Palestine is a position no one wants to be in (except for some disciplines such as Asian American Studies)⁴⁸ and indeed, much

⁴⁵ Message from Robert J. Zimmer and Daniel Diermeier, Univ. of Chicago, Message regarding Immigration (Jan. 29, 2017), <https://perma.cc/KHJ4-P946>.

⁴⁶ *An Open Letter to College and University Trustees and Regents: It's Time to Adopt Institutional Neutrality*, <https://perma.cc/AL25-CYNM>; see also Angel Eduardo, *Whether You Call It Institutional 'Neutrality' or 'Restraint,' the Kalven Report Is the Best Way Forward*, FIRE (Feb. 13, 2024), <https://perma.cc/9CX6-K3KH>.

⁴⁷ Michael R. Bloomberg, *Hamas's Barbarity Heightens the Crisis in Higher Education*, WALL ST. J. (Nov. 17, 2023), <https://perma.cc/M7Z3-RSE2>.

⁴⁸ Statement, Ass'n for Asian Am. Studies, AAAS Endorsement of Solidarity with Palestine Statement, (Nov. 3, 2023), <https://perma.cc/WL56-D2F7>.

of the criticism of university leaders after October 7 was precisely that they had previously spoken out on many other issues unconnected to the university, but were happy to ignore a vicious terrorist attack against Israelis. The backlash has now claimed two Ivy League presidencies, illustrating the high stakes.

As the war continued, college presidents found themselves in the crosshairs, not just for what they said or did not say publicly, but for how they handled protests. National student groups such as the Students for Justice in Palestine have led demonstrations that call for divestment from Israel and a boycott of Israeli academic institutions. Some universities responded with heavy force, but the basic demand for divestment is not going away. Indeed, divestment was one of the student demands in the 1960s that motivated the Kalven Report in the first place.⁴⁹ The Kalven Report rejected the idea that corporate activities of the University should be used for politics, and so universities have turned to its principles during the campus speech crises.

It is also important to note that Kalven has its critics. Some decry the use of the term “neutrality” as being an impossible ideal.⁵⁰ Others suggest that it is used selectively, with a conservative leaning.⁵¹ Wesleyan President Michael S. Roth has suggested that reliance on Kalven is an act of cowardice.⁵² For other universities, especially those with a religious mission, it might be inappropriate to limit speech that advances the particular mission of the school. Still, even the critics note the increased momentum toward a policy of not making public statements. Wheaton College, a Christian institution in Illinois, recently adopted a general policy of neutrality.⁵³

⁴⁹ JOHN W. BOYER, *THE UNIVERSITY OF CHICAGO: A HISTORY* 459–60 (2015).

⁵⁰ Post, *supra* note 41; Janet E. Halley, Opinion, *Institutional Neutrality or Institutional Deception?*, HARV. CRIMSON, (Feb. 27, 2024), <https://perma.cc/95AR-6QUA>; Michael T. Nietzel, *The Kalven Report and The Limits of University Neutrality*, FORBES (Dec. 26, 2023), <https://perma.cc/2LEC-GEZ5>.

⁵¹ Jennifer Ruth, Opinion, *The Uses and Abuses of the Kalven Report*, CHRON. OF HIGHER EDUC. (Oct. 24, 2023), <https://perma.cc/HV3L-Y6AB>.

⁵² Michael S. Roth & Jeffrey Sonnenfeld, *For University Leaders, Silence on the Israel-Hamas War Is Not Golden*, TIME (Nov. 22, 2023), <https://perma.cc/X4SC-MXNP>.

⁵³ Institutional Statements General Policy, Wheaton College (Dec. 12, 2022), <https://perma.cc/MG6W-Q8M8> (“As a general policy, neither the Senior Administrative Cabinet nor the President will issue public statements on broader political, legal, or social issues or events.”).

III. COMPARING FOR-PROFIT CORPORATIONS AND EDUCATIONAL INSTITUTIONS

These examples demonstrate how similar the issue is for universities and for-profit corporations. In both cases, the managers must decide whether to commit the institution to a position. Those managers face pressure from their various stakeholder constituencies, which include employees, government officials and regulators, and the communities in which their institutions operate. While universities have the unique constituency of students, they are often analogized to customers or consumers.⁵⁴

Universities do not, however, have shareholders. To be sure, alumni are stakeholders, in that they have an investment in the brand of the university, but they lack the voting power of true shareholders. As a general matter, the Board of Trustees of a university does not face a threat of being voted out of the board room by a coalition that has amassed enough voting shares. They are not, in that sense, susceptible to campaigns of the activist shareholder. And yet, the last few months have seen a campaign by Bill Ackman—an activist shareholder by day—to oust the leadership at several major universities because of the positions they have (or have not) taken on social issues.

Ackman's campaign is a reminder that while universities do not have shareholders, they do have investors in the form of donors. These investors do not have the voice that comes with a vote. But to the extent institutions expect future donations, they have an exit threat. It is, we think, crucial to a university's mission to resist pressure from these investors and to function independently of their demands for speech. It would undermine the entire mission of free inquiry and research to allow donors to demand that universities or their faculty take positions on any social issue, and this is indeed one of the reasons the University of Chicago adopted its position in 1899.⁵⁵

The same cannot be said about corporations and shareholders. The right to vote out directors is fundamental to the entirety of corporate law.⁵⁶ A board that entirely ignores shareholder pressure on a social issue might not remain a board for very long. Still, for large publicly traded corporations, we suspect that many, if

⁵⁴ Yan Dominic Searcy, *Let me Speak to the Manager!*, INSIDE HIGHER ED (June 4, 2017), <https://perma.cc/44AF-7XXE>.

⁵⁵ Banout & Ginsburg, *supra* note 42.

⁵⁶ *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 652 (Del. 1988).

not most, shareholders (many of whom are themselves large institutions) would welcome a policy that moved corporations toward a meta-norm of silence. Retail investors have many other means of expressing themselves on social and political issues and can always sell shares if they dislike the direction a company is taking. Large investors have larger diversified portfolios.

It is also worth noting that, as tax-exempt non-profits, universities are prohibited from making contributions to or otherwise getting involved in political campaigns.⁵⁷ For-profit corporations, on the other hand, are notorious for their involvement in the political process. Some of the other essays in this Symposium Issue explore that phenomenon in detail. One might cynically note a mismatch between corporate statements and the donations to political campaigns.⁵⁸ This reinforces our point that the statements are likely cheap talk resulting from a pooling equilibrium. The political donations are more likely part of lobbying that relates to the operations of the business—for example when corporations lobby for or against legislation that would impact regulation of their industry. Such efforts would fall within the operational exceptions of a Kalven-like commitment to remain silent on politics.⁵⁹ Finally, universities have a special mission that makes institutional neutrality imperative. As the Kalven Report states, “The mission of the university is the discovery, improvement, and dissemination of knowledge. Its domain of inquiry and scrutiny includes all aspects and all values of society.”⁶⁰ This mission requires that the institution foster and encourage dissent and the exploration of unpopular ideas and positions, which might be undermined if the University takes positions on contested issues. In a 1936 statement that was paraphrased in the Kalven Report, President Robert Maynard Hutchins said, “[a] University is a community of scholars. It is not a kindergarten; it is not a social club; it is not a reform school; it is not a political

⁵⁷ See Lloyd Hitoshi Mayer, *Nonprofit Corporations & Politics: The Entity/Coordination Tension*, 3 U. CHI. BUS. L. REV. 473 (2024) for a detailed discussion of tax rules for non-profit campaign contributions.

⁵⁸ See Anna Toniolo, *Corporate Participation in Social Debates*, 3 U. CHI. BUS. L. REV. 361 (2024) (noting inconsistencies between corporation’s activist statements and political contributions).

⁵⁹ To be clear, corporate political donations raise all sorts of concerns, which are addressed in the various other essays in this volume. But those concerns are of a different nature than the ones we address here.

⁶⁰ Kalven Committee, *Report on the University’s Role in Political and Social Action*, Vol. I, No. 1 (Nov. 11, 1967).

party; it is not an agency of propaganda.”⁶¹ This stark statement of the unique mission of the university is seen as informing the need for maximum internal debate.

The same is not likely to be true for most for-profit corporations.⁶² Dissent is not obviously fundamental to a business that specializes in supply logistics, manufacturing, or mining. That is not to say that a Kalven-like policy wouldn't benefit these businesses. But the argument may be less compelling than for a research university, for which it goes to the core mission. Still, Hutchins' statement could apply as well to most businesses, which are neither kindergartens nor political parties. The purpose of a business is typically to make money, though many adopt other goals as part of their missions.

IV. WHAT WOULD A CORPORATE EXPRESSION POLICY LOOK LIKE?

It is impossible to say precisely why some corporate statements fuel the fire of backlash while others do not. We suspect that many corporations exist in an unfortunate state where they face two types of social issues. On the one hand, there are issues where one position is so popular that the corporation faces no real cost in making a statement. But statements on these issues—because they are costless—carry little value. It communicates nothing about a corporation's culture or purpose to hear its CEO say the same thing that every other CEO is saying. Everyone knows the corporation is only taking a position because it is easy to do and every other corporation is doing the same thing.

On the other hand, there are issues that are so controversial to the corporation's stakeholders that the corporation cannot say anything without enraging an important audience. Statements on these issues have meaning. But they present three problems. First, once the corporations realize the costs, they begin to backtrack. Wavering and backtracking provide evidence that corporations desire to make public statements when talk is cheap and seek to get out of the situation when it turns out that the price is higher than expected. Second, it is not clear who will decide what position the corporation will take on such issues. Should the

⁶¹ Banout & Ginsburg, *supra* note 42, at 35.

⁶² It will be true for some. Most corporations in the journalism space must cultivate dissent and free inquiry. For-profit research firms may be another example. And firms who pride themselves on disruption and innovation will want to cultivate dissenting ideas. But they may also want to take disrupting social positions as well.

directors be looking to please its shareholders, its employees, its customers, or the government entities who regulate it? Third, if the corporation makes a calculated decision to take a position in order to please one audience, the statement loses much of its value. If employees complain so loudly that the CEO must take a position, it may provide utility to the employees, but conveys very little information about the CEO's true beliefs or the corporation's core values. Still, it does convey a message about which constituency is most important. And that message has value to that group.

If we are correct that corporate speech is usually either costless or devastatingly polarizing, then the best path may be for all corporations to make no statement, to be silent. But as the University examples make clear, silence can only be a non-statement if the corporation is consistently silent. When one speaks on one issue but not another, the silence on the second issue speaks volumes. Moreover, a corporation that remains silent on the first type of issue—where the position is costless—will face pressure if it is the only one not taking a position. Silence becomes the costly signal. The best outcome is for all corporations to remain silent, but there is a collective action problem that prevents that equilibrium from emerging.

This is where the value of an *ex ante* commitment comes in. A policy like Kalven commits an institution *ex ante* to refrain from taking a position. While this commitment cannot reduce the cost to zero—universities committed to Kalven have certainly faced pressure to take positions—it does reduce the cost. When one can point to a prior commitment to silence, it takes away the inference that the silence has something to do with the current issue. If a critical mass of corporations adopts such policies, it will become less costly for others to do so. This can potentially facilitate a meta-norm of silence that allows corporations to avoid the pressure to make vacuous statements. In any instance, corporations will still feel pressure to make a statement. But—by pointing to their precommitment—they can shift the discussion from the statement implied by their silence to one about the value of neutrality.

Getting to a critical mass will, however, be difficult. As with universities, leading institutions will be important to the development. But even with those leaders, the mass may not be critical, and it may take an external force to push the corporations to equilibrium. For example, an entity like the Business Roundtable

could facilitate the emergence of a norm by recommending that firms adopt a form of Kalven.

Importantly, there will be some issues on which a corporation has to speak. Kalven provides for an exception for matters that directly affect the operations of the University, and indeed requires the University to speak when issues arise that “threaten the very mission of the University and its values of free inquiry.”⁶³ A corporate Kalven policy should of course include a similar exception. Depending on the operations of the business, this exception may turn out to be narrow or broad.

Consider the following as a generic resolution for a Board of Directors: “It is our policy that ACME, Inc. will not make institutional statements on political matters that do not directly affect our ability to operate. We affect society through producing the best widgets.” Of course, there may be some firms that need to engage in political activity to advance their missions. This would presumably fall into the category of directly affecting the firm’s ability to operate.

We recognize also that some corporations may decide that pleasing one group of stakeholders is crucially important to its operations. As noted above, the research purpose of universities (with corollary need for internal dissent) provides an especially compelling reason to adopt the Kalven policy. Without that justification, corporations may find that certain constituencies are unwilling to accept a commitment to silence. In such cases, the corporation may have to carve out core issues of special importance to its customers, employees, or other stakeholders. Similar situations can be found with religious universities. For example, the University of Notre Dame—while embracing the University of Chicago’s free speech principles⁶⁴—regularly issues statements on public issues that are consistent with the views of the Catholic Church.⁶⁵ This approach is consistent with an *ex ante* carve out for one constituency. A corporation could similarly identify a core constituency or issue that would form the exception to its policy.

Consider for example, a company that makes products for a particular social group, say women or the transgender

⁶³ Banout & Ginsburg, *supra* note 42, at 117.

⁶⁴ See Statement from Rev. John I. Jenkins, C.S.C., *Freedom of Expression at Notre Dame*, Univ. of Notre Dame (Feb. 20, 2023), <https://perma.cc/RGF9-JBKP> (noting a “commitment to freedom of expression aligns with the justly celebrated principles of the University of Chicago”).

⁶⁵ Statements of this nature can be found here: <https://perma.cc/Y8TB-TY7T>.

community. We would expect that it would be appropriate for the firm to speak out on, say, health care issues affecting these groups, since it will directly affect its customers. Similarly, we would expect the manufacturer of electric vehicles or firms in the business of energy production to speak out on national energy policy and the imperatives of responding to climate change.

Drawing the lines is tricky and will require judgement. And even the best constructed carveout will produce cases at the margin in which judgment is crucial. We have seen this with universities. Are immigration rules that affect the ability of their students to attend classes within the exceptions of the Kalven Report? Should universities have filed amicus briefs in the Supreme Court in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*?⁶⁶ Should law schools or medical schools take views on professional licensing requirements for their graduates? Should universities be more willing to speak out on local politics that affect their direct communities? These are difficult questions. But they do not undermine the value of an *ex ante* policy of neutrality when it comes to statements on broader topics such as racial hate crimes and faraway foreign conflicts. The crucial thing is for corporate leadership to have some policy guidelines in advance. Laying out the considerations to be weighed, including which stakeholders should be prioritized, can make management's job easier. Board level guidance can help management exercise restraint in situations in which it is only speaking to join a virtue cascade. This in turn can reduce the costs of not speaking, since expectations will be lower in light of the policy.

As we have noted, defining and applying the exception will be difficult, but there will be gains from an advance policy with clear criteria even if it is imperfect. Any decision to prioritize one constituency will be controversial and must be considered and deliberate. A modified version of the Kalven policy still provides support for corporate silence when issues outside the core arise.

V. CONCLUSION

As Tom Cole has pointed out, good governance demands that corporations plan ahead on the question of taking positions on

⁶⁶ *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181 (2023).

social issues.⁶⁷ Perhaps that planning includes adopting Kalven or a modified version of it. Or perhaps certain corporations would be served better by adopting a more proactive approach, in which they articulate values that will guide their issuing of statements. But that corporation will benefit by considering ahead of time when they will take positions and how those positions will be determined. The process should be structured to produce a reasoned decision on when and when not to speak rather than an ad hoc reaction to the dominant emotions of any given moment. This is especially true when, as recent events have shown, the costs of getting this policy wrong can be so high.

⁶⁷ Cole, *supra* note 3.