

CORPORATE EVOLUTION

Omari Scott Simmons†

Political entrepreneurs have declared war on environmental, social, and governance policies (“ESG”), going so far as to attempt to criminalize ESG-influenced investing. They seek a return to some real or imagined past. They amplify and elevate their efforts into mainstream public discourse. They pursue extraordinary goals and tactics to disrupt and even dismantle institutional structures, norms, and established processes. The contemporary anti-ESG backlash is not simply a battle over corporate purpose and the dueling perspectives of shareholder primacy versus stakeholderism or disputes concerning sustainable investment and operational strategies. It reflects aggressive political entrepreneurship and the tension between competing narratives: stasis, reversion, and evolution. Whereas anti-ESG political entrepreneurs see stability in the past, others see corporate governance as evolving forward, albeit with occasional fluctuations. This Article contributes to the corporate governance literature advancing an evolutionary theory. It posits that the demands and expectations placed upon directors and officers must evolve with the growing complexity of the global business environment. It advances the need for incremental changes to corporate law and governance. It finds support in corporate law, modern corporate governance practices, and theory.

TABLE OF CONTENTS

| | |
|--------------------------------------|------|
| INTRODUCTION | 1247 |
| I. THE CONTEMPORARY ENVIRONMENT..... | 1249 |

† Lyle T. Alverson Professor of Law, The George Washington University Law School. I would like to thank Robert Esposito, Keir Gumbs, Tom C.W. Lin, Dan Solove, Mary Anne Franks, Jeremy Bearer-Friend, Barak Richman, Jill Fisch, Stephen Schooner, Sergio Alberto Gramitto Ricci, Christina Sautter, and E. Norman Veasey for their valuable insights. I also want to thank Noah McDuff, Kendall Murphy, Tiffany Robson, Isabella Schwarze, Jian Wang, Colton Diges, Mary Muthersbaugh, Isy Kristick, Sherry Xia, Aria Charles, and Elene Abramidze for their valuable assistance. This Article is dedicated to my friend, the late Randy J. Holland, former Delaware Supreme Court Associate Justice.

| | |
|--|------|
| A. <i>Dimensions of the ESG Debate</i> | 1249 |
| 1. Investor Level | 1251 |
| 2. Corporate Entity Level | 1253 |
| B. <i>Acronym Imprecision</i> | 1254 |
| C. <i>Equivocal Research Findings on ESG and Financial Impact</i> | 1255 |
| 1. Valuation Impact | 1256 |
| 2. Investment and Corporate Performance | 1256 |
| D. <i>Culture Wars: ESG and Companies at a Crossroads</i> | 1258 |
| E. <i>Federal and State Anti-ESG Dynamics</i> | 1262 |
| 1. Federal | 1262 |
| 2. State | 1265 |
| II. THE INTERPLAY BETWEEN POLITICAL ENTREPRENEURSHIP AND BACKLASH ... | 1271 |
| A. Political Entrepreneurs | 1271 |
| 1. Defining Political Entrepreneurship | 1271 |
| 2. Political Entrepreneurship and Contemporary ESG Backlash | 1273 |
| B. <i>Defining Political Backlash</i> | 1275 |
| 1. Backlash Elements | 1277 |
| a. Reversionary Objectives | 1277 |
| b. Extraordinary Goals, Strategies, Tactics, and Claims | 1278 |
| c. Entering Public Discourse | 1278 |
| d. Political Entrepreneurs and Other Accelerants | 1279 |
| III. ANTI-ESG POLITICAL ENTREPRENEURSHIP: THE CURIOUS CASE OF FLORIDA | 1280 |
| A. <i>The War on “Woke” Disney</i> | 1280 |
| B. <i>Florida’s Anti-ESG Legislation and Initiatives</i> | 1283 |
| 1. Initiative to Protect Floridians from ESG Financial Fraud | 1284 |
| 2. Revised Investment Policy Statement: Eliminating ESG Considerations from Pension and Other Investments | 1285 |
| 3. State Treasury Divestment from BlackRock | 1286 |
| 4. Chief Financial Officer Directive: Deferred Compensation Plan | 1288 |
| 5. Multistate Anti-ESG Alliance | 1289 |
| 6. House Bill 3 | 1289 |
| C. <i>Florida, Political Entrepreneurship, and the Backlash Paradigm</i> | 1292 |
| 1. Reversionary Objectives | 1292 |
| 2. Extraordinary Claims, Goals, Strategies, and Tactics | 1292 |
| 3. Entering Mainstream Public Discourse | 1293 |
| 4. Political Entrepreneurs and Other Accelerants | 1294 |
| D. <i>Outcomes</i> | 1295 |

| | |
|--|------|
| IV. EVOLUTIONARY TENSIONS AND CORPORATE GOVERNANCE THEORY | 1295 |
| V. POLITICAL ENTREPRENEURSHIP RISKS FOR CORPORATE FIRMS | 1298 |
| A. “Greenwashers,” “Greenhushing,” Metrics, and Social Demand..... | 1298 |
| B. Undermining Internal Governance and Private Ordering..... | 1300 |
| VI. POLITICAL ENTREPRENEURSHIP RISKS FOR THE CORPORATE-GOVERNANCE REGIME | 1300 |
| A. Jurisdictional Competitiveness, Corporate Migration, and Capital Mobilization..... | 1301 |
| 1. U.S. Jurisdictional Competitiveness..... | 1302 |
| 2. Attacks on Federal and State Institutions | 1303 |
| a. Federal Dynamics | 1303 |
| b. Delaware Dynamics..... | 1304 |
| B. Hostility to Well-Established Laws and Evolutionary Trends..... | 1308 |
| 1. Business Judgment Rule | 1308 |
| 2. Caremark, ESG, and Evolution..... | 1311 |
| 3. Independent Director Protection of Public Investors | 1313 |
| 4. Judicial Independence and Legitimacy..... | 1313 |
| CONCLUSION..... | 1314 |

INTRODUCTION

“The leveraging of corporate power to impose an ideological agenda on society represents an alarming trend.”¹

Political entrepreneurs have declared war on environmental, social, and governance policies (“ESG”), going so far as to attempt to criminalize it.² They seek to stall, disrupt, and reverse the dominant trend toward ESG integration, or even exaggerate its prevalence to stir or generate opposition. They want to return to some better state, real or imagined, when companies and investors maintained a laser focus on profits, paying little or no attention to stakeholder concerns, intangibles, or long-term financial impact. Political entrepreneurs want to go back to the past. Amid the current anti-ESG backlash, companies must navigate a

¹ Press Release, Off. of Governor Ron DeSantis, Governor Ron DeSantis Announces Initiatives to Protect Floridians from ESG Financial Fraud (July 27, 2022), <https://www.flgov.com/2022/07/27/governor-ron-desantis-announces-initiatives-to-protect-floridians-from-esg-financial-fraud> [https://perma.cc/43GL-GMES].

² Matt Levine, *Making ESG a Crime*, BLOOMBERG (Jan. 17, 2024, 6:15 PM), <https://www.bloomberg.com/opinion/articles/2024-01-17/making-esg-a-crime> [https://perma.cc/GS2R-Y73E]. But see Elizabeth Pollman, *The Making and Meaning of ESG*, 14 HARV. BUS. L. REV. 403 (2024).

fractious, volatile, and dysfunctional political environment under pressure from a range of external constituencies, especially state and federal lawmakers.³ This Article contributes to the corporate governance literature by advancing an evolutionary theory of corporate governance.⁴ The contemporary ESG backlash is not simply a battle over corporate

³ See, e.g., Nicholas Confessore, 'America Is Under Attack': Inside the Anti-D.E.I. Crusade, N.Y. TIMES (Jan. 20, 2024), <https://www.nytimes.com/interactive/2024/01/20/us/dei-woke-claremont-institute.html> [<https://web.archive.org/web/20250221110556/https://www.nytimes.com/interactive/2024/01/20/us/dei-woke-claremont-institute.html>]; Brooks Barnes, *Disney Pulls Plug on \$1 Billion Development in Florida*, N.Y. TIMES (May 18, 2023), <https://www.nytimes.com/2023/05/18/business/disney-ron-desantis-florida.html> [<https://web.archive.org/web/20241128205413/https://www.nytimes.com/2023/05/18/business/disney-ron-desantis-florida.html>]; Danielle Moran, *Jamie Dimon Warns Texas to Stop Pushing Anti-Business Laws*, BLOOMBERG (Nov. 2, 2023, 11:08 AM), <https://www.bloomberg.com/news/articles/2023-11-02/dimon-urges-texas-to-keep-pro-business-stance-amid-anti-esg-laws>; Shabab Ahmed Mirza, Sarah McBride & Laura E. Durso, *North Carolina's Discriminatory H.B. 2 Threatens More than Half Billion Dollars in Economic Activity*, CTR. FOR AM. PROGRESS (Apr. 13, 2016), <https://www.americanprogress.org/article/north-carolinas-discriminatory-h-b-2-threatens-more-than-half-billion-dollars-in-economic-activity> [<https://perma.cc/KB6C-BJNF>]; Dana Goldstein, *Publisher Scholastic Backtracks on Isolating Works on Race and Gender*, N.Y. TIMES (Oct. 25, 2023), <https://www.nytimes.com/2023/10/25/us/scholastic-book-fair-race-gender.html> [<https://web.archive.org/web/20250216072525/https://www.nytimes.com/2023/10/25/us/scholastic-book-fair-race-gender.html>]; Khadeeja Safdar, *How Target Botched Its Response to the North Carolina Bathroom Law*, WALL ST. J. (Apr. 5, 2017, 10:55 AM), <https://www.wsj.com/articles/how-target-botched-its-response-to-the-north-carolina-bathroom-law-1491404107> [<https://web.archive.org/web/20210119091406/https://www.wsj.com/articles/how-target-botched-its-response-to-the-north-carolina-bathroom-law-1491404107>]; Santul Nerkar, *Some Businesses Make 'Woke Free' a Selling Point*, N.Y. TIMES (Sept. 19, 2023), <https://www.nytimes.com/2023/09/18/business/companies-conservative.html> [<https://web.archive.org/web/20241113050545/https://www.nytimes.com/2023/09/18/business/companies-conservative.html>]; Gregory Krieg & Nathaniel Meyersohn, *Newsom to Shut Walgreens out of California State Business Following Abortion Pill Decision*, CNN (Mar. 8, 2023, 8:43 PM), <https://www.cnn.com/2023/03/07/politics/gavin-newsom-walgreens-california-abortion-drug/index.html> [<https://perma.cc/UQF9-89MN>]; see also Phillip I. Blumberg, *The Politicization of the Corporation*, 51 B.U. L. REV. 425, 425 (1971) ("The increasing politicization of the large American corporation, illustrated by numerous current developments, is primarily the product of changing concepts of the role of business in the society, set against a background of profound unresolved problems in the society itself.").

⁴ See E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992–2004? A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1436 (2005); E. Norman Veasey, *Policy and Legal Overview of Best Corporate Governance Principles*, 56 SMUL. REV. 2135, 2139 (2003). The jurisprudence and writing of former Chief Justice E. Norman Veasey advance this perspective. See generally Veasey & Di Guglielmo, *supra*; Veasey, *supra*. Veasey served as Chief Justice of the Delaware Supreme Court from 1992 to 2004. *Historical List of Delaware Supreme Court Justices*, DEL. CTS., <https://courts.delaware.gov/supreme/history/justicespast.aspx#veasey> [<https://perma.cc/UJE8-EMLD>]. He is the author of opinions and articles, but also was influential in shaping corporate law as a practitioner. See *id.* He is considered the architect of Delaware General Corporation Law Section 102(b)(7) passed in the wake of *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985); see Univ. of Pa. Carey L. Sch., 102(b)(7): E. Norman Veasey Interview, YOUTUBE (Aug. 7, 2017), <https://www.youtube.com/watch?v=z0hnw5M79ss&t=72s> [<https://perma.cc/ZQ94-KY2V>].

purpose and the dueling perspectives of shareholder primacy versus stakeholder capitalism or sustainable investment and operational strategies. It reflects aggressive political entrepreneurship and a struggle between competing narratives: stasis, reversion, and evolution. Whereas anti-ESG political entrepreneurs seek to move the future back, others ascribe to a more dynamic, evolutionary view of corporate governance: acknowledging that the demands and expectations placed upon directors and officers must evolve to address the growing complexity of the global business environment. This evolutionary perspective posits the need for incremental changes to internal private governance and corporate law. It finds support in corporate law, theory, and modern corporate governance practices.

Part I describes the contemporary business environment. It captures dimensions of the ESG debate: volatility, culture wars, and a strong wave of ESG backlash. Part II defines political entrepreneurship and examines how it interacts with backlash politics. Part III provides a contemporary example to illustrate the relationship between political entrepreneurship and backlash politics: whether Florida state government officials are waging war on Walt Disney or promulgating anti-ESG legislation. Florida has emerged as the chief battleground for the anti-ESG movement in the United States. Part IV advances a theory of corporate evolution, which looks beyond shareholder primacy and stakeholder governance theories, positing that the demands and expectations placed upon directors and officers must evolve with the growing complexity of the global business environment. Corporate governance has a strong directional component explaining its trajectory. Part V illustrates how contemporary ESG backlash affects corporate firms. It explains how anti-ESG backlash impacts “greenwashing” and “greenhushing” metrics, social demand, internal firm governance, and private ordering. Part VI examines the potential risks that anti-ESG political entrepreneurship poses to the U.S. corporate governance regime, including hostility to established law and evolutionary trends, encouraging corporate migration, and reducing jurisdictional competitiveness and U.S. regulatory dominance.

I. THE CONTEMPORARY ENVIRONMENT

A. *Dimensions of the ESG Debate*

Constructive criticisms of ESG initiatives are justified, especially the democratic deficits associated with “corporate governing,” the lack of uniform standards, disparate rating methodologies, deceptive virtue signaling and greenwashing, and mischaracterization of ESG data and

findings.⁵ These questions reflect fundamental issues about the integrity and financial relevance of ESG information, whether it represents the “social or political preferences of certain investors and asset managers, or whether these concepts have both public policy and economic significance.”⁶ However, the tenor of the debate remains rhetorical and immersed in culture wars rather than constructively seeking to improve the ESG concept and practices, which have arguably been in place since the 1970s with the emergence of the Sullivan Principles and the socially responsible investment (“SRI”) movement and advocacy of Ralph Nader.⁷ Out of the South African anti-apartheid movement grew the institutions and architecture upon which SRI stands, including data collection and analysis.⁸ The debate concerning the role of corporations in society was transformed as pension trustees, school endowment officials, and activism-oriented groups, such as the Interfaith Center for Corporate Social Responsibility (ICCR), engaged in a direct dialogue with corporations on issues such as apartheid, the environment, and employment practices.⁹ Faith-based investment groups played an instrumental role in creating the SRI architecture. Contemporary academics often ignore this important history. The current anti-ESG blitz led and funded by a network of conservative and libertarian groups, dark money, and anti-ESG billionaires is at odds with the positions of many faith-based organizations, who have spearheaded SRI efforts for decades.¹⁰ The distinction between SRI and its newer counterpart, ESG, is small. Both concepts may consider social and ethical factors in

⁵ See Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 436 (2020); Pollman, *supra* note 2, at 438; Matteo Gatti, *Corporate Governing: Understanding Corporations as Agents of Socioeconomic Change* 1 (Eur. Corp. Governance Inst. Working Paper, Paper No. 730, 2024), <https://papers.ssrn.com/abstract=4530776> [<https://perma.cc/QFN6-5GCV>]; Jill E. Fisch, *How Do Corporations Play Politics?: The FedEx Story*, 58 VAND. L. REV. 1495, 1559–61 (2005).

⁶ Virginia Harper Ho, *Climate Disclosure Line-Drawing & Securities Regulation*, 56 U.C. DAVIS L. REV. 1875, 1878 (2023).

⁷ See Zeb Larson, *The Sullivan Principles: South Africa, Apartheid, and Globalization*, 44 DIPLOMATIC HIST. 479, 482 (2020) (contending that the Sullivan Principles “augured the future of corporate responses to globalization concerns”); AMY DOMINI, *SOCIALLY RESPONSIBLE INVESTING: MAKING A DIFFERENCE AND MAKING MONEY* 37–38 (2001); Herbert Mitgang, *G.M. Challenged on ‘Responsibility’*, N.Y. TIMES, May 17, 1970, at 129.

⁸ DOMINI, *supra* note 7, at 37–38.

⁹ *Id.* at 38.

¹⁰ See Brian Roewe, *Republican Anti-ESG Push Complicates Faith-Based Impact Investing*, NAT’L CATH. REP. (Aug. 24, 2023), <https://www.ncronline.org/earthbeat/politics/republican-anti-esg-push-complicates-faith-based-impact-investing> [<https://perma.cc/YA2F-89K3>]; see also Saijel Kishan, *The Little-Known Group That’s Battling Wall Street over ESG*, BLOOMBERG (June 7, 2023, 10:01 AM), <https://www.bloomberg.com/news/articles/2023-06-07/bank-of-america-is-latest-target-for-anti-esg-group-that-battled-blackrock> [<https://perma.cc/M42Z-VQSS>].

investment decisions.¹¹ SRI, however, has a more robust ethical and social lens, whereas ESG is more focused on financial returns and mitigating risks.¹² Political entrepreneurs are not necessarily responding to a new threat but, at most, anxieties repackaged as ESG. They seek to revert to a distant past.¹³

In any case, the contemporary debate is more nuanced than the prevailing political rhetoric suggests. Attempts to regulate and dismantle ESG integration have various dimensions, particularly at the investor and corporate-entity levels. Controversies canvas several areas, including ESG investing, ESG-labeled funds, ESG ratings, retirement security, shareholder activism, and managing company-level operations for ESG risk and performance.

1. Investor Level

At the asset owner, asset manager, and pension official levels, regulatory concerns include fiduciary duties, investor stewardship codes, ESG engagement, and voting.¹⁴ Large asset managers, such as BlackRock and Vanguard, are incorporating ESG criteria into their decision-making processes and engaging companies in ESG and sustainability efforts.¹⁵ As shareholders, asset managers have multiple ways to engage and voice their preferences: ESG investment strategies (stock picking and

¹¹ *What Is the Difference Between ESG Investing and Socially Responsible Investing*, S&P GLOB. (Feb. 25, 2020), <https://www.spglobal.com/en/research-insights/market-insights/what-is-the-difference-between-esg-investing-and-socially-responsible-investing> [<https://web.archive.org/web/20240529183048/https://www.spglobal.com/en/research-insights/market-insights/what-is-the-difference-between-esg-investing-and-socially-responsible-investing>].

¹² *Id.*

¹³ See discussion *infra* Section VI.B.

¹⁴ Ho, *supra* note 6, at 1883.

¹⁵ See Schanzenbach & Sitkoff, *supra* note 5, at 392–97 (discussing the evolution of ESG investing); Jeff Schwartz, *Stewardship Theater*, 100 WASH. U. L. REV. 393, 395 (2022) (“A small group of asset managers have accumulated unrivaled wealth and power. Industry leaders—like BlackRock, Vanguard, and State Street (the ‘Big 3’)—have compiled massive equity holdings in public companies through the mutual funds and exchange traded funds (ETFs) that they oversee.” (footnote omitted)); Michal Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243, 1291–95 (2020) (arguing that index fund managers’ interest in ESG is motivated by a desire to court investment by socially conscious millennials rather than a concern for shareholder value); Keir Gumbs, *How Companies Can Navigate ESG as It Reaches a Crossroads*, GOVERNANCEINTEL. (June 29, 2023), <https://www.governance-intelligence.com/boardroom/how-companies-can-navigate-esg-it-reaches-crossroads> [<https://perma.cc/5X3Z-35L5>] (“Many institutional investors, particularly larger ones, are increasingly incorporating ESG factors into their decision-making and engaging with companies on sustainability matters. There also continues to be growing demand from US investors for ESG-based products and strategies.”).

screening), active shareholding (stewardship), shareholder activism in the form of nonbinding resolutions, withholding votes and proxy contests, and types of informal engagement.¹⁶ The Big Three asset managers, BlackRock, State Street, and Vanguard, own approximately twenty percent of all companies in the S&P 500.¹⁷ The power of asset managers is controversial.¹⁸ They have drawn political critique and backlash, with some states boycotting asset managers for their stances and practices related to ESG integration and investing.¹⁹ Commentators have gone so far as to compare asset managers to regulators.²⁰

Retirement security is a salient political issue for the American public. ESG integration in the employee benefits arena raises legal fiduciary duty concerns for pensions and employer-sponsored retirement plans. In this context, the fiduciary duty standard, the sole interest rule, is narrower than the fiduciary standards (e.g., duties of care and loyalty) that corporate managers generally exercise. Some critics express concern about whether retirement plan fiduciaries can consider ESG factors and still meet their fiduciary obligations.²¹ A fair reading of the Employee Retirement Security Income Act (ERISA) of 1974 and Supreme Court jurisprudence indicates yes, provided fiduciaries make these decisions based on a good faith belief that considering ESG factors will improve risk-adjusted returns for plan participants and beneficiaries.²² They

¹⁶ See Schanzenbach & Sitkoff, *supra* note 5, at 437–48. Similar to the evolutionary theory of corporate law advanced by this Article, the internal power dynamics between shareholders, directors, and officers have evolved significantly over the past several decades. See Harwell Wells, *A Long View of Shareholder Power: From the Antebellum Corporation to the Twenty-First Century*, 67 FLA. L. REV. 1033, 1034–35 (2015). An increase in shareholder power has given large institutional shareholders, such as BlackRock, more influence over entities in which it owns shares. See *id.*

¹⁷ See Caleb N. Griffin, *Margins: Estimating the Influence of the Big Three on Shareholder Proposals*, 73 SMUL. REV. 409, 417 (2020); JOHN COATES, *THE PROBLEM OF TWELVE: WHEN A FEW FINANCIAL INSTITUTIONS CONTROL EVERYTHING* 41 (2023).

¹⁸ Jeff Sommer, *Millions of Fund Investors Are Getting a Voice*, N.Y. TIMES (Feb. 23, 2024), <https://www.nytimes.com/2024/02/23/business/vanguard-blackrock-state-street-investing-voting.html> [<https://web.archive.org/web/20240609131700/https://www.nytimes.com/2024/02/23/business/vanguard-blackrock-state-street-investing-voting.html>].

¹⁹ See Larry Fink, *A Fundamental Reshaping of Finance*, BLACKROCK (2020), <https://www.blackrock.com/corporate/investor-relations/2020-larry-fink-ceo-letter> [<https://perma.cc/JX2C-J944>] (“[BlackRock’s] investment conviction is that sustainability—and climate-integrated portfolios can provide better risk-adjusted returns to investors.”); discussion *infra* Section III.B.3 (discussing Florida’s blacklisting of BlackRock).

²⁰ See, e.g., Dorothy S. Lund, *Asset Managers as Regulators*, 171 U. PA. L. REV. 77, 80 (2022) (“[T]he Big Three are providing a form of privatized regulation—a body of standards and mandates that is more stringent than existing law, enforced with penalties, and applied across the market.” (footnote omitted)).

²¹ See discussion *infra* Section III.B.

²² See generally Schanzenbach & Sitkoff, *supra* note 5.

cannot incorporate ESG considerations into plan decision-making simply based on their personal belief in ESG's promise. Notwithstanding, vigorous debate continues on this issue.

2. Corporate Entity Level

Corporations integrate ESG with a focus on risk management and strategy, mandatory and voluntary disclosures, and fiduciary duties. The business judgment rule and duties of care and loyalty give managers enough discretion to embrace or reject ESG integration consistent with the corporation's best interests. The ESG and sustainability infrastructure (e.g., employees, practices, processes, and departments) are relatively cemented into the operations of most large publicly traded corporations.²³ They are part of a corporate immune system that performs an internal regulatory function. In theory, it lowers costs for government regulators by providing internal mechanisms, such as a monitoring board, compliance and risk management systems, contractual devices, and the elevation of senior roles, such as chief legal officer, chief compliance officer, chief risk officer, and chief sustainability officer.²⁴ From this vantage point, attempts to infuse ESG factors into decision-making and operations are not revolutionary but pragmatic. They reflect an evolutionary process where companies and the legal regime adapt to the increasing demands and expectations the business environment places upon them and their management.

Despite these innovations, ESG and sustainability frameworks are still underdeveloped, imperfect, and evolving. Rules and regulations lack

²³ See WEINREB GRP., 2023 WEINREB GROUP CHIEF SUSTAINABILITY OFFICER REPORT (2023), <https://weinrebgroup.com/wp-content/uploads/2023/03/2023-CSO-Report.pdf> [https://perma.cc/QZW8-HJ3U]; Mark Segal, *Companies Double Use of Environmental, DEI Metrics in Exec Incentive Comp in 2022: WTW Survey*, ESG TODAY (Jan. 3, 2023), <https://www.esgtoday.com/companies-double-use-of-environmental-dei-metrics-in-exec-incentive-comp-in-2022-wtw-survey> [https://perma.cc/X2AJ-ADZ6]; Lucy Pérez, Dame Vivian Hunt, Hamid Samandari, Robin Nuttall & Krysta Biniek, *Does ESG Really Matter—And Why?*, MCKINSEY Q. (Aug. 10, 2022), <https://www.mckinsey.com/capabilities/sustainability/our-insights/does-esg-really-matter-and-why> [https://perma.cc/K7EP-V3N7]; Eric Rosenbaum, *These Are the Top 100 ESG Stocks in America: The 2022 JUST 100 Ranking*, CNBC (Jan. 12, 2022, 11:10 AM), <https://www.cnbc.com/2022/01/11/these-are-the-top-100-esg-stocks-in-america-the-2022-just-100.html> [https://perma.cc/VY4D-H9LG]; Allysia Finley, *Bidenomics and the Boom in DEI and ESG Jobs*, WALL ST. J. (July 16, 2023, 4:56 PM), <https://www.wsj.com/articles/bidenomics-and-the-boom-in-dei-and-esg-jobs-college-grads-disclosure-8c284ca0> [https://web.archive.org/web/20240601143721/https://www.wsj.com/articles/bidenomics-and-the-boom-in-dei-and-esg-jobs-college-grads-disclosure-8c284ca0].

²⁴ See Omari Scott Simmons, *The Corporate Immune System: Governance from the Inside Out*, 2013 U. ILL. L. REV. 1131, 1144–47, 1150–53. Governments may be resource- and expertise-constrained, which creates regulation and enforcement difficulties. *Id.* at 1134–35, 1137, 1154, 1156.

harmony; local, regional, national, and international differences persist.²⁵ For example, in the sustainability domain, companies must navigate federal, state, and European Union (EU) disclosure regulations, which may diverge in scale and scope.²⁶ These shortcomings are not unique to ESG integration and coupled with domestic culture wars they are an insufficient basis to jettison ESG integration altogether.

B. *Acronym Imprecision*

The current ESG backlash in the United States is loaded with irony. The acronym captures a broad range of practices in which many companies already engage—for example, diversity, equity, and inclusion (“DEI”), sustainability, employee wellbeing, ethical sourcing, and investor stewardship—yet no list is definitive or exhaustive.²⁷ It was created when corporate social responsibility and SRI became politically contested terms associated with wasteful expenditures with limited

²⁵ See, e.g., Jon McGowan, *Newsom Commits to Sustainability/ESG Reporting in California by 2026*, FORBES (Sept. 19, 2023, 4:15 PM), <https://www.forbes.com/sites/jonmcgowan/2023/09/19/newsom-commits-to-sustainability-esg-reporting-in-california-by-2026> [https://perma.cc/987R-JDZ8]; see also Addisu Lashitew, *The Coming of Age of Sustainability Disclosure: How Do Rules Differ Between the US and the EU?*, BROOKINGS (June 6, 2022), <https://www.brookings.edu/articles/the-coming-of-age-of-sustainability-disclosure-how-do-rules-differ-between-the-us-and-the-eu> [https://perma.cc/AZK7-XXV5]; Brett Wolf, *ESG Gap Widens: EU Rules Become More Prescriptive as US Proposals Wait in the Wings*, REUTERS (June 1, 2022), <https://www.thomsonreuters.com/en-us/posts/investigation-fraud-and-risk/esg-gap-widens> [https://perma.cc/5KP3-8C5S].

²⁶ See discussion *infra* Sections I.E, VI.A.1.

²⁷ See Kristen Talman, *How ‘ESG’ Came to Mean Everything and Nothing*, BBC (Nov. 15, 2023), <https://www.bbc.com/worklife/article/20231114-how-esg-came-to-mean-everything-and-nothing> [https://perma.cc/D7GS-2PLW] (“[C]orporations have gladly used the ESG descriptor for all sorts of business decisions.”). There is a proliferation of compliance, sustainability, DEI, and risk management programs and infrastructure within large companies. See Theo Francis & Lauren Weber, *The Legal Assault on Corporate Diversity Efforts Has Begun*, WALL ST. J. (Aug. 8, 2023, 5:30 AM), <https://www.wsj.com/articles/diversity-equity-dei-companies-blum-2040b173> [https://web.archive.org/web/20241026052441/https://www.wsj.com/us-news/law/diversity-equity-dei-companies-blum-2040b173] (describing DEI programs and infrastructure as “widely deployed across American corporations”); Liam Stoker, *Reuters IMPACT: Tracking the Evolution of Sustainability Strategies and Investments Across the Globe*, REUTERS (Oct. 10, 2023), <https://www.thomsonreuters.com/en-us/posts/esg/reuters-impact-sustainability-report> [https://perma.cc/C997-Z5Q6] (“Many businesses are preparing for more comprehensive sustainability reporting requirements by investing in a range of different tools and technologies.”); Jones Day Talks, *The Evolution of Corporate Compliance Programs: Key Issues for Multinational Companies*, JONES DAY (Oct. 3, 2023), <https://www.jonesday.com/en/insights/2023/10/jones-day-talks-the-evolution-of-corporate-compliance-programs-key-issues-for-multinational-companies> [https://perma.cc/PP93-AWQA] (“Across every industry and every region of the world, corporate compliance programs have increasingly become an integral part of a company’s operations and procedures—and the trend shows no signs of slowing.”).

business implications or value.²⁸ In theory, ESG was intended to integrate environmental and social concerns with private enterprise to create an inclusive approach to help companies navigate the complex multi-stakeholder environment and its constellation of social, political, and economic variables.²⁹ Now, it is under attack for exactly that reason and weaponized to the extent that some companies are abandoning the use of the term ESG or downplaying it.³⁰ No matter how much companies manipulate acronyms and semantics, political entrepreneurs will be able to stoke political tensions.

C. *Equivocal Research Findings on ESG and Financial Impact*

Extreme anti-ESG attacks are buttressed by inconclusive empirical support that ESG practices compromise the corporate bottom line. They are more politically salient than empirically sound. The business case for ESG is essentially a function of context, company, and industry.³¹ Economic performance arguments for or against ESG often depend on metrics, definitions, and timelines.³²

²⁸ Schanzenbach & Sitkoff, *supra* note 5, at 392–97; *see also* Pollman, *supra* note 2, at 421.

²⁹ Pollman, *supra* note 2, at 413–14.

³⁰ *See Bud Light Boycott over Trans Influencer Dylan Mulvaney Hits Beer Giant's Sales*, BBC (Aug. 3, 2023), <https://www.bbc.com/news/business-66398296> [<https://perma.cc/LFC4-QEF2>]; Alexander Burns, *States with Abortion Bans Risk Losing Their Economic Edge*, N.Y. TIMES (July 11, 2022), <https://www.nytimes.com/2022/07/11/us/politics/abortion-ban-states-businesses.html> [<https://web.archive.org/web/20241014134016/https://www.nytimes.com/2022/07/11/us/politics/abortion-ban-states-businesses.html>].

³¹ *See, e.g., ESG Industry Materiality Map*, MSCI (Apr. 16, 2024), <https://www.msci.com/our-solutions/esg-investing/esg-industry-materiality-map> [<https://perma.cc/7JRK-WJ7N>] (assessing “the long-term resilience of companies to environmental, social, and governance (ESG) issues” using a dynamic, industry-specific, and company-specific model).

³² Guangyou Zhou, Lian Liu & Sumei Luo, *Sustainable Development, ESG Performance and Company Market Value: Mediating Effect of Financial Performance*, 31 BUS. STRATEGY & ENV'T 3371, 3382 (2022) (discussing how the regression results of ESG performance, growth capacity, and the company's market value metric show the company's ESG performance “is significantly positively correlated with [its] market value”); Mahmut Aydoğmuş, Güzhan Gülay & Korkmaz Ergun, *Impact of ESG Performance on Firm Value and Profitability*, 22 BORSA İSTANBUL REV. S119, S125 (2022) (analyzing data from 1,720 firms from 2013 to 2021 using a panel data fixed effects model focusing on “the impact of ESG scores on firm value” and finding that the combined ESG score is strongly and positively correlated with firm value, namely, that the social and governance aspects of ESG show a “significant positive relationship[] with firm value,” whereas the environmental component does not demonstrate such a relationship).

1. Valuation Impact

In terms of impact on company valuation, a company's ESG profile is akin to intangible assets, which are a legitimate part of valuation. Whereas tangible assets accounted for 83% of the value of the S&P 500 in 1975, they accounted for only 10% of the S&P 500 value in 2020.³³ Intangible assets are responsible for 90% of the business value of S&P 500 companies.³⁴ From this vantage point, the embrace of ESG is pragmatic.

2. Investment and Corporate Performance

When assessing ESG impact, one must distinguish investment performance from corporate-level performance. Investment performance reflects returns from vetting and selecting investments meeting ESG criteria. Alternatively, corporate-level performance focuses on improving a company's own practices and managing ESG-related risks and opportunities. Overall, research findings on ESG impact are mixed.³⁵ However, a meta-analysis of over 1,000 studies published between 2015 and 2020 found that most supported a positive or neutral relationship between ESG factors and financial performance, whether in the corporate or investment context.³⁶

³³ *Intangible Asset Market Value Study*, OCEAN TOMO (2020), <https://oceanatomo.com/intangible-asset-market-value-study> [<https://perma.cc/2EG9-8RRK>]; see also Colleen Honigsberg & Shivaram Rajgopal, *Wage Wars: The Battle over Human Capital Accounting*, 12 HARV. BUS. L. REV. 275, 285–88 (2022).

³⁴ OCEAN TOMO, *supra* note 33.

³⁵ TENSIE WHELAN, ULRICH ATZ, TRACY VAN HOLT & CASEY CLARK, ESG AND FINANCIAL PERFORMANCE: UNCOVERING THE RELATIONSHIP BY AGGREGATING EVIDENCE FROM 1,000 PLUS STUDIES PUBLISHED BETWEEN 2015–2020 10 (2021) (providing that the analysis of over 1,000 research papers since 2015 on the link between ESG factors and financial performance suggests “a growing consensus”: good ESG management often leads to better operational metrics like return on equity, return on assets, and stock price, particularly for long-term investors). ESG strategies tend to yield market rate or excess returns compared to traditional investments and offer protection in times of crisis. *Id.* Most studies show a positive or neutral but rarely negative correlation between ESG and financial performance. *Id.*

³⁶ *Id.*; see Ulrich Atz, Tracy Van Holt, Elyse Douglas & Tensie Whelan, *The Return on Sustainability Investment (ROSI): Monetizing Financial Benefits of Sustainability Actions in Companies*, 39 ST. JOHNS U. REV. BUS.: INTERDISC. J. ON RISK & SOC'Y 1 (2020); 1 SUSTAINABLE CONSUMPTION AND PRODUCTION (Ranjula Bali Swain & Susanne Sweet eds., 2021). Other findings reveal: (1) ESG-related improvement to financial performance “becomes more marked over . . . time”; (2) ESG integration strategies “perform better than negative screening approaches” and, in some instances, their “momentum . . . cause[s] improves to outperform leaders”; (3) “ESG investing . . . provide[s] downside protection, especially during social or economic crisis”; (4) corporate-level sustainability initiatives “drive financial performance” through “improved risk

Nevertheless, ESG-related research often exhibits weaknesses. Findings are usually correlative rather than causal.³⁷ They often lack robust explanations, clear distinctions between approaches, and a focus on a specific theme.³⁸ Companies may be virtue signaling and greenwashing without implementing substantive changes.³⁹ Researchers have demonstrated this pattern of behavior among companies in the ESG context.⁴⁰ The absence of consensus regarding the meaning and metrics for ESG exacerbates virtue signaling. With these open questions, researchers, corporate managers, professional service providers, and politicians, both pro and con, cannot make definitive claims about the efficacy of ESG investment strategies or that ESG drives firm performance in any direction.

Recent anti-ESG backlash is not historically or statistically informed but is essentially a heavy-handed political overreaction to speculation and intangibles.⁴¹ By necessity, companies operate in an environment without complete information. They experiment, innovate, and take risks. They would like to preserve, rather than limit, their options, including the discretion to pursue both ESG and anti-ESG strategies. This could inure to the benefit of stakeholders: shareholders and nonshareholders.

Despite no strong evidence completely undercutting their efficacy, sustainability and ESG initiatives have been weaponized by political entrepreneurs in culture wars.⁴² Still, no one is suggesting they should be

management” and increased innovation; (5) “managing for a low-carbon future improves financial performance”; and (6) “ESG disclosure on its own does not drive financial performance.” WHELAN ET AL., *supra* note 35, at 7–9.

³⁷ WHELAN ET AL., *supra* note 35; Alex Edmans, *Can We Really Make \$4 Trillion Fall from the Sky? (Part 2)*, MAY CONTAIN LIES (Oct. 21, 2023), <https://maycontainlies.com/can-we-really-make-4-trillion-fall-from-the-sky-part-2> [https://perma.cc/6CPT-HXBR]; see ALEX EDMANS, MAY CONTAIN LIES: HOW STORIES, STATISTICS, AND STUDIES EXPLOIT OUR BIASES—AND WHAT WE CAN DO 152 (2024).

³⁸ WHELAN, ET AL., *supra* note 35, at 10.

³⁹ See, e.g., Quinn Curtis, Jill Fisch & Adriana Z. Robertson, *Do ESG Mutual Funds Deliver on Their Promises?*, 53 ENV'T L. REP. 10630 (2023); Barbara Ballan and Jason J. Czarnecki, *Disclosure, Greenwashing, and the Future of ESG Litigation*, 81 WASH. & LEE L. REV. 545 (2024); John Burn-Murdoch, *Yes, CEOs Are Moving Left, but ‘Woke Capitalism’ Is Not the Whole Story*, FIN. TIMES (Oct. 18, 2024), <https://www.ft.com/content/29426c31-b8f9-49da-bc8b-e6c860935694> [https://web.archive.org/web/20241109135932/https://www.ft.com/content/29426c31-b8f9-49da-bc8b-e6c860935694].

⁴⁰ See Mariassunta Giannetti, Martina Jasova, Maria Loumioti & Caterina Mendicino, “Glossy Green” Banks: The Disconnect Between Environmental Disclosures and Lending Activities 1–6 (Swedish House of Fin., Research Paper No. 23-07; Eur. Corp. Governance Inst., Working Paper No. 919/2023), <https://papers.ssrn.com/abstract=4424081> [https://perma.cc/Q32V-6ARG].

⁴¹ See discussion *infra* Sections I.C–I.D, II.A.2.

⁴² New Hampshire Republican lawmakers have proposed state legislation making it a crime to consider ESG factors in pension investments. Matt Levine, *Making ESG a Crime*, BLOOMBERG (Jan.

exempt from deep constructive criticism. On the contrary, critique enhances their impact, operationalization, and legitimacy. Constructive feedback is a gift; dogma is, at best, a distraction and, at worst, an obstruction. However, current ESG critiques are often hollow and attempt to provoke culture wars rather than enhance corporate governance.

D. *Culture Wars: ESG and Companies at a Crossroads*

The ESG movement stands at the same crossroads as the country. Public dissatisfaction with political gridlock and failures are palpable.⁴³ Companies are not immune to the repercussions.⁴⁴ However, they are not passive victims of political overreach; they are proactive political actors who influence regulation through various mechanisms to benefit their self-interested corporate objectives.⁴⁵ Corporate engagement becomes a

17, 2024, 6:15 PM), <https://www.bloomberg.com/opinion/articles/2024-01-17/making-esg-a-crime> [<https://perma.cc/97Z3-CPRX>] (“‘Knowingly’ violating the law would be a felony punishable by not less than one year and no more than 20 years imprisonment, according to the proposal.”).

⁴³ See Geoffrey Skelley, *How House Republicans Failed to Elect a Speaker*, ABC NEWS (Oct. 19, 2023, 8:10 PM), <https://abcnews.go.com/538/house-republicans-failed-elect-speaker/story?id=104150001> [<https://perma.cc/TF5X-T8EX>]; Blumberg, *supra* note 3, at 431; Lucy Colback, *The Role of the Corporation in Society*, FIN. TIMES (July 10, 2020), <https://www.ft.com/content/482a8435-c04c-4be8-9856-941e7ecf128a> [<https://perma.cc/XVU3-8Y56>]; Lydia Saad, *Historically Low Faith in U.S. Institutions Continues*, GALLUP (July 6, 2023), <https://news.gallup.com/poll/508169/historically-low-faith-institutions-continues.aspx> [<https://perma.cc/FAS8-J6WB>]; *Americans’ Dismal Views of the Nation’s Politics*, PEW RSCH. CTR. (Sept. 19, 2023), <https://www.pewresearch.org/politics/2023/09/19/americans-dismal-views-of-the-nations-politics> [<https://perma.cc/TED3-EV3G>].

⁴⁴ See Amina Dunn & Andy Cerda, *Anti-Corporate Sentiment in U.S. Is Now Widespread in Both Parties*, PEW RSCH. CTR. (Nov. 17, 2022), <https://www.pewresearch.org/short-reads/2022/11/17/anti-corporate-sentiment-in-u-s-is-now-widespread-in-both-parties> [<https://perma.cc/C8YL-4YXK>]; J. Baxter Oliphant, *Top Tax Frustrations for Americans: The Feeling That Some Corporations, Wealthy People Don’t Pay Fair Share*, PEW RSCH. CTR. (Apr. 7, 2023), <https://www.pewresearch.org/short-reads/2023/04/07/top-tax-frustrations-for-americans-the-feeling-that-some-corporations-wealthy-people-dont-pay-fair-share> [<https://perma.cc/V8TL-NNP>].

⁴⁵ See Fisch, *supra* note 5; see also David Gelles & Andrew Ross Sorkin, *Hundreds of Companies Unite to Oppose Voting Limits, but Others Abstain*, N.Y. TIMES (May 27, 2021), <https://www.nytimes.com/2021/04/14/business/ceos-corporate-america-voting-rights.html> [<https://web.archive.org/web/20210531053343https://www.nytimes.com/2021/04/14/business/ceos-corporate-america-voting-rights.html>] (“Amazon, BlackRock, Google, Warren Buffett and hundreds of other companies and executives signed on to a new statement . . . opposing ‘any discriminatory legislation’ that would make it harder for people to vote.”); David Hessekiel, *Companies Taking a Public Stand in the Wake of George Floyd’s Death*, FORBES (June 12, 2020, 4:50 PM), <https://www.forbes.com/sites/davidhessekiel/2020/06/04/companies-taking-a-public-stand-in-the-wake-of-george-floyds-death> [<https://perma.cc/X884-N93H>] (listing numerous

pragmatic tool for political entrepreneurs seeking to influence contemporary ESG, sustainability, and social justice issues. They leverage corporations as another target for public grievance, dismiss even credible claims of injustice, environmental degradation, and climate change, and pry terms like “woke” from their original context to undercut debate.⁴⁶

companies that pledged donations to groups working on racial justice); *Verizon Brings Together Major Fortune 500 Companies to Launch Women’s CoLab*, VERIZON (Oct. 11, 2021), <https://www.verizon.com/about/news/verizon-brings-together-major-fortune-500-companies-launch-womens-colab> [https://perma.cc/3Z3C-94CN] (announcing that Verizon and its partners, including Accenture, Walmart, and MasterCard “launched Women’s CoLab, an initiative providing women with essential resources to help them achieve success in an increasingly digital economy”); Dina Bass, *Microsoft Agrees to Human Rights Review in Deals with Law Enforcement, Government*, BLOOMBERG (Oct. 13, 2021, 12:49 PM), <https://www.bloomberg.com/news/articles/2021-10-13/microsoft-agrees-to-investor-push-for-human-rights-review-of-government-deals> [https://perma.cc/9GZJ-VS8T] (“Microsoft Corp., which has faced pressure from employees and shareholders over contracts with governments and law enforcement agencies, agreed to commission an independent human rights review of some of those deals. The move came in response to . . . a shareholder proposal asking the company to evaluate how well it sticks to its human rights statement and related policies.”). There are a growing number of successful shareholder proposals related to climate change and social issues. See, e.g., Press Release, Conf. Bd., In 2020, Companies Will Continue to Face Pressure to Diversify Their Boards, Address Pay Gaps, and Expand Political Contribution Disclosure (Dec. 17, 2019), <https://www.prnewswire.com/news-releases/in-2020-companies-will-continue-to-face-pressure-to-diversify-their-boards-address-pay-gaps-and-expand-political-contribution-disclosure-300976064.html> [https://perma.cc/SD9J-HKAE]; Catherine Thorbecke, *Over 200 Companies Pledge Net-Zero Emissions by 2040 as Pressure on Private Sector Mounts*, ABC NEWS (Sept. 20, 2021, 12:17 PM), <https://abcnews.go.com/Business/200-companies-pledge-net-emissions-2040-pressure-private-story?id=80124841> [https://perma.cc/MX43-3B83] (“Nearly 90 new companies—including multinational corporate giant Procter & Gamble, tech behemoth HP and cloud-computing titan Salesforce—have signed onto the Climate Pledge, an Amazon-backed initiative that asks firms to commit to achieving net-zero carbon emissions by 2040.”); Emma Hinchliffe, *Business Finally Speaks Out in Support of Abortion Rights in Texas*, FORTUNE (Sept. 22, 2021, 9:14 AM), <https://fortune.com/2021/09/22/business-finally-speaks-out-in-support-of-abortion-rights-in-texas> [https://perma.cc/L83Y-ZX8B] (“[M]ore than 50 companies signed an updated version of the ‘Don’t Ban Equality’ letter that argues that abortion restrictions are bad for business.”); Marc Treviño, Melissa Sawyer, H. Rodgin Cohen & June Hu, *2019 Proxy Season Review: Part 1—Rule 14a-8 Shareholder Proposals*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 26, 2019), <https://corpgov.law.harvard.edu/2019/07/26/2019-proxy-season-review-part-1-rule-14a-8-shareholder-prop> [https://perma.cc/TBD4-JXZT]; Melissa Eddy, Vanessa Friedman & Michael J. de la Merced, *Adidas Ends Partnership with Kanye West at a Considerable Cost*, N.Y. TIMES (Oct. 25, 2022), <https://www.nytimes.com/2022/10/25/business/adidas-kanye-west.html> [https://web.archive.org/web/20230204173533/https://www.nytimes.com/2022/10/25/business/adidas-kanye-west.html].

⁴⁶ Press Release, Off. of Governor Ron DeSantis, *supra* note 1 (“The Florida House will join the fight to stop woke financial titans who seek to dictate policy to Floridians regardless of our choices at the ballot box. I look forward to working with Governor DeSantis to protect Floridians’ pocketbooks and strengthen our national security.” (quoting former Speaker Designate Paul Renner)).

Public confidence in societal institutions is incredibly low.⁴⁷ A *Gallup* poll found that only 8% of the public has great confidence in Congress.⁴⁸ Big business did not fare much better, with only 14% having great confidence.⁴⁹ A movement is afoot to limit the discretion and reach of key institutions: colleges, universities, and K-12 schools (e.g., admissions practices, reading lists, and hiring); regulatory agencies (e.g., discretion and expertise); and corporations (e.g., ESG, sustainability, and DEI).⁵⁰

Anti-ESG backlash, although connecting to a sense of public grievance, is not a grassroots movement. It is an extensive targeted campaign orchestrated by political entrepreneurs—a network of politicians, conservative and libertarian groups, dark money, and anti-ESG billionaires—articulating theories to restrict corporate purpose and dosed with grievance politics. Ordinary citizens do not wake up with a deep dislike of acronyms such as ESG—people perhaps, but not acronyms. Roughly sixty percent of the U.S. public owns stock directly or indirectly.⁵¹

Underlying these culture wars are conservative activists such as Leonard Leo, billionaire megadonors such as Nelson Peltz, Ken Griffin, Peter Thiel, and Bill Ackman, and others who support politicians waging

⁴⁷ Saad, *supra* note 43; see also Omari Scott Simmons, *Political Risk Management*, 64 WM. & MARY L. REV. 707, 718 (2023) (“All of society’s institutions and their activities have come under increased scrutiny, especially corporations’ role in, and accountability for, economic and social outcomes.”); Tracy Jan, Jena McGregor & Meghan Hoyer, *Corporate America’s \$50 Billion Promise*, WASH. POST (Aug. 24, 2021, 7:03 PM), <https://www.washingtonpost.com/business/interactive/2021/george-floyd-corporate-america-racial-justice> [<https://perma.cc/HLM4-MNGN>] (discussing corporate accountability following the death of George Floyd); Paul Roberts, *Costco and Boeing, Commit Tens of Millions to Social Justice Programs*, SEATTLE TIMES (Aug. 29, 2020, 12:28 PM), <https://www.seattletimes.com/business/local-business/two-of-washingtons-biggest-companies-costco-and-boeing-commit-tens-of-millions-to-social-justice-programs> [<https://perma.cc/4CNJ-LXUZ>] (highlighting corporate contributions to social justice programs); Jeffrey Sonnenfeld, *CEOs Lead America’s New Great Awakening*, WALL ST. J. (Apr. 15, 2021, 12:44 PM), <https://www.wsj.com/articles/ceos-lead-americas-new-great-awakening-11618505076> [<https://perma.cc/CMN3-D4KF>] (describing CEO responses to social issues).

⁴⁸ Saad, *supra* note 43.

⁴⁹ *Id.*

⁵⁰ See Confessore, *supra* note 3; Stephanie Saul, Patricia Mazzei & Trip Gabriel, *DeSantis Takes on the Education Establishment, and Builds His Brand*, N.Y. TIMES (Jan. 31, 2023, 7:55 PM), <https://www.nytimes.com/2023/01/31/us/governor-desantis-higher-education-chris-ruf.html> [<https://web.archive.org/web/20230201010223/http://www.nytimes.com/2023/01/31/us/governor-desantis-higher-education-chris-ruf.html>]; Matt Egan, *House Takes Aim at Harvard, MIT and UPenn’s Tax-Exempt Status over Antisemitism*, CNN (Jan. 10, 2024, 6:22 PM), <https://www.cnn.com/2024/01/10/investing/harvard-tax-status-house-ways-and-means/index.html> [<https://perma.cc/4AX4-QX3W>].

⁵¹ See *What Percentage of Americans Own Stock?*, GALLUP (May 24, 2023), <https://news.gallup.com/poll/266807/percentage-americans-owns-stock.aspx> [<https://perma.cc/7W2P-JK99>] (finding that in 2023, “61% of Americans report[ed] that they own[ed] stock, . . . up from the 56% measured in 2021 and 55% measured in 2020”).

war on ESG like Florida Governor Ron DeSantis and former Republican presidential candidate Vivek Ramaswamy.⁵² Although it is difficult to ascertain unexpressed billionaire motives, this top-down support may exacerbate, exaggerate, and manipulate the degree of public outrage. Social and other media can amplify dissent. The elevation of the ESG acronym into the public sphere and discourse reflects effective organization, marketing, aggressive strategy, and tactics. A critical question is who benefits from this crusade: investors, managers, politicians, or the public?⁵³

The contemporary ESG debate confounds traditional political positions held among conservatives and liberals, Democrats and Republicans. Political labels are no longer effective predictors of business positions. For example, traditional conservative political stances advocate

⁵² The anti-ESG campaign is advanced by organizations and individuals tied to dark money king and conservative activist Leonard Leo. See Steven Mufson, *This Group Is Sharpening the GOP Attack on 'Woke' Wall Street*, WASH. POST (Jan. 30, 2023, 6:10 AM), <https://www.washingtonpost.com/climate-environment/2023/01/30/climate-change-sustainable-investing> [https://web.archive.org/web/20231120135040/https://www.washingtonpost.com/climate-environment/2023/01/30/climate-change-sustainable-investing]; Kishan, *supra* note 10. Vivek Ramaswamy made his fortune in a pharmaceutical venture and then began his career as a political figure in the conservative movement largely by attacking “woke” companies. See Sheelah Kolhatkar, *Anti-Woke, Inc.*, NEW YORKER, Dec. 19, 2022, at 28. Ramaswamy’s attacks on investment firms like BlackRock, however, are profitable to him both monetarily and politically. See *id.* Notably, Ramaswamy is co-founder of Strive Asset Management, an investment firm backed by conservative megadonor Peter Thiel, which seeks to take on the Big Three asset managers, accusing them of pushing a political agenda. See *id.*; Liam Denning, *The Tricky Politics of Anti-ESG Investing*, BLOOMBERG (May 19, 2022, 6:00 AM), <https://www.bloomberg.com/opinion/articles/2022-05-19/the-tricky-politics-of-a-new-asset-firm-backed-by-peter-thiel> [https://perma.cc/D76H-TS2W]. Activist investor Nelson Peltz has sought a board seat with Disney multiple times and has been a vocal critic of Disney management’s handling of social and other issues. See James B. Stewart & Lauren Hirsch, *The Billionaire Taking on Disney Just Wants Some Respect*, N.Y. TIMES (Mar. 19, 2024), <https://www.nytimes.com/2024/03/16/business/media/peltz-disney-proxy.html> [https://web.archive.org/web/20240909021907/https://www.nytimes.com/2024/03/16/business/media/peltz-disney-proxy.html]. Ken Griffin moved his company, Citadel Securities, to Florida because Chicago is “a city [with] so much violence.” Alyson Velati & Dakin Campbell, *Why Billionaire Ken Griffin Is Moving Citadel’s HQ to Miami from Chicago: Riots, an Employee Stabbed, and the Attempted Hijacking of His Own Car*, BUS. INSIDER (June 23, 2022, 3:30 PM), <https://www.businessinsider.com/ken-griffin-citadel-moving-headquarters-to-miami-from-chicago-2022-6> [https://web.archive.org/web/20240710121955/https://www.businessinsider.com/ken-griffin-citadel-moving-headquarters-to-miami-from-chicago-2022-6].

⁵³ See discussion *infra* Parts V–VI; Catherine Rampell, *DeSantis Promoted the Bud Light Boycott. Now He’s Mad It Worked*, WASH. POST (July 25, 2023, 7:00 AM), <https://www.washingtonpost.com/opinions/2023/07/25/desantis-bud-light-florida-shareholder-investigation/>; Christina Cheddar Berk, *Boycotts Hit Stocks Hard. Here’s What Might Be Next for Bud, Target and Others Caught in the Anti-Pride Backlash*, CNBC (June 5, 2023, 11:11 AM), <https://www.cnbc.com/2023/06/03/anti-pride-backlash-what-target-anheuser-busch-and-others-should-expect-next-.html> [https://perma.cc/3ZUC-5KP2].

for corporate speech rights and nonintervention and tout free markets.⁵⁴ Conservatives are now pursuing interventionist policies and trying to restrict corporations from taking social positions, that they now disagree with.⁵⁵ Accordingly, state, federal, and private actors are pursuing anti-ESG-related measures to generate outrage, social media clicks, and attention.⁵⁶ Meanwhile, procedural legitimacy, characterized by expert engagement with the lawmaking process, is often absent.

E. *Federal and State Anti-ESG Dynamics*

The ESG backlash and pro-ESG reaction reflect political entrepreneurship dynamics that span a range of controversies and resonate at the state and federal levels.

1. Federal

At the federal level, the U.S. Securities and Exchange Commission (SEC) has passed and proposed new disclosure requirements on ESG issues such as climate change, cyber security, and human capital,⁵⁷ attracting the attention of proponents and opponents. The U.S. Department of Labor has also addressed ESG in the context of retirement

⁵⁴ Compare *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 689–90 (2014) (holding that it is unlawful for the United States Department of Health and Human Services to mandate “that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies’ owners”), and *Citizens United v. FEC*, 558 U.S. 310, 319 (2010) (“The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.”), with Andrew Winston, *Why Business Leaders Must Resist the Anti-ESG Movement*, HARV. BUS. REV. (Apr. 5, 2023), <https://hbr.org/2023/04/why-business-leaders-must-resist-the-anti-esg-movement> [<https://perma.cc/PH5G-G6R9>] (discussing how “the normally anti-big-government legislators and governor behind the [‘Don’t Say Gay’] bill came down on Disney, taking away some longstanding economic advantages and the company’s ability to govern itself in central Florida” after Disney spoke out against conservative legislation).

⁵⁵ See discussion *infra* Section III.A.

⁵⁶ See discussion *infra* Sections II.B.1.d, III.C.4.

⁵⁷ See The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21372 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239 and 249); see also SEC INV. ADVISORY COMM., RECOMMENDATION OF THE SEC INVESTOR ADVISORY COMMITTEE’S INVESTOR-AS-OWNER SUBCOMMITTEE REGARDING HUMAN CAPITAL MANAGEMENT DISCLOSURE (Sept. 21, 2023), <https://www.sec.gov/files/spotlight/iac/20230921-recommendation-regarding-hcm.pdf> [<https://perma.cc/8MMA-W2SX>]; Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure, Securities Act Release No. 11038, Exchange Act Release No. 94382, Investment Company Act Release No. 34529, 87 Fed. Reg. 16590 (proposed Mar. 9, 2022) (to be codified at 17 C.F.R. pts. 229, 232, 239, 240 and 249).

plans and retirement security.⁵⁸ The Biden administration rules maintained that retirement plan decisions must be based primarily upon financial factors but, unlike an earlier Trump-era rule, stress “that issues such as climate change and social justice can impact companies’ long-term financial health.”⁵⁹ In response, congressional Republicans have held hearings and introduced several bills seeking to amend ERISA to limit the influence of ESG criteria on retirement plan fiduciary decisions.⁶⁰ Generally, these bills, such as the First Responder Fair Return for Employees on Their Initial Retirement Earned (RETIRE) Act, or, more descriptively, the Roll Back ESG to Increase Retirement Earnings Act, focus on retirement plan fiduciaries’ duty to plan participants and describe ESG considerations as nonfinancial factors.⁶¹ A coalition of Republican-dominated states also sought relief in federal court to strike down Department of Labor rules and guidance permitting socially conscious investing by employee retirement plans and pension funds.⁶² However, socially conscious investment funds have been part of U.S. retirement plans for decades.

Anti-ESG advocates are also advancing legal theories to challenge the shareholder proposal process and the constitutionality of ESG-related disclosure regulations: the SEC’s Approval of Diversity Disclosure Rule, Rulemaking on Cybersecurity Threat, and new rules on Climate Change

⁵⁸ See, e.g., Daniel Wiessner, *Biden Administration Moves to Nix US States’ Challenge to ESG Investing Rule*, REUTERS (June 5, 2023, 6:32 PM), <https://www.reuters.com/world/us/biden-admin-moves-nix-us-states-challenge-esg-investing-rule-2023-06-05> [<https://web.archive.org/web/20240802221346/https://www.reuters.com/world/us/biden-admin-moves-nix-us-states-challenge-esg-investing-rule-2023-06-05/>].

⁵⁹ *Id.*

⁶⁰ Employee Retirement Income Security Act (ERISA) of 1974, Pub. L. No. 93-406, § 403, 88 Stat. 829 (codified as amended at 29 U.S.C. § 1103(a)–(c)) (requiring retirement plan assets to be held in trust by one or more trustees and used only to benefit the plan participants or used to pay reasonable plan expenses); *ERISA*, U.S. DEP’T OF LABOR, <https://www.dol.gov/general/topic/health-plans/erisa> [<https://perma.cc/7GVD-ZKNP>]. See generally JAMES A. WOOTEN, *THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY* (2004).

⁶¹ First Responder Fair Return for Employees on Their Initial Retirement Earned Act of 2021, S. 129, 117th Cong. (2021); Roll Back ESG to Increase Retirement Earnings (RETIRE) Act, H.R. 5339, 118th Cong. (as passed by House, Sept. 18, 2024); H.R. REP. NO. 118-225, at 1–7 (2023). Other bills include: The Retirement Proxy Protection Act, H.R. 5337, 118th Cong. (2023), Providing Complete Information to Retirement Investors Act, H.R. 5340, 118th Cong. (2023), and No Discrimination in My Benefits Act, H.R. 5338, 118th Cong. (2023). See also Simon Mundy, Patrick Temple-West & Kenza Bryan, *Follow the Money on ESG Attacks*, FIN. TIMES (July 14, 2023), <https://www.ft.com/content/bc9a08e7-3c93-4a72-9add-e4c9b41e73c7> [<https://perma.cc/FC67-V3LY>] (describing how the Republican-led House of Representatives Financial Services Committee was investigating ESG-backed investment decisions).

⁶² Wiessner, *supra* note 59; Complaint for Declaratory and Injunctive Relief ¶¶ 1–2, 4, 7, *Utah v. Walsh*, No. 23-cv-16 (N.D. Tex. Jan. 26, 2023), 2023 WL 662151.

Disclosure.⁶³ In essence, ESG opponents are challenging the SEC's power to promulgate disclosure rules.⁶⁴ Despite recent judicial recognition of the SEC's broad delegated power and expertise in the *Alliance for Fair Board Recruitment v. Securities and Exchange Commission* decision,⁶⁵ this pro-ESG victory was short-lived. On December 11, 2024, the Court of Appeals for the Fifth Circuit held that the SEC lacked authority to approve the NASDAQ board diversity rule.⁶⁶ This overruled the earlier panel decision upholding the board diversity rule.

The Supreme Court's recent overturning of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* signals a change in agency power and more aggressive challenges to agency authority in regulating future corporate activity.⁶⁷ All signals point toward the second Trump

⁶³ See, e.g., *Considerations for Preparing Your 2024 Form 10-K and 2025 Proxy Statement*, GIBSON DUNN (Dec. 20, 2024), <https://www.gibsondunn.com/considerations-for-preparing-your-2024-form-10-k-and-2025-proxy-statement> [<https://perma.cc/R57T-WYU2>]; *Four Years of Evolving Form 10-K Human Capital Disclosures*, GIBSON DUNN (Dec. 16, 2024), <https://www.gibsondunn.com/four-years-of-evolving-form-10-k-human-capital-disclosures> [<https://perma.cc/6SUH-QBS6>]; *SEC Adopts New Rules on Cybersecurity Disclosure for Public Companies*, GIBSON DUNN (July 23, 2023), <https://www.gibsondunn.com/sec-adopts-new-rules-on-cybersecurity-disclosure-for-public-companies> [<https://perma.cc/2P97-F2CU>]; Jon McGowan, *The SEC May Be Overstepping Its Authority in ESG/Climate Related Disclosure Standards*, FORBES (Aug. 30, 2023, 11:23 PM), <https://www.forbes.com/sites/jonmcgowan/2023/08/30/the-sec-may-be-overstepping-its-authority-in-esg-climate-related-disclosure-standards> [<https://perma.cc/6QGV-QE8X>] ("The major questions doctrine will come into play in the new [SEC] Climate Related Disclosure rule.").

⁶⁴ See Jaqueline M. Vallette & Kathryn M. Gray, *SEC's Climate Risk Disclosure Proposal Likely to Face Legal Challenges*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 10, 2022), <https://corpgov.law.harvard.edu/2022/05/10/secs-climate-risk-disclosure-proposal-likely-to-face-legal-challenges> [<https://perma.cc/T8ZA-M3VV>] (discussing how opponents may argue that, among other things, "the SEC lacks statutory authority to adopt mandatory disclosure rules on climate change because such rules are outside the subject matters and purpose prescribed by Congress" or that "the new rules involve major questions of climate change policy that should be decided by duly elected members of the legislature, not a single executive branch agency").

⁶⁵ 85 F.4th 226, 251 (5th Cir. 2023); see also Adam Feldman, *Supreme Court Eyeing Fifth Circuit, but Too Early to Decipher Why*, BLOOMBERG L. (Dec. 11, 2023, 4:30 AM), <https://news.bloomberglaw.com/us-law-week/supreme-court-eyeing-fifth-circuit-but-too-early-to-decipher-why> [<https://web.archive.org/web/20240825230732/https://news.bloomberglaw.com/us-law-week/supreme-court-eyeing-fifth-circuit-but-too-early-to-decipher-why>] ("Court watchers have been musing that the US Supreme Court's conservative supermajority will lead the justices to closely align with the most right-leaning lower courts.").

⁶⁶ *All. for Fair Bd. Recruitment v. SEC*, 125 F.4th 159 (5th Cir. 2024); Bryan V. Breheny et al., *Nasdaq Board Diversity Rule Vacated by the Fifth Circuit*, SKADDEN (Dec. 16, 2024), <https://www.skadden.com/insights/publications/2024/12/nasdaq-board-diversity-rules-vacated-by-the-fifth-circuit> [<https://perma.cc/7Z9B-882C>].

⁶⁷ 467 U.S. 837 (1984), overruled by *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024); see also Douglas Hallward-Driemeier et al., *In Overturning Chevron, Supreme Court Makes It Easier for Regulated Entities to Challenge Agencies on Statutory Interpretation*, ROPES & GRAY (July 1, 2024), <https://www.ropesgray.com/en/insights/alerts/2024/07/in-overturning-chevron-supreme->

administration remaining hostile toward ESG and sustainability initiatives and aggressive future efforts to dismantle or weaken them.⁶⁸

2. State

Culture wars and political entrepreneurship underlie the aggressive onslaughts on corporate ESG, DEI, LGBTQ+, climate, and reproductive rights efforts in a significant number of states.⁶⁹ Anti-ESG political entrepreneurs have aggressively challenged companies' initiatives through legislation, boycotts, shareholder proposals, lawsuits, and the bully pulpit.⁷⁰ Meanwhile, politically liberal states like California are

court-makes-it-easier-for-regulated-entities [https://perma.cc/V32D-DBHF] (“*Loper Bright* strips agencies of this presumptive deference and invites new litigation over interpretations of statutory language that govern many areas of law and business. The decision also signals that more changes to administrative law may be on the horizon.”).

⁶⁸ Emma Boyde, *ESG Investors Retain a Glimmer of Hope Even After Trump’s Victory*, FIN. TIMES (Dec. 9, 2024), <https://www.ft.com/content/a7dd525b-0422-4757-aa56-c6deaa818102> [https://perma.cc/JCG6-QC9L].

⁶⁹ See Brooks Barnes, *Disney to Lose Special Tax Status in Florida amid ‘Don’t Say Gay’ Clash*, N.Y. TIMES (Apr. 21, 2022), <https://www.nytimes.com/2022/04/21/business/disney-florida-special-tax-status.html> [https://web.archive.org/web/20220510094813/https://www.nytimes.com/2022/04/21/business/disney-florida-special-tax-status.html]; Nikki McCann Ramirez, *DeSantis Calling Special Session to Punish Disney for Opposing Anti-LGBTQ Law*, ROLLING STONE (Feb. 2, 2023), <https://www.rollingstone.com/politics/politics-news/rondesantis-special-session-punish-disney-1234672868> [https://perma.cc/X6YD-TN8K]; Gerald F. Seib, *Why Business Leaders Are Taking Political Stands*, WALL ST. J. (Apr. 19, 2021, 3:05 PM), <https://www.wsj.com/articles/political-systems-failures-compel-corporate-activism-11618842598> [https://perma.cc/Y598-HF8D]. As of March 2025, 127 anti-DEI bills have been introduced in twenty-nine states. *DEI Legislation Tracker*, CHRON. HIGHER EDUC. (Mar. 14, 2025), <https://www.chronicle.com/article/here-are-the-states-where-lawmakers-are-seeking-to-ban-colleges-dei-efforts> [https://perma.cc/FCJ5-XBNU]. Out of these 127 bills, fifteen have final legislative approval and fifteen have become law. *Id.* Although remaining bills have been either tabled, failed to pass, or vetoed, the onslaught of anti-DEI and other legislation is unlikely to vanish in the coming months and perhaps years. *Id.* The second Trump administration’s anti-DEI executive orders bolster concurrent state efforts.

In retaliation for Delta Airline’s decision to cancel discounts for National Rifle Association members following the Parkland School shooting, Georgia terminated a \$50 million dollar tax break for Delta Airlines. See Leslie Josephs, *Georgia Lawmakers Pull Airline Tax Break After Delta Killed NRA Discounts*, CNBC (Mar. 1, 2018, 7:52 PM), <https://www.cnn.com/2018/03/01/georgia-lawmakers-pull-airline-break-after-delta-killed-nra-discounts.html> [https://perma.cc/4D3Y-BT66]; Richard Fausset, *Georgia Passes Bill That Stings Delta over N.R.A. Position*, N.Y. TIMES (Mar. 1, 2018), <https://www.nytimes.com/2018/03/01/business/delta-nra-georgia.html> [https://web.archive.org/web/20240820232440/https://www.nytimes.com/2018/03/01/business/delta-nra-georgia.html].

⁷⁰ See Heidi Welsh, *Anti-ESG Shareholder Proposals in 2023*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 1, 2023), <https://corpgov.law.harvard.edu/2023/06/01/anti-esg-shareholder-proposals-in-2023> [https://perma.cc/NFX4-YHHU] (“The most popular [shareholder] proposals for anti-ESG proponents question the wisdom of encouraging racial and ethnic diversity on boards

passing legislation reaffirming support for the same efforts.⁷¹ State legislation and initiatives have indirectly and directly embroiled companies in a range of controversies.⁷² Some state anti-ESG efforts challenge long-standing company practices and initiatives.⁷³ State attorneys general are applying pressure on companies taking ESG stances and making commitments.⁷⁴ The State Financial Officers Foundation

and in the workplace”); Steve Blonder, *The Litigation Risks That Companies Face in an Age of ESG*, REUTERS (Sept. 26, 2023, 2:00 PM), <https://www.reuters.com/legal/legalindustry/litigation-risks-that-companies-face-an-age-esg-2023-09-26> [<https://perma.cc/74GC-5F6A>] (“Simply put, ESG litigation is on the rise, mostly from private litigants or from government agencies intent on pushing back against ESG initiatives.”); Edward Segal, *How the Backlash to ESG Can Create a Crisis for Companies*, FORBES (Sept. 25, 2023, 6:32 AM), <https://www.forbes.com/sites/edwardsegal/2023/09/25/how-the-backlash-to-esg-can-create-a-crisis-for-companies> [<https://perma.cc/LPJ9-227F>] (“The backlash to ESG can create a crisis by putting corporate executives on the defensive because of critical comments on social media, protests, and boycotts.”); Charles Donefer, *State ESG Laws in 2023: The Landscape Fractures*, REUTERS (May 31, 2023), <https://www.thomsonreuters.com/en-us/posts/esg/state-laws> [<https://perma.cc/VN5E-79AF>] (“The volume of anti-ESG bills introduced in state legislatures is growing. Many are passing as the topic gains political salience, particularly on the political right. As these laws pass, they serve as models for similar legislation in other states.”).

⁷¹ Coral Davenport, *Gavin Newsom Wants to Export California’s Climate Laws to the World*, N.Y. TIMES (Oct. 26, 2023), <https://www.nytimes.com/2023/10/23/climate/gavin-newsom-california-climate-action.html> [<https://web.archive.org/web/20240926032717/https://www.nytimes.com/2023/10/23/climate/gavin-newsom-california-climate-action.html>]; McGowan, *supra* note 25; Kiara Alfonseca, *California Passes Slate of LGBTQ Protections*, ABC NEWS (Sept. 27, 2023, 11:51 AM), <https://abcnews.go.com/US/california-passes-slate-lgbtq-protections/story?id=103501392> [<https://perma.cc/NQW8-SYAK>].

⁷² See, e.g., Andrew Winston, *Why Business Leaders Must Resist the Anti-ESG Movement*, HARV. BUS. REV. (Apr. 5, 2023), <https://hbr.org/2023/04/why-business-leaders-must-resist-the-anti-esg-movement> [<https://perma.cc/AFX2-TCWH>] (“The culture wars in the U.S. continue to rage, and they’ve come for business. Companies are being dragged into issues that stir emotions, such as abortion, gay and trans rights, racial and gender equity, and climate change.”).

⁷³ See Gumbs, *supra* note 15 (“A number of ‘culture war’ issues—including reproductive rights and diversity, equity & inclusion [] programs—have complicated the ESG landscape as long-standing company initiatives in these areas are being challenged by opponents of ESG through litigation, boycotts and shareholder proposals.”).

⁷⁴ See Letter from Jonathan Skrmetti, Tenn. Att’y Gen., to Financial Service Provider, Signatory of Net Zero Fin. Serv. Providers All. (Sept. 13, 2023), <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2023/pr23-37-letter.pdf> [<https://perma.cc/SA6J-6BJW>] (including additional signatories of attorneys general from Alabama, Alaska, Arkansas, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Oklahoma, Ohio, South Carolina, Utah, Virginia, West Virginia, and Wyoming); Press Release, Jason S. Miyares, Att’y Gen., Commonwealth of Va. Off. of Att’y Gen., Attorney General Miyares Demands Answers from BlackRock-linked Mutual Fund Directors Regarding Conflicts of Interest, ESG Investments (July 12, 2023), <https://www.oag.state.va.us/media-center/news-releases/2592-july-12-2023-attorney-general-miyares-demands-answers-from-blackrock-linked-mutual-fund-directors-regarding-conflicts-of-interest-esg-investments> [<https://perma.cc/Z2GR-MVH3>]; Press Release, Keith Ellison, Off. of Minn. Att’y Gen., Attorney General Ellison Calls on Congress to Defend Consideration of ESG Factors (Dec. 14, 2023), https://www.ag.state.mn.us/Office/Communications/2023/12/14_ESG.asp [<https://perma.cc/N8NR-KJWQ>].

(SFOF) is working closely with the American Legislative Exchange Council (ALEC) to restrict banks and asset managers from receiving state pension investments and contracts, claiming they are unfairly boycotting “sin” companies, such as fossil fuel, tobacco, and gun producers.⁷⁵ ALEC’s influence and lawmaking practices are controversial, has created a model anti-ESG statute that certain states have adopted in part.⁷⁶

Financial institutions like BlackRock, that are members of Climate Action 100+, Glasgow Financial Alliance for Net Zero (GFANZ), and other climate alliances, have come under increased scrutiny and received inquiries from state attorneys general suggesting net-zero goals amount to violations of antitrust laws and fiduciary duty.⁷⁷ Ironically, banks that

⁷⁵ SFOF is a nonprofit organization founded by state treasurers from oil, gas, and coal-producing states. *State Financial Officers Foundation*, INFLUENCE WATCH, <https://www.influencewatch.org/non-profit/state-financial-officers-foundation> [<https://perma.cc/72JH-YKBB>]. ALEC is a nonprofit composed of state legislators and private sector representatives who draft model legislation. Brian Duignan, *American Legislative Exchange Council*, BRITANNICA (Mar. 20, 2023), <https://www.britannica.com/topic/American-Legislative-Exchange-Council> [<https://perma.cc/L9S3-776P>].

⁷⁶ See *State Government Employee Retirement Protection Act*, AM. LEGIS. EXCH. COUNCIL (Aug. 28, 2023), <https://alec.org/model-policy/state-government-employee-retirement-protection-act> [<https://perma.cc/N877-9QM9>]; Karin Rives, *States’ Anti-ESG Push Leaves Patchwork of Policies, Unclear Mandates*, S&P GLOB. (Aug. 22, 2023), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/states-anti-esg-push-leaves-patchwork-of-policies-unclear-mandates-77133331> [<https://perma.cc/WGU4-ERWT>] (“In 2022, ALEC published a model policy known as the State Government Employee Retirement Protection Act, which many states used to create bills prohibiting or limiting their pension funds from considering ESG-related risks and opportunities when making investments.”); David H. Webber, David Berger & Beth Young, *The Liability Trap: Why the ALEC Anti-ESG Bills Create a Legal Quagmire for Fiduciaries Connected with Public Pensions*, HARV. L. SCH. F. ON CORPORATE GOVERNANCE (Feb. 27, 2023), <https://corpgov.law.harvard.edu/2023/02/27/the-liability-trap-why-the-alec-anti-esg-bills-create-a-legal-quagmire-for-fiduciaries-connected-with-public-pensions> [<https://perma.cc/4EGR-X9L3>] (asserting that ALEC’s model bills take “a ‘plug and play’ approach allowing them to be introduced in state legislatures with very little customization”); Leah Malone, Emily Holland & Carolyn Houston, *ESG Battlegrounds: How the States Are Shaping the Regulatory Landscape in the U.S.*, HARV. L. SCH. F. ON CORPORATE GOVERNANCE (Mar. 11, 2023), <https://corpgov.law.harvard.edu/2023/03/11/esg-battlegrounds-how-the-states-are-shaping-the-regulatory-landscape-in-the-u-s> [<https://perma.cc/2J47-A474>] (providing a summary of state anti-ESG bills).

⁷⁷ See Amelia Miazad, *Investor Climate Alliances*, 102 WASH. U. L. REV. 797 (2025) (analyzing climate alliance dynamics); Alastair Marsh, ‘Toxic’ Attacks on ESG Lead Wall Street to Mount a New Defense, BLOOMBERG (Jan. 18, 2024, 9:00 AM), <https://www.bloomberg.com/news/articles/2024-01-18/-toxic-attacks-on-esg-lead-wall-street-to-mount-a-new-defense>; GLASGOW FIN. ALL. FOR NET ZERO, <https://www.gfanzero.com> [<https://perma.cc/Y79P-FM2Q>]; Press Release, Jim Jordan, Chairman, House of Representatives Judiciary Comm., Chairman Jordan Subpoenas as You Sow and GFANZ in ESG Investigation (Nov. 1, 2023), <https://judiciary.house.gov/media/press-releases/chairman-jordan-subpoenas-you-sow-and-gfanz-esg-investigation> [<https://perma.cc/ZS2Z-UWJ6>]; Letter from Dan Bishop, U.S. Representative, et al., to Mindy S. Lubber, Investor Representative, Climate Action 100+, & Simiso Nzima, Investor

red-state attorneys general have targeted for ESG stances, such as Wells Fargo and JPMorgan Chase, are among the largest lenders to the fossil fuel industry.⁷⁸ Recently, Congress initiated hearings citing antitrust concerns about climate alliances.⁷⁹ This political pressure prompted some financial groups, such as Vanguard, Allianz, and Lloyds of London, to withdraw.⁸⁰ In response, climate alliances are pushing back, modifying and clarifying their language to avert antitrust scrutiny.⁸¹ However, companies continue to leave climate alliances.⁸² In 2023, at least forty-six states introduced legislation prohibiting the use of ESG investment strategies by pension fund managers, investment managers, and asset managers.⁸³ Some states, largely Republican-led, seek to punish or at least

Representative, Climate Action 100+ (Dec. 6, 2022), <https://nsjonline.com/wp-content/uploads/2022/12/2022-12-06-612712009-House-Republican-letter-to-ClimateAction-100.pdf> [https://perma.cc/94PC-8ANY]; Mark Brnovich, *ESG May Be an Antitrust Violation*, WALL. ST. J. (Mar. 6, 2022, 4:40 PM), <https://www.wsj.com/articles/esg-may-be-an-antitrustviolation-climate-activism-energy-prices-401k-retirement-investment-political-agenda-coordinated-influence-11646594807> [https://web.archive.org/web/20230628032239/https://www.wsj.com/articles/esg-may-be-an-antitrust-violation-climate-activism-energy-prices-401k-retirement-investment-political-agenda-coordinated-influence-11646594807] (“The biggest banks and money managers seek to implement a political agenda, such as compliance with the Paris Climate Accord. Then a group mobilizes: Climate Action 100+, for example, comprised of hundreds of big banks and money managers that together manage \$60 trillion.”).

⁷⁸ Brooke Masters & Patrick Temple-West, *The Real Impact of the ESG Backlash*, FIN. TIMES (Dec. 4, 2023), <https://www.ft.com/content/a76c7feb-7fa5-43d6-8e20-b4e4967991e7> [https://perma.cc/3X3Y-L5YT].

⁷⁹ Press Release, Jim Jordan, Chairman, House of Representatives Judiciary Comm., Judiciary Republicans: Woke Companies Pursuing ESG Policies May Violate Antitrust Law (Dec. 6, 2022), <https://judiciary.house.gov/media/press-releases/judiciary-republicans-woke-companies-pursuing-esg-policies-may-violate> [https://perma.cc/SH7U-X4V2].

⁸⁰ Masters & Temple-West, *supra* note 78.

⁸¹ *Id.*; see also Dominic Webb, ‘We Are Not a Cabal’—Anne Simpson on Climate Action 100+, RESPONSIBLE INV. (Dec. 20, 2022), <https://www.responsible-investor.com/we-are-not-a-cabal-annesimpson-on-climate-action-100> [https://perma.cc/K83C-3RX4].

⁸² See, e.g., Simon Jessop & Ross Kerber, *JPMorgan, State Street Quit Climate Group, BlackRock Steps Back*, REUTERS (Feb. 15, 2024, 6:07 PM), <https://www.reuters.com/sustainability/sustainable-finance-reporting/jpmorgan-fund-arm-quits-climate-action-100-investor-group-2024-02-15> [https://web.archive.org/web/20241216222646/https://www.reuters.com/sustainability/sustainable-finance-reporting/jpmorgan-fund-arm-quits-climate-action-100-investor-group-2024-02-15] (discussing JPMorgan and State Street’s departure from Climate Action 100+, citing “a threat to independence” that “remove[s] nearly \$14 trillion of total assets from efforts to coordinate Wall Street action on tackling climate change”).

⁸³ Townsend Brown, *Anti-ESG Proliferated in the States in 2023, but Traditional ESG Still Had Some Wins*, MULTISTATE (Oct. 31, 2023), <https://www.multistate.us/insider/2023/10/31/anti-esg-legislation-proliferated-in-the-states-in-2023-but-traditional-esg-still-had-some-wins> [https://perma.cc/QXC5-6Y5U]; Rives, *supra* note 76; see, e.g., N.C. GEN. STAT. § 143-162.6 (2023) (prohibiting the use of ESG or “economically targeted investments” in employment decisions and the award of state contracts).

threaten companies taking stances on ESG.⁸⁴ Between 2020 and 2025, approximately 465 anti-ESG bills have proliferated across the United States.⁸⁵ This flurry of activity raises an interesting question: What drives political actors, state attorneys general, and governors to lead the charge against ESG and business discretion? The probable answer is no surprise: political advancement.⁸⁶ They are rarely former scions of industry but may be accountable to them.⁸⁷ Not all of the pressure comes from red

⁸⁴ See Gumbs, *supra* note 15 (“Legislation prohibiting the use of ESG investment strategies has been introduced in at least 17 states, while Republican-led states seek to punish companies that take stances on ESG issues.”); see also Andrew Solender, ‘Get Woke. Go Broke.’: GOP Calls Grow to Punish ‘Woke’ Businesses with Legislation, *FORBES* (Apr. 26, 2021, 2:56 PM), <https://www.forbes.com/sites/andrewsolender/2021/04/26/getwoke-go-broke-gop-calls-grow-to-punish-woke-businesses-with-legislation> [https://perma.cc/3Y5U-WLDD].

⁸⁵ *Live Anti-ESG State Action Tracker*, PLEIADES STRATEGY, <https://www.pleiadesstrategy.com/pleiades-anti-esg-bill-tracker-state-legislation-attacks-on-responsible-investing> [https://perma.cc/Z48G-DRSJ]; see also CONNOR GIBSON & FRANCES SAWYER, PLEIADES STRATEGY, 2023 STATEHOUSE REPORT 3 (2023), <https://www.pleiadesstrategy.com/state-house-report-bill-tracker-republican-anti-esg-attacks-on-freedom-to-invest-responsibly-earns-business-labor-and-environmental-opposition> [https://perma.cc/XUG9-6PFM]; CONNOR GIBSON, FRANCES SAWYER & JEREMY SIEGEL, PLEIADES STRATEGY, 2024 STATEHOUSE REPORT 4 (2024), <https://www.pleiadesstrategy.com/state-house-report-bill-tracker-republican-anti-esg-state-legislative-attacks-on-responsible-investing-continue-weakened-and-resaped-by-their-costly-reality-and-a-year-of-continued-opposition> [https://perma.cc/D3HD-NSEH].

⁸⁶ See discussion *supra* Section I.D. See generally Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593 (2014) (discussing prosecutor political dynamics); Ronald F. Wright, *Prosecutors and Their State and Local Politics*, 110 J. CRIM. L. & CRIMINOLOGY 823 (2020) (same).

⁸⁷ For example, Ken Griffin, founder of Citadel Securities, has been particularly vocal regarding his support for Governor Ron DeSantis and other politicians. See Brian Schwartz, *Billionaire Ken Griffin, Former DeSantis Donor, on Sidelines for GOP Presidential Primary*, *CNBC* (Mar. 5, 2024, 3:41 PM), <https://www.cnbc.com/2023/09/18/billionaire-ken-griffin-former-desantis-donor-sits-out-gop-primary.html> [https://perma.cc/7J2G-652V] (describing Ken Griffin as “a major Republican donor” who supported DeSantis for re-election as Florida governor but then later dropped his support). Griffin has an estimated net worth of \$43.5 billion dollars and is, according to *Forbes*, the world’s thirty-fifth richest person. *The Real-Time Billionaires List*, *FORBES* (2025), <https://www.forbes.com/real-time-billionaires> [https://perma.cc/TE9F-7EKV]. Griffin recently moved his company’s headquarters from Illinois to Florida due in part to opposition to state taxation policies. Svea Herbst-Bayliss, *Hedge Fund Citadel to Move Headquarters to Miami from Chicago*, *REUTERS* (June 23, 2022, 1:01 PM), <https://www.reuters.com/business/hedge-fund-citadel-move-headquarters-miami-chicago-2022-06-23> [https://perma.cc/5P62-9Q25]. However, Griffin is far from the only important business figure who maintains an influence in politics. Billionaire activist investor Nelson Peltz has served as a donor and close confidant for several politicians, including Senator Joe Manchin and President Donald Trump. See Brian Schwartz, *Billionaire Investor Nelson Peltz Says He Talks Every Week to Sen. Joe Manchin, Who Is Pushing to Cut Biden Agenda*, *CNBC* (Oct. 20, 2021, 3:02 PM), <https://www.cnbc.com/2021/10/20/billionaire-nelson-peltz-says-he-talks-to-sen-joe-manchin-every-week.html> [https://perma.cc/WT6H-XV9L]. Further, Bill Ackman, founder of Pershing Square Capital Management, at one time supported anti-ESG presidential candidate Vivek Ramaswamy. See Rebecca Davis O’Brien, *Dean Phillips, Bill Ackman, a \$1 Million Gift and a Website Tweak*, *N.Y. TIMES* (Jan. 17, 2024),

states. Governor Gavin Newsom of California targeted Walgreens for its decision to stop distributing an abortion pill and, more recently, clashed with petroleum producers over new climate regulations and sparred with Governor Ron DeSantis in televised debates.⁸⁸

<https://www.nytimes.com/2024/01/17/us/politics/dean-phillips-bruce-ackman-dei.html> [<https://web.archive.org/web/20240118013138/https://www.nytimes.com/2024/01/17/us/politics/dean-phillips-bruce-ackman-dei.html>]; Pierre Paulden, *Bill Ackman Is Betting on GOP Presidential Hopeful Ramaswamy*, BLOOMBERG (Aug. 24, 2023, 4:00 PM), <https://www.bloomberg.com/news/articles/2023-08-24/bill-ackman-is-betting-vivek-ramaswamy-s-just-getting-started> [<https://perma.cc/G8NB-2SU9>].

⁸⁸ Pam Belluck & Julie Creswell, *Walgreens Faces Blowback for Not Offering Abortion Pill in 21 States*, N.Y. TIMES (Mar. 7, 2023, 9:48 PM), <https://www.nytimes.com/2023/03/07/business/walgreens-abortion-pill.html> [<https://perma.cc/Z5HG-ZHZ8>]; see also Sharon Udasin, *Newsom Declares Intention to Sign Landmark Climate Disclosure Bill*, HILL (Sept. 18, 2023, 11:34 AM), <https://thehill.com/homenews/state-watch/4209917-newsom-declares-intention-to-sign-landmark-climate-disclosure-bill> [<https://perma.cc/L63N-WCA3>]; *DeSantis vs. Newsom: The Great Red vs. Blue State Debate* (Fox News television broadcast Nov. 30, 2023); Jonathan Weisman, *5 Takeaways from the DeSantis-Newsom Debate*, N.Y. TIMES (Nov. 30, 2023), <https://www.nytimes.com/2023/11/30/us/politics/desantis-newsom-debate-takeaways.html> [<https://web.archive.org/web/20231202061926/https://www.nytimes.com/2023/11/30/us/politics/desantis-newsom-debate-takeaways.html>].

II. THE INTERPLAY BETWEEN POLITICAL ENTREPRENEURSHIP AND BACKLASH

Political entrepreneurship often catalyzes and accelerates political backlash. Contemporary corporate governance narratives overwhelmingly focus on institutions, rules, regulations, processes, intermediaries, and market forces but rarely on political entrepreneurship, which, without question, contributes to the politicization of modern corporations.⁸⁹ The preoccupation with institutional stability underestimates how backlash and political entrepreneurship conspire to disrupt corporate governance, regulation, and outcomes. Examining this interplay offers a more accurate and dynamic understanding of legal institutions, the evolution of regulatory architecture, institutional fluidity, and corporate governance, capturing both endogenous and exogenous determinants of institutional and regulatory changes.⁹⁰

A. *Political Entrepreneurs*

1. Defining Political Entrepreneurship

Political entrepreneurship encompasses a range of political behaviors, from fraudulent behavior at one end to hard bargaining and savvy tactics at the other.⁹¹ The legal literature does not adequately define political entrepreneurship and capture its impact on corporate governance and the regulatory environment in which companies operate. Instead, it often considers the related concept of opportunism in the context of transaction or agency costs.⁹² Opportunism is an aspect of the

⁸⁹ See Blumberg, *supra* note 3, at 425–26, 431, 454.

⁹⁰ See generally Adam D. Sheingate, *Political Entrepreneurship, Institutional Change, and American Political Development*, 17 *STUD. AM. POL. DEV.* 185 (2003).

⁹¹ See *id.* at 187–90.

⁹² Opportunism is a broad term capturing a wide range of phenomena. Oliver E. Williamson, *Opportunism and Its Critics*, 14 *MANAGERIAL & DECISION ECON.* 97, 101 (1993) (“[T]he unapologetic reference to opportunism invites attention to and helps to unpack a much wider set of phenomena than normally arise when reference is made to adverse selection and moral hazard.”). “Opportunism also manifests itself under both socialism and capitalism. Again, the behavior in question is better described as managerial discretion than shirking.” *Id.* at 103; see also James H. Love, *Opportunism, Hold-up and the (Contractual) Theory of the Firm*, 166 *J. INST. & THEORETICAL ECON.* 479 (2010). Williamson defined opportunism, in the organizational context, as “self-interest seeking with guile.” Williamson, *supra*, at 97. But he and other scholars acknowledged that “[h]uman behavior is too complicated to be adequately summarized by

human condition that is not limited to corporate actors; it extends to political and government actors. In economics and political science, the term *political opportunist* is often used interchangeably with *political entrepreneur*.⁹³ Political science wields the term political entrepreneurship “to describe cunning and resourceful political leadership.”⁹⁴ It captures the conduct of traditional government actors—governors, legislators, judges—and individuals and groups associated with political and social movements.⁹⁵ It encompasses actions in response to exogenous shocks, such as a systemic financial crisis, corporate scandal and misconduct, and backlash,⁹⁶ as well as endogenous, self-initiated political strategies to place issues on the agendas of constituents and other stakeholders. Institutional complexity may create opportunities for political entrepreneurs but, like markets, may also raise barriers to

opportunism alone.” Maria Moschandreas, *The Role of Opportunism in Transaction Cost Economics*, 31 J. ECON. ISSUES 39, 43 (1997) (“Thorstein Veblen, for example, wrote, at the turn of the century, that ‘... throughout men’s dealings with one another ... there runs a sense of equity, fair dealing and workmanlike integrity’ that ‘... discontents gain that is got at an undue cost to others’ and that ‘in common with other men, the business man is moved by ideals of serviceability and an aspiration to make the way of life easier for his fellows.’” (alterations in original) (citations omitted) (quoting THORSTEIN VEBLEN, *THE THEORY OF BUSINESS ENTERPRISE* 25–26 (3d prtg. St. Martin’s Press 1932)). A range of human motivations inspire action including “[a] regard for human dignity and the development of trust in relationships, the desire for power and leadership, the impact of group dynamics, and a regard for ethics, social pressures, and cultural conditioning can influence human behavior significantly.” Moschandreas, *supra*, at 43. And “most economic agents are engaged in business-as-usual, with little or no thought to opportunism, most of the time.” Williamson, *supra*, at 98.

⁹³ Alvin Carpio, *The Rise of the Political Entrepreneur and Why We Need More of Them*, WORLD ECON. F. (Nov. 23, 2017), <https://www.weforum.org/agenda/2017/11/the-rise-of-the-political-entrepreneur-and-why-we-need-more-of-them> [<https://perma.cc/HJC9-VZSN>] (“Political entrepreneurs are people who create ideas and innovations, and act as new leaders in the field of politics. They are individuals and groups who seek to improve the science and art of politics through disruption. The founders of movements such as the Chartists and Suffragettes, Capitalists and Marxists, Futurists and Luddites were all political entrepreneurs.”). Joseph A. Schumpeter defined entrepreneurs as “forceful individual[s]” who lead to a “change in economic life” which then “spreads to the rest of the economy.” JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM & DEMOCRACY* xi (George Allen & Unwin 1976) (1942); For another depiction of the entrepreneurship concept, see, for example, Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 S.CAL. L. REV. 383 (2017).

⁹⁴ Sheingate, *supra* note 90, at 187.

⁹⁵ See *id.*; see, e.g., Neomi Frisch-Aviram, Itai Beeri & Nissim Cohen, *Entrepreneurship in the Policy Process: Linking Behavior and Context Through a Systematic Review of the Policy Entrepreneurship Literature*, 80 PUB. ADMIN. REV. 188 (2020) (“[O]ne of Kingdon’s main insights is the importance of policy entrepreneurs in policy change: given a window of opportunity, policy entrepreneurs play a key role in connecting the streams by linking the problem and solution.”).

⁹⁶ See, e.g., Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521 (2005); J. Robert Brown Jr., *Criticizing the Critics: Sarbanes-Oxley and Quack Corporate Governance*, 90 MARQ. L. REV. 309 (2006).

entry.⁹⁷ Failure to recognize and reckon with the varied influence of political entrepreneurship represents a blind spot in the legal literature.

In the corporate governance context, political entrepreneurship captures a range of activities. It includes ad hoc and knee-jerk legislation that discounts corporate expertise, capacity, and informational advantages. It leverages the bully pulpit to corporations and strategically shift accountability to a large visible target.⁹⁸ It can contribute to adverse outcomes, such as jurisdictional and capital migration, by undermining principles that support sound business planning, such as predictability, stability, neutrality, and flexibility. However, not all political entrepreneurship is harmful or confined to a particular political party or ideology. It may involve less adversarial, more collaborative public-private partnerships. It can help to improve corporate performance, lessen operational and regulatory burdens, and promote market access, technological advancement, inclusivity, and equity. Under the right circumstances, political entrepreneurship can bring changes that strengthen the corporate governance architecture.

2. Political Entrepreneurship and Contemporary ESG Backlash

The present moment of political backlash is ripe for political entrepreneurs. Within this context, anti-ESG lawmakers and politicians have a greater opportunity to secure advantages. They can maneuver in a range of nuanced ways to maximize political capital and generate broader political support when they pursue anti-ESG policies.⁹⁹ Political entrepreneurship coupled with backlash can disrupt markets as well as mediate economic turmoil.¹⁰⁰ Corporate scandals, social unrest, and severe economic disruptions often shift political power dynamics, creating opportunities for political entrepreneurs to secure advantages.¹⁰¹

Political entrepreneurs can catapult simplified narratives, misinformation, or incomplete information into public discourse,

⁹⁷ Sheingate, *supra* note 90, at 194; ROBERT A. DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY 227 (2d ed. 2005) (“To the political entrepreneur who has skill and drive, the political system offers unusual opportunities for pyramiding a small amount of initial resources into a sizable political holding. This possibility will prove to be highly important . . . in accounting for changes in influence in New Haven.”).

⁹⁸ Blumberg, *supra* note 3, at 426, 428, 431; see also Romano, *supra* note 96.

⁹⁹ See Sam Peltzman, *George Stigler’s Contribution to the Economic Analysis of Regulation*, 101 J. POL. ECON. 818, 824 (1993); Omari Scott Simmons, *Taking the Blue Pill: The Imponderable Impact of Executive Compensation Reform*, 62 SMU L. REV. 299, 329 (2009).

¹⁰⁰ Mark J. Roe, *Backlash*, 98 COLUM. L. REV. 217, 217 (1998).

¹⁰¹ Sam Peltzman, *The Economic Theory of Regulation After a Decade of Deregulation*, in BROOKINGS PAPERS ON ECONOMIC ACTIVITY: MICROECONOMICS 1, 58 (1989).

sometimes emphasizing fear and grievance over evidence.¹⁰² Public opinion does not always originate organically from people's minds; political entrepreneurs can manufacture it.¹⁰³ Small retail investors or employees holding retirement accounts do not wake up every morning with an acute case of ESG-induced anxiety. Would non-equity holders or passive equity holders notice ESG practices without political entrepreneurs working to shift public opinion? The likely answer is no. Even diffuse, disorganized, and seemingly disconnected constituencies may engage with the political process when given "free (and easy to digest, perhaps entertaining) information" and a "political[ly] salient[t] . . . national issue that commands attention," incites outrage, and encourages action.¹⁰⁴ Social media amplifies and distorts these effects.¹⁰⁵ Extant anti-ESG efforts, where political entrepreneurs connect ESG investment and corporate practices with broader cultural wars, reflect this pattern.¹⁰⁶ Isolated citizen demands may not significantly affect corporate behavior, but coupled with political entrepreneur intervention, they are more likely to be successful.¹⁰⁷

¹⁰² Gary M. Lucas Jr., *Paternalism and Psychic Taxes: The Government's Use of Negative Emotions to Save Us from Ourselves*, 22 S. CAL. INTERDISC. L.J. 227, 259 (2013) ("Firms have an incentive to use sophisticated techniques to persuade consumers to engage in behavior that will increase profits, even at the expense of consumer welfare. . . . [I]n some cases, firms may simply be giving consumers what they want.").

¹⁰³ See MURRAY EDELMAN, *THE POLITICS OF MISINFORMATION* 53 (2001); Gary M. Lucas Jr. & Slavisa Tasic, *Behavioral Public Choice and the Law*, 118 W. VA. L. REV. 199, 200, 213–14 (2015).

¹⁰⁴ Peltzman, *supra* note 101, at 51–52; see Lucas & Tasic, *supra* note 103, at 203–04 ("A key insight of behavioral public choice is that people have less incentive to behave rationally in their capacity as political actors than in their capacity as market actors. Elections are rarely decided by a single vote, so voters have little reason to take them seriously. Moreover, the voters, politicians, and bureaucrats who participate in the political process know that the costs and benefits of their decisions fall largely upon others. So these political actors have less at stake than consumers, investors, and other market participants who make decisions that primarily affect themselves. Because political actors have little incentive to behave rationally, irrationality is common in politics, and it has a substantial negative effect on the law. . . . Research in behavioral public choice suggests a cautious approach to policy making and a healthy skepticism of government action whether it is motivated by market failures or by paternalism.").

¹⁰⁵ See Farhad Manjoo, *Social Media's Globe-Shaking Power*, N.Y. TIMES (Nov. 16, 2016), <https://www.nytimes.com/2016/11/17/technology/social-medias-globe-shaking-power.html> [<https://web.archive.org/web/20220919172841/https://www.nytimes.com/2016/11/17/technology/social-medias-globe-shaking-power.html>].

¹⁰⁶ See discussion *infra* Section I.D.

¹⁰⁷ Simmons, *supra* note 47, at 774. Mark Roe's description of "backlash" acknowledges the importance of broader public sentiment beyond the manager-shareholder constituency. See Roe, *supra* note 100, at 217–18.

B. Defining Political Backlash

Attempts to define backlash in the academic literature, particularly in the corporate context, are underdeveloped.¹⁰⁸ The lack of precise patterns and predictability has limited study in the social sciences, law, and other disciplines.¹⁰⁹ Corporate governance scholars have addressed how companies exercise political influence, shape regulation, and manage political risks.¹¹⁰ Some have examined the political dynamics surrounding crisis-mode regulation, especially in response to economic calamities.¹¹¹ However, few have analyzed the policy changes associated with contemporary backlash dynamics.¹¹² Context matters. The crisis-mode environment giving rise to the Sarbanes-Oxley (SOX) and Dodd-Frank legislation differs inherently from the current ESG backlash context.¹¹³ A verifiable economic crisis and a crisis primarily manufactured by political entrepreneurs are different.

¹⁰⁸ See, e.g., Roe, *supra* note 100.

¹⁰⁹ See, e.g., Karen J. Alter & Michael Zürn, *Conceptualising Backlash Politics: Introduction to a Special Issue on Backlash Politics in Comparison*, 22 BRITISH J. POL. & INT'L RELS. 563 (2020) [hereinafter Alter & Zürn, *Conceptualising Backlash Politics*]; Karen J. Alter & Michael Zürn, *Theorising Backlash Politics: Conclusion to a Special Issue on Backlash Politics in Comparison*, 22 BRITISH J. POL. & INT'L RELS. 739 (2020) [hereinafter Alter & Zürn, *Theorising Backlash Politics*].

¹¹⁰ See, e.g., Simmons, *supra* note 47; Gatti, *supra* note 5.

¹¹¹ See, e.g., Romano, *supra* note 96, at 1544 (“SOX stands as an exemplar of low-quality legislative decisionmaking in the context of a crisis, a feature that has been repeated on other occasions when the federal government has intervened in financial markets . . .”). Compare Lucas & Tasic, *supra* note 103, at 215, and THOMAS SOWELL, APPLIED ECONOMICS: THINKING BEYOND STAGE ONE 4 (2d ed. 2009) (“When most voters do not think beyond stage one, many elected officials have no incentive to weigh what the consequences would be in the later stages—and considerable incentives to avoid getting beyond what their constituents think and understand, for fear that the rival politicians can drive a wedge between them and their constituents by catering to short-run public perceptions.”), with Brown, *supra* note 96, at 309 (“[SOX] was adopted in a rush, political expediency necessitating that something be done before the 2002 election to minimize voter backlash from the collapse of Enron and WorldCom. Two arguably moribund bills, with very different philosophies, were cobbled together, augmented, and passed in a flurry of activity, ostensibly enacting the most far-reaching reforms of the nation’s business practices since the Great Depression.” (footnote omitted)), and Robert A. Prentice & David B. Spence, *Sarbanes-Oxley as Quack Corporate Governance: How Wise Is the Received Wisdom?*, 95 GEO. L.J. 1843, 1846 (2007) (“The notion that business interests enjoy advantages in the legislative process permeates both popular opinion and the academic literature. Not surprisingly, tracking polls have long shown considerable public suspicion over disproportionate influence exerted by business firms over the legislative process.”).

¹¹² See, e.g., Roe, *supra* note 100.

¹¹³ See Luca Enriques & Dirk Zerk, *Quack Corporate Governance, Round III?: Bank Board Regulation Under the New European Capital Requirement Directive*, 16 THEORETICAL INQ. L. 211, 213 (2015) (“No matter which side one takes in the U.S. debate on the quackery of SOX and Dodd-Frank corporate governance reforms, few would disagree that in a post-financial crisis environment

Backlash, a term used to describe a range of phenomena, is ubiquitous in political life, yet has received relatively limited study in the social sciences and among legal scholars.¹¹⁴ Backlash politics is a variant of contested politics with the potential to “instigate substantial change in societies and political systems.”¹¹⁵ However, most accounts of corporate governance and political change do not distinguish between contentious politics-as-usual, social movements, and backlash.¹¹⁶ This dearth of attention is partly due to a desire for precision and predictability, which backlash seemingly defies.¹¹⁷ The standard dictionary definition of backlash is “a strong adverse reaction (as to a recent political or social development).”¹¹⁸ This definition is too broad because many political or social developments generate strong reactions. Similarly, pundits invoke backlash indiscriminately as a countermovement or mobilization against a specific decision, policy, or action perceived as going too far.¹¹⁹ Most scholars associate backlash with politically charged topics, such as globalization, populism, legal rulings, right-wing politics, racial politics, feminism, and sexuality.¹²⁰ Legal scholars often use it in a narrow sense to describe negative reactions to court decisions.¹²¹ In the corporate law literature, backlash has been described as when “[v]oters may see market

there is the risk of lawmakers acting in haste.” (footnote omitted) (citing John C. Coates, IV & Suraj Srinivasan, *SOX After Ten Years: A Multidisciplinary Review* 2 (Eur. Corp. Governance Inst. L. Working Paper No. 234, 2014)), <https://papers.ssrn.com/abstract=2343108> [<https://perma.cc/CPG4-GPZPJ>]; Romano, *supra* note 96, at 1524 (describing how SOX was passed on the heels of “high-profile corporate scandals causing significant displacement and financial distress, as well as a sharp decline in the stock market”).

¹¹⁴ See, e.g., Lauren Hirsch, *JPMorgan Chief Addresses the E.S.G. Backlash*, N.Y. TIMES (Nov. 29, 2023, 7:08 PM), <https://www.nytimes.com/2023/11/29/business/dealbook/jamie-dimon-esg-texas.html> [<https://web.archive.org/web/20240504060027/https://www.nytimes.com/2023/11/29/business/dealbook/jamie-dimon-esg-texas.html>]; Melissa Korn, *Harvard President Resigns After Plagiarism Allegations, Campus Antisemitism Backlash*, WALL ST. J. (Jan. 2, 2024, 6:17 PM), <https://www.wsj.com/us-news/education/harvard-president-claudine-gay-resigns-e52adc44>; Sade Browne, *Northern California High School’s Restroom Restrictions Draw Backlash*, CBS NEWS (Jan. 12, 2024, 8:59 PM), <https://www.cbsnews.com/sacramento/news/northern-california-high-schools-restroom-restrictions-draw-backlash> [<https://perma.cc/H4FW-4R2R>].

¹¹⁵ Alter & Zürn, *Conceptualising Backlash Politics*, *supra* note 109, at 564.

¹¹⁶ See, e.g., Roe, *supra* note 100.

¹¹⁷ See, e.g., Alter & Zürn, *Conceptualising Backlash Politics*, *supra* note 109, at 564.

¹¹⁸ *Backlash*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/backlash> [<https://perma.cc/X4D8-Y2BQ>].

¹¹⁹ Alter & Zürn, *Conceptualising Backlash Politics*, *supra* note 109, at 564–65.

¹²⁰ See *id.* at 565.

¹²¹ See *id.* at 565; Reva B. Siegel, *Community in Conflict: Same-Sex Marriage and Backlash*, 64 UCLA L. REV. 1728, 1731 (2017) (“Critics argued that court decisions shutting down democratic debate were counterproductive and provoked backlash that exacerbated political polarization and inhibited the prospects of change.”). See generally MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

arrangements as unfair, leading them to lash back and disrupt otherwise efficient arrangements.”¹²²

Backlash is a normatively neutral concept. It is not necessarily left or right, regressive or progressive, negative or positive. For example, the temperance movement was considered by some a positive backlash against the ills of alcohol abuse, including violence, and an attempt to reestablish a less indulgent cultural order.¹²³ Backlash has its own features and deserves a nuanced analysis distinct from social movements and contested politics-as-usual. Closer examination builds upon the understanding of how companies navigate volatile political environments and the forces that exacerbate or quell political volatility.

1. Backlash Elements

Backlash politics is undertheorized. Recently, scholars have attempted to fill the gap.¹²⁴ Emerging definitions coalesce around four key elements: (1) a reversionary objective seeking to return to a prior social condition or an imagined one, (2) extraordinary goals and tactics that challenge dominant scripts or exaggerated claims of what is the dominant script in order to undercut the prevailing socio-political order, (3) a threshold condition of entering mainstream public discourse, and (4) political entrepreneurs and other accelerants.¹²⁵

a. Reversionary Objectives

Backlash implies looking backward. It goes beyond reversing a specific policy and aims to revert to a broader social condition or order.¹²⁶ Politics pursuing socialism would not be considered backlash because socialism has never existed as the dominant political script in the United States.¹²⁷ ESG backlashers seek a return to an actual or perceived time when companies did not consider broader stakeholder considerations or their impact on nonshareholder constituencies.¹²⁸ They envision corporations laser-focused on profits, ignoring externalities, and restricting employee rights; a corporate governance regime that does not heighten oversight responsibilities for its managers. Whether and when this perceived prior social condition existed is debatable. It can be

¹²² Roe, *supra* note 100, at 217.

¹²³ See Alter & Zürn, *Conceptualising Backlash Politics*, *supra* note 109, at 566.

¹²⁴ See *id.*; Alter & Zürn, *Theorising Backlash Politics*, *supra* note 109.

¹²⁵ See Alter & Zürn, *Conceptualising Backlash Politics*, *supra* note 109, at 565–70.

¹²⁶ *Id.* at 565–67.

¹²⁷ *Id.* at 566.

¹²⁸ See discussion *infra* Sections III.C, VI.B.

imagined. Nonetheless, the dominant script of contemporary corporate governance reflects a trend toward greater sustainability, ESG, external stakeholder-focused regulation, and heightened managerial oversight. A company that does not attempt to navigate the tensions among profits, people, and the planet arguably is not evolving in response to contemporary challenges.¹²⁹ It ignores the shared responsibility of business, government, and civil society.

b. Extraordinary Goals, Strategies, Tactics, and Claims

The second element for backlash is the use of “extraordinary goals, claims [and] tactics that challenge dominant [or prevailing] scripts,” as well as exaggerated depictions of dominant scripts to undercut the prevailing socio-political order.¹³⁰ *Extraordinary* in this context does not mean revolutionary, but simply the rejection of broadly shared understandings of political legitimacy.¹³¹ Political entrepreneurs challenge dominant scripts in two ways. First, they challenge policies, principles, goals, practices, procedures, and even the institutions “within which . . . the exercise of corporate political authority occurs.”¹³² Second, they attempt to unsettle dominant, broadly shared views of what constitutes a better state of affairs.¹³³ Political entrepreneurs in a significant number of jurisdictions seek to stall and reverse the trend toward ESG integration. They target asset managers, companies, agencies, and courts to disrupt and undermine any consideration of social and environmental factors, not simply specific policies.¹³⁴ They sometimes exaggerate the danger and dominance of ESG to generate opposition, wrongly contending that ESG is diametrically opposed to profit-seeking and shareholder interests.¹³⁵

c. Entering Public Discourse

The third necessary element of backlash is crossing a threshold into public debate and mainstream politics.¹³⁶ Political entrepreneurs often seek broader proliferation of their arguments. The public does not

¹²⁹ See Ian Smith, Attracta Mooney & Aime Williams, *The Uninsurable World: What Climate Change Is Costing Homeowners*, FIN. TIMES (Feb. 13, 2024), <https://www.ft.com/content/ed3a1bb9-e329-4e18-89de-9db90eaadc0b> [https://perma.cc/ZRG2-H2SA].

¹³⁰ Alter & Zürn, *Conceptualising Backlash Politics*, *supra* note 109, at 566–67; see also discussion *infra* Section III.C.2.

¹³¹ See Alter & Zürn, *Conceptualising Backlash Politics*, *supra* note 109, at 567.

¹³² *Id.* at 566–67.

¹³³ *Id.*

¹³⁴ See discussion *infra* Section III.B.

¹³⁵ See discussion *infra* Section I.C.

¹³⁶ See Alter & Zürn, *Conceptualising Backlash Politics*, *supra* note 109, at 567–68.

naturally feel threatened by an acronym, but political entrepreneurs have successfully aroused passions about ESG in a public debate that has, to some extent, stalled the progress of ESG integration in the United States.¹³⁷ Their economic arguments assert that ESG integration diminishes shareholder returns; their political narrative posits that “woke” corporate executives and asset managers are substituting their political preferences and values to the detriment of “hardworking” retirees. To incite public outrage, political entrepreneurs attempt to connect ESG and SRI to broader culture wars involving diversity and climate change.¹³⁸ The long-term impact of anti-ESG arguments and objectives on public discourse is undetermined.

d. Political Entrepreneurs and Other Accelerants

Backlash cannot occur in a vacuum. In addition to the noted characteristics—reversionary objectives; extraordinary goals, claims, and tactics; and penetration of mainstream public discourse—political entrepreneurship and other accelerants “intensify backlash politics and make it more likely that backlash politics generate consequential outcomes.”¹³⁹ Political entrepreneurship and other accelerants include emotive appeals, taboo-breaking political strategies, challenges to procedures and institutions associated with the dominant script, and distortion of the dominant script to incite backlash.¹⁴⁰ They can determine potential outcomes and destabilize the larger political process.

In the current wave of corporate ESG backlash, political entrepreneurs through emotive appeals engage the psychology of constituents elevating the salience of ESG to engage disaffected bystanders as mobilized voters.¹⁴¹ Political entrepreneurs seek to attract new adherents “to identify with the social aspirations of the backlash group” and oppose ESG integration.¹⁴² In terms of “[t]aboo breaking and new political strategies,” political entrepreneurs reject institutions, norms, and common justifications for the status quo, not merely to shift the public discourse,¹⁴³ but to reshape and, in extreme cases, destroy institutions. Anti-ESG political entrepreneurs have targeted companies and other institutional decision-makers, including the agencies and courts, who impede their reversionary goals and, sometimes, such

¹³⁷ Boyde, *supra* note 68.

¹³⁸ See discussion *infra* Section I.D.

¹³⁹ Alter & Zürn, *Theorising Backlash Politics*, *supra* note 109, at 740.

¹⁴⁰ *Id.*

¹⁴¹ Alter & Zürn, *Conceptualising Backlash Politics*, *supra* note 109, at 568–69; see discussion *infra* Section III.C.4.

¹⁴² Alter & Zürn, *Conceptualising Backlash Politics*, *supra* note 109, at 569.

¹⁴³ *Id.*

fundamental processes as freedom of the press, election of representatives, and selection of judges.¹⁴⁴

III. ANTI-ESG POLITICAL ENTREPRENEURSHIP: THE CURIOUS CASE OF FLORIDA

Florida's anti-ESG efforts offer a prime example of the intersection of political entrepreneurship, political backlash, and political divisiveness that permeate the contemporary debate.¹⁴⁵ The state is ground zero for anti-ESG political entrepreneurship from the executive, legislative, and judicial branches and has created a model for other states and even the federal government to emulate. Should they? This case study illustrates the promise and perils of backlash accelerated by political entrepreneurship.

A. *The War on "Woke" Disney*

With presidential aspirations, Florida Governor Ron DeSantis dove deeply into the nation's culture wars to pursue an unprecedented interventionist and seemingly anti-business agenda.¹⁴⁶ In 2022, Bob Chapek, former CEO of the Walt Disney Company, spoke out against Florida's passage of a state education bill dubbed the "Don't Say Gay" law, which limits what teachers can say about gender and sexuality in public

¹⁴⁴ *Id.* at 570.

¹⁴⁵ A historical example of the interplay between backlash and political opportunism can be found in post-World War II Great Britain. The British Conservative Party, in a major shift from its relatively liberal stance on immigration during the 1950s and 1960s, began to strongly oppose new immigration during the 1970s and 1980s. Anthony M. Messina, *The Impacts of Post-WWII Migration to Britain: Policy Constraints, Political Opportunism and the Alteration of Representational Politics*, 63 REV. POL. 259, 259–60 (2001) (“[A]lthough Britain was an early and energetic importer of foreign labor after World War II, it was the first of the major immigrant-receiving states of Western Europe to initiate aggressive and successful efforts to curb its flow.”).

¹⁴⁶ See James Politi, *Ron DeSantis Vows to Crack Down on Federal Reserve's 'Social Engineering'* FIN. TIMES (July 31, 2023), <https://www.ft.com/content/40cfecfb-e597-4bba-9ca6-a0fccb187184> [<https://perma.cc/M382-5J2N>].

schools.¹⁴⁷ Disney also suspended political donations to legislators supporting the controversial bill.¹⁴⁸

In response, DeSantis declared war on his state's largest private employer, breaking a nearly fifty-five-year alliance between pro-business Republicans and the company.¹⁴⁹ In 1967, the Florida legislature created a special district in response to a presentation by Walt and Roy Disney, who sought to avoid the oversight they experienced when building Disneyland in Anaheim, California.¹⁵⁰ DeSantis and the Florida legislature hastily created a law revoking Disney's control over what was once called the Reedy Creek Improvement District.¹⁵¹ Although the law did not have the far-reaching impact DeSantis promised, it changed the district's name and, most important, granted the governor power to appoint all members of the district's board of directors.¹⁵² Previously, Disney had picked the directors.¹⁵³ The Florida legislature's action restricted the company's autonomy and subjected it to greater oversight concerning zoning and other matters in the future.¹⁵⁴ The new board subsequently initiated a range of activities, including an audit of Disney's practices.¹⁵⁵

¹⁴⁷ Christopher Grimes, *Walt Disney Sues Ron DeSantis over 'Retaliation' for 'Don't Say Gay' Stance*, FIN. TIMES (Apr. 26, 2023), <https://www.ft.com/content/1635adfl-fdcf-45f0-a28a-7caf31437a6d> [<https://perma.cc/2QAU-STJ7>]; see also H.B. 1557, 2022 Leg., Reg. Sess. (Fla. 2022) ("Classroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in kindergarten through grade 3 or in a manner that is not age-appropriate . . .").

¹⁴⁸ Kelsey Ables, *Disney Suspends Political Donations in Florida After Bill Restricting LGBTQ Discussion*, WASH. POST (Mar. 12, 2022, 7:42 PM), <https://www.washingtonpost.com/arts-entertainment/2022/03/12/disney-donation-pause-dont-sat-gay-bill> [https://perma.cc/D_P2W-5AZ7].

¹⁴⁹ Barnes, *supra* note 69.

¹⁵⁰ *Id.*; RICHARD E. FOGLESONG, MARRIED TO THE MOUSE: WALT DISNEY WORLD AND ORLANDO 57–62 (2001) (describing the issues encountered in Anaheim, California, Disney's discussions with Florida Governor Burns, and the genesis of the Reedy Creek Improvement District).

¹⁵¹ Barnes, *supra* note 69.

¹⁵² Christopher Grimes, *Walt Disney vs Ron DeSantis: Who Really Won the 'Don't Say Gay' Dust-Up?*, FIN. TIMES (Mar. 2, 2023), <https://www.ft.com/content/bb462d91-0907-43d2-b69c-277604aa2782> [<https://perma.cc/DX5Y-7UJC>].

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ CENT. FLA. TOURISM OVERSIGHT BD., REPORT ON PAST PRACTICES OF THE REEDY CREEK IMPROVEMENT DISTRICT (2023); Dawn Chmielewski, *DeSantis Board Accuses Disney of Controlling Previous One with Gifts*, REUTERS (Dec. 4, 2023, 4:18 PM), <https://www.reuters.com/world/us/desantis-board-accuses-disney-controlling-previous-one-with-gifts-2023-12-04> [<https://web.archive.org/web/20231212065944/https://www.reuters.com/world/us/desantis-board-accuses-disney-controlling-previous-one-with-gifts-2023-12-04>].

DeSantis claimed that these measures were needed to thwart Disney's "goal to inject sexuality into programs for young kids."¹⁵⁶ In response, Disney's new CEO, Bob Iger, vigorously defended its special status: "A year ago the company took a position on pending Florida legislation, and while the company may not have handled the position it took very well, the company has a right to freedom of speech just like individuals do."¹⁵⁷ At Disney's annual meeting, he asserted that the DeSantis policies were "not just anti-business but it sounds anti-Florida."¹⁵⁸ He noted "plans to invest \$17 billion in Walt Disney World over the next decade" creating "13,000 jobs in the state [of Florida]."¹⁵⁹

In 2023, Disney sued Governor DeSantis, the Florida Department of Economic Opportunity, and other government entities and officials in federal court, claiming the Central Florida Tourism Oversight Board violated the company's First Amendment rights by using political power for retaliation.¹⁶⁰ In a court document, Disney called DeSantis's efforts "as clear a case of retaliation as this Court is ever likely to see."¹⁶¹ The company said it would "continue to fight vigorously to defend these contracts, because these agreements will determine whether or not Disney can invest billions of dollars and generate thousands of new jobs in Florida."¹⁶² In March 2024, Governor DeSantis and his allies reached a

¹⁵⁶ Grimes, *supra* note 152; see also *Disney Is Not Sexualizing Children, CEO Iger Says*, CBS NEWS (July 13, 2023, 10:58 AM), <https://www.cbsnews.com/miami/news/disney-is-not-sexualizing-children-says-ceo-bob-iger> [<https://perma.cc/SY6A-963W>].

¹⁵⁷ Christopher Grimes, *Bob Iger Calls Ron DeSantis 'Anti-Business' in Fight over Disney District*, FIN. TIMES (Apr. 3, 2023), <https://www.ft.com/content/ef6788db-4063-4eca-8a95-724bf7ef5b5c> [<https://perma.cc/JQ34-5FTK>].

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*; Jesus Jiménez & Brooks Barnes, *What We Know About the DeSantis-Disney Dispute*, N.Y. TIMES (May 19, 2023), <https://www.nytimes.com/article/disney-floridadesantis.html> [<https://perma.cc/K2TX-TSXV>]; see also Michelle Goldberg, *Ron DeSantis vs. the 'Woke Mind Virus'*, N.Y. TIMES (May 25, 2023), <https://www.nytimes.com/2023/05/25/opinion/ron-desantis-woke-mind-virus.html> [<https://web.archive.org/web/20250210010623/https://www.nytimes.com/2023/05/25/opinion/ron-desantis-woke-mind-virus.html>].

¹⁶⁰ Complaint for Declaratory and Injunctive Relief ¶ 20–27, *Walt Disney Parks & Resorts U.S., Inc. v. DeSantis*, No. 23-cv-163 (N.D. Fla. Apr. 26, 2023), 2023 WL 3098088; *id.* ¶ 17 ("It is a clear violation of Disney's federal constitutional rights—under the Contracts Clause, the Takings Clause, the Due Process Clause, and the First Amendment—for the State to inflict a concerted campaign of retaliation because the Company expressed an opinion with which the government disagreed.").

¹⁶¹ *Id.* ¶ 9.

¹⁶² Kevin Breuninger, *Disney Drops All but Free Speech Claim in Political Retaliation Suit Against DeSantis*, CNBC (Sept. 7, 2023, 5:24 PM), <https://www.cnbc.com/2023/09/07/disney-drops-all-but-free-speech-claim-in-political-retaliation-suit-against-desantis.html> [<https://perma.cc/99CV-JTYS>]; see also Greg Allen, *In Florida, There's Détente in the Battle Between Disney and Gov. Ron DeSantis*, NPR (Mar. 28, 2024, 5:00 AM), <https://www.npr.org/2024/03/28/1241296687/florida-governor-ron-desantis-disney-legal-battle-settled>

settlement with Disney ending disputes in state and federal court.¹⁶³ Whereas DeSantis boasted about his battle with Disney on the presidential campaign trail, his attacks subsided, to some extent, when his presidential campaign abruptly ended.¹⁶⁴

B. *Florida's Anti-ESG Legislation and Initiatives*

Florida is emblematic of coordinated anti-ESG efforts nationwide, and Governor Ron DeSantis, leveraging aggressive political entrepreneurship, has become the leader and face of the anti-ESG movement.¹⁶⁵ Generally, Florida's measures target several areas: (1) restricting the use of ESG factors in investment, procurement, and shareholder (i.e., proxy) voting decisions and concomitantly endorsing a sharp focus on financial criteria; (2) targeting companies that boycott specific industries, particularly "sin" industries (e.g., fossil fuels, guns, and tobacco); and (3) prohibiting discrimination based on ESG screening, scores, and ratings. Anti-ESG initiatives include legislation, enforcement activities, statements and initiatives from elected officials,

[<https://perma.cc/7BUZ-NRM3>]; Mike Schneider, *Settlement Reached in Lawsuit Between Disney and Florida Gov. Ron DeSantis' Allies*, ASSOCIATED PRESS (Mar. 27, 2024, 4:11 PM), <https://apnews.com/article/disney-florida-ron-desantis-settlement-91040178ad4708939e621dd57bc5e494> [<https://perma.cc/ALG8-NLR6>].

¹⁶³ Schneider, *supra* note 162.

¹⁶⁴ Brooks Barnes, *With DeSantis on the Stump, Disney Sees a Long Campaign Ahead*, N.Y. TIMES (July 3, 2023), <https://www.nytimes.com/2023/07/03/business/disney-ron-desantis-criticism.html> [<https://web.archive.org/web/20240728221138/https://www.nytimes.com/2023/07/03/business/disney-ron-desantis-criticism.html>]; Steven Contorno & Kit Maher, *DeSantis Ends 2024 Presidential Campaign and Endorses Trump*, CNN (Jan. 21, 2024, 3:58 PM), <https://www.cnn.com/2024/01/21/politics/desantis-ends-2024-campaign/index.html> [<https://perma.cc/UJ7A-73PD>].

¹⁶⁵ DeSantis's aggressive political tactics have brought critique from outside and inside his political party for being anti-business. Some Republican Florida lawmakers have accused politicians within the same party of ideological discrimination, "badgering the industries that are responding to market forces." Jim Turner, *Florida House Moves Forward with Bill That Would Prevent 'Progressive' Government Investments*, ORLANDO WKLY. (Mar. 8, 2023, 5:45 PM), <https://www.orlandoweekly.com/news/florida-house-moves-forward-with-proposal-that-would-prevent-progressive-government-investments-33717029> [<https://perma.cc/RP8C-C8A9>]. Representative Dotie Joseph noted: "It's going to cause financial havoc because somebody wants to score a political point with this bill." *Id.* In the wake of DeSantis's aggressive participation in the culture wars, he also lost some support from large donors. Madison Darbyshire, *Top Republican Donor Sours on Florida Governor's Stance on Social Issues*, FIN. TIMES (Apr. 15, 2023), <https://www.ft.com/content/9fa26170-5533-4e0b-a852-238b0ef15118> [<https://perma.cc/34XF-4BJU>]. One opined: "Because of his stance on abortion and book banning . . . myself, and a bunch of friends, are holding our powder dry." *Id.* (alteration in original). DeSantis's positions may also pose a threat to businesses and investments. See, e.g., Jaren Kerr, *Walt Disney Scraps Plan to Move Thousands of Workers to New Florida Campus*, FIN. TIMES (May 18, 2023), <https://www.ft.com/content/9e7e1898-ee05-4d8c-83dd-c91dc00e0b4b> [<https://perma.cc/9MBJ-Q64X>].

and coordinated multistate coalition activity. Florida has engaged in them all. Florida politicians claim these measures are necessary to protect the citizenry, particularly investors, from significant corporate overreach and abuse, but often without offering empirical support. Arguably, these measures seek to impede some profitable corporate activities. Outrage is not a surrogate for evidence.

1. Initiative to Protect Floridians from ESG Financial Fraud

On July 27, 2022, Governor DeSantis announced his “Initiative to Protect Floridians from ESG Financial Fraud.”¹⁶⁶ It was an outline of his and the state legislature’s plan “to “protect Floridians from the environmental, social, and corporate governance (ESG) movement which threatens the vitality of the American economy and Americans’ economic freedom by targeting disfavored individuals and industries to advance a woke ideological agenda.”¹⁶⁷ DeSantis further characterized the threat:

ESG investors prioritize woke corporate ideals and non-financial factors as part of their investing process. ESG investors are corporate cartel elites who do not represent the will of the people, but rather base their investment strategies on social causes and virtue signaling while driving up costs for consumers in the name of diversity and sidelining hardworking Americans by threatening their livelihoods.¹⁶⁸

The governor’s proposed agenda highlighted three key areas of legislation:

[1] Prohibit big banks, credit card companies and money transmitters from discriminating against customers for their religious, political, or social beliefs. [2] Prohibit State Board of Administration (SBA) fund managers from considering ESG factors when investing the state’s money. [3] Require SBA fund managers to only consider maximizing the return on investment on behalf of Florida’s retirees.¹⁶⁹

DeSantis and the state legislature would ultimately deliver on these proposals and beyond. Although Floridians were the intended audience, DeSantis, understanding the broader implications, particularly for his presidential campaign and a potential nationwide ESG countermovement, promised to “work with likeminded states to leverage

¹⁶⁶ Press Release, Off. of Governor Ron DeSantis, *supra* note 1; see OFF. OF GOVERNOR RON DESANTIS, PEOPLE BEFORE CORPORATE POWER (2022), <https://www.flgov.com/eog/sites/default/files/press/People-Before-Corporate-ESG-1.pdf> [<https://perma.cc/TLZ2-QP7H>].

¹⁶⁷ Press Release, Off. of Governor Ron DeSantis, *supra* note 1.

¹⁶⁸ OFF. OF GOVERNOR RON DESANTIS, *supra* note 166.

¹⁶⁹ Press Release, Off. of Governor Ron DeSantis, *supra* note 1.

the investment power of state pension funds through shareholder advocacy to ensure corporations are focused on maximizing shareholder value, rather than the proliferation of woke ideology.”¹⁷⁰

2. Revised Investment Policy Statement: Eliminating ESG Considerations from Pension and Other Investments

On August 23, 2022, DeSantis and the Trustees of the SBA passed a resolution eliminating ESG considerations from state pension investments.¹⁷¹ Established by the state constitution, the SBA is an asset management organization charged with the responsibility for investing state and local government assets.¹⁷² It “is governed by a three-member Board of Trustees,” composed of the state’s highest elected officials—“the Governor as Chair, the Chief Financial Officer and the Attorney General”—who “delegate authority to the Executive Director and Chief Investment Officer,” provide “strategic direction” and “manage[] approximately 200 professional investment and administrative . . . staff.”¹⁷³ The SBA manages over twenty-five funds with approximately \$257 billion in assets under management.¹⁷⁴ The primary funds include:

- [1] Florida Retirement System Pension Plan, accounting for approximately 80 percent of all assets under management
- [2] Florida Retirement System Investment Plan, one of the nation’s largest defined contribution plans
- [3] Florida PRIME[,] provid[ing] eligible participants a safe, liquid, cost-effective investment vehicle for their surplus funds
- [and 4] Florida Hurricane Catastrophe Fund¹⁷⁵

The resolution, in essence, revised the SBA’s investor policy statement to assert that “investment decision[s] must be based only on pecuniary factors,” which “do not include the consideration of the

¹⁷⁰ *Id.*

¹⁷¹ Press Release, Off. of Governor Ron DeSantis, Governor Ron DeSantis Eliminates ESG Considerations from State Pension Investments (Aug. 23, 2022), <https://www.flgov.com/2022/08/23/governor-ron-desantis-eliminates-esg-considerations-from-state-pension-investments> [<https://perma.cc/7QKY-F7C4>].

¹⁷² *State Board of Administration of Florida*, OFF. PROGRAM POL’Y ANALYSIS & GOV’T ACCOUNTABILITY, <https://oppaga.fl.gov/ProgramSummary/ProgramDetail?programNumber=4040> [<https://perma.cc/B5F2-FS2A>]; *About the SBA*, FLA. STATE BD. ADMIN., <https://www.sbafla.com/about-the-sba> [<https://perma.cc/PA9Y-AX6N>].

¹⁷³ FLA. STATE BD. ADMIN., *supra* note 172.

¹⁷⁴ *Id.*

¹⁷⁵ FLA. STATE BD. OF ADMIN., OVERVIEW OF THE STATE BOARD OF ADMINISTRATION OF FLORIDA (n.d.), <http://jsg.legis.state.pa.us/resources/documents> [<https://perma.cc/F2DH-UWLP>].

furtherance of social, political, or ideological interests.”¹⁷⁶ It also stipulates that the SBA “may not sacrifice investment return or take on additional investment risk to promote any non-pecuniary factors” when making investments or proxy votes.¹⁷⁷ It instructs the SBA to “conduct a comprehensive review and prepare a report of the governance policies over the voting practices of the Florida Retirement System Defined Benefit Pension Plan.”¹⁷⁸

Upon passage of the resolution, Governor DeSantis asserted that “[c]orporate power has increasingly been utilized to impose an ideological agenda on the American people through the perversion of financial investment priorities under the euphemistic banners of environmental, social, and corporate governance and diversity, inclusion, and equity.”¹⁷⁹ His further justification for the resolution was protecting retirees’ investments and economic security, a salient issue with voters.¹⁸⁰

3. State Treasury Divestment from BlackRock

On December 1, 2022, the Florida State Treasury announced that it would divest \$2 billion from BlackRock due to the asset manager’s positions on ESG.¹⁸¹ BlackRock had previously managed \$1.43 billion of the state’s long-duration portfolio in addition to the treasury’s \$600 million short-term investment fund.¹⁸² Florida’s actions targeting

¹⁷⁶ FLA. STATE BD. OF ADMIN., A RESOLUTION DIRECTING AN UPDATE TO THE INVESTMENT POLICY STATEMENT AND PROXY VOTING POLICIES FOR THE FLORIDA RETIREMENT SYSTEM DEFINED BENEFIT PENSION PLAN AND DIRECTING THE ORGANIZATION AND EXECUTION OF AN INTERNAL REVIEW 3 (2022), <https://www.flgov.com/wp-content/uploads/2022/08/ESG-Resolution-Final.pdf> [<https://perma.cc/MC55-3CYK>].

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Press Release, Off. of Governor Ron DeSantis, *supra* note 171.

¹⁸⁰ *Id.* DeSantis justifies opposition to ESG investing:

With the resolution we passed today, the tax dollars and proxy votes of the people of Florida will no longer be commandeered by Wall Street financial firms and used to implement policies through the board room that Floridians reject at the ballot box. We are reasserting the authority of republican governance over corporate dominance and we are prioritizing the financial security of the people of Florida over whimsical notions of a utopian tomorrow.

Id.

¹⁸¹ Ross Kerber, *Florida Pulls \$2 Bln from BlackRock in Largest Anti-ESG Divestment*, REUTERS (Dec. 1, 2022, 4:39 PM), <https://www.reuters.com/business/finance/florida-pulls-2-bln-blackrock-largest-anti-esg-divestment-2022-12-01> [<https://web.archive.org/web/20250227160644/https://www.reuters.com/business/finance/florida-pulls-2-bln-blackrock-largest-anti-esg-divestment-2022-12-01>].

¹⁸² *Id.*

BlackRock parallel the actions of other states; how much they will expand beyond a plurality of red states is unclear.¹⁸³

Why target BlackRock? BlackRock is the world's largest asset manager.¹⁸⁴ Along with Vanguard and State Street, it is one of the "Big Three" shareholders in 80% of S&P 500 firms.¹⁸⁵ As a significant portion of the public invests its retirement money with intermediaries like BlackRock, its actual and potential power to influence corporate policies on such issues as executive compensation, climate, and diversity through shareholder voting, via proxy and other mechanisms is palpable.¹⁸⁶ The power of Big Three asset managers and passive voting practices have drawn the attention of academics.¹⁸⁷ In a famous letter to shareholders in 2020, BlackRock's CEO, Larry Fink, touted sustainable capitalism.¹⁸⁸ Within less than three years, caught in the backlash, he became an enemy of the political right and recently indicated he would cease using the term ESG, citing politicization and rancor.¹⁸⁹ In response to the Florida

¹⁸³ *Id.* ("So far, only Republican-controlled states have made major reallocations away from BlackRock, including \$794 million pulled by Louisiana's treasurer and \$500 million by Missouri's treasurer, both in October [2022].").

¹⁸⁴ See Schwartz, *supra* note 15, at 429 & n.219; Lund, *supra* note 20, at 79 n.5; Dorothy S. Lund & Adriana Robertson, *Giant Asset Managers, the Big Three, and Index Investing* 1, 4 (Univ. S. Cal. Gould Sch. of L. Ctr. for L. & Soc. Sci., Research Paper No. 23-13, 2023), <https://papers.ssrn.com/abstract=4406204> [<https://perma.cc/J8LL-MX65>]; COATES, *supra* note 17, at 10; BLACKROCK, <https://www.blackrock.com/us/individual> [<https://perma.cc/QU4D-2RPS>]; see also Lucian Bebchuk & Scott Hirst, *Big Three Power, and Why It Matters*, 102 B.U. L. REV. 1547, 1550 (2022); David McLaughlin & Annie Massa, *The Hidden Dangers of the Great Index Fund Takeover*, BLOOMBERG (Jan. 9, 2020, 1:40 PM), <https://www.bloomberg.com/news/features/2020-01-09/the-hidden-dangers-of-the-great-index-fund-takeover> [<https://perma.cc/6KY2-ZUEE>].

¹⁸⁵ See Dawn Lim, *BlackRock Gives Big Investors Ability to Vote on Shareholder Proposals*, WALL ST. J. (Oct. 7, 2021, 1:21 PM), <https://www.wsj.com/articles/blackrock-gives-big-investors-ability-to-vote-on-shareholder-proposals-11633617321> [<https://web.archive.org/web/20240421081004/https://www.wsj.com/articles/blackrock-gives-big-investors-ability-to-vote-on-shareholder-proposals-11633617321>] (stating that as of 2021, BlackRock, for example, was one of the three largest shareholders in "more than 80% of the companies in the S&P 500"); Amir Amel-Zadeh, Fiona Kasperk & Martin C. Schmalz, *Mavericks, Universal, and Common Owners—The Largest Shareholders of U.S. Public Firms* 11–12 (Eur. Corp. Governance Inst., Finance Working Paper No. 838/2022, 2022), <https://papers.ssrn.com/abstract=4059513> [<https://perma.cc/8J6D-XAMU>] (stating that researchers estimate that institutional investors owned about "70–90% of outstanding equity" in the average firm in the S&P 500, and that one of the so-called "Big Three" firms—BlackRock, Vanguard, and State Street—were the largest shareholder in about 90% of S&P 500 firms).

¹⁸⁶ Lund, *supra* note 20.

¹⁸⁷ COATES, *supra* note 17; Lund, *supra* note 20.

¹⁸⁸ Fink, *supra* note 19.

¹⁸⁹ Masters & Temple-West, *supra* note 78; Peter Vanham & David Meyer, *Vivek Ramaswamy's BlackRock Broadside Marks a New Phase in His Anti-ESG Activism*, FORTUNE (Sept. 22, 2022, 5:32 AM), <https://fortune.com/2022/09/22/vivek-ramaswamy-blackrock-larry-fink-clinton-esg> [<https://web.archive.org/web/20230524063239/https://fortune.com/2022/09/22/vivek->

divestment, BlackRock said: “We are disturbed by the emerging trend of political initiatives like this that sacrifice access to high-quality investments and thereby jeopardize returns, which will ultimately hurt Florida’s citizens.”¹⁹⁰ Fink added: “Fiduciaries should always value performance over politics.”¹⁹¹

4. Chief Financial Officer Directive: Deferred Compensation Plan

On January 23, 2023, Florida’s Chief Financial Officer, Jimmy Patronis, issued a directive barring asset managers for Florida’s Deferred Compensation Plan from investing participants’ compensation in financial products associated with ESG standards.¹⁹² This supplemental retirement plan for state employees allows participants to defer a portion of their compensation “through a payroll deduction each pay period”; those sums are “invested and sheltered from tax[es] until withdrawn after separation from service.”¹⁹³ The plan has three investment providers and employees can choose from over seventy-eight funds covering a wide range of asset classes.¹⁹⁴ Despite that discretion, the directive asserts that employees are “not . . . aware of the nonpecuniary goals of [particular] funds.”¹⁹⁵ Like other state measures, the directive expresses concern over the power of asset managers to use proxy voting and other methods to steer companies toward ESG activities, which they claim are inconsistent with the “[p]lan’s fiduciary responsibilities to participants.”¹⁹⁶

ramaswamy-blackrock-larry-fink-clinton-esg]; Brooke Masters, *Larry Fink Dismisses ‘Sad’ Criticism of BlackRock in Republican Debate*, FIN. TIMES (Dec. 7, 2023), <https://www.ft.com/content/b985a3ad-f0fa-4463-bcf1-7ff3435e0f23> [https://perma.cc/CT3X-AAHZ].

¹⁹⁰ Kerber, *supra* note 181; see also Andrew Ross Sorkin et al., *DeSantis Claims Win in Campaign Against E.S.G.*, N.Y. TIMES (Aug. 25, 2022), <https://www.nytimes.com/2022/08/24/business/dealbook/desantis-florida-esg-investing.html> [https://web.archive.org/web/20231210122513/https://www.nytimes.com/2022/08/24/business/dealbook/desantis-florida-esg-investing.html]; Maxine Joselow, *Bills in Red States Punish Climate-Conscious Businesses*, WASH. POST (June 1, 2022, 8:03 AM), <https://www.washingtonpost.com/politics/2022/06/01/bills-red-states-punish-climate-conscious-businesses/> [https://web.archive.org/web/20240622003026/https://www.washingtonpost.com/politics/2022/06/01/bills-red-states-punish-climate-conscious-businesses/].

¹⁹¹ Kerber, *supra* note 181.

¹⁹² FLA. DEP’T OF FIN. SERV., CHIEF FINANCIAL OFFICER DIRECTIVE 2023-01, at 2 (2023), <https://www.myfloridacfo.com/docs-sf/cfo-news-libraries/news-documents/2023/cfo-directive--2023-1.pdf> [https://perma.cc/K67L-KN6P].

¹⁹³ *Id.* at 1.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

5. Multistate Anti-ESG Alliance

DeSantis's advocacy has been central to a Florida-led alliance of eighteen states declaring war on ESG.¹⁹⁷ In March 2023, he and seventeen other governors announced efforts to prohibit consideration of ESG factors when state and local governments are making investment decisions.¹⁹⁸ This alliance tracks other efforts to blacklist major asset managers, such as BlackRock, and prevents asset managers and fiduciaries from considering ESG criteria when making investment decisions.¹⁹⁹

6. House Bill 3

The culmination of Governor DeSantis's anti-ESG crusade is his support of House Bill 3 ("HB 3"), which he signed into law on May 2, 2023. Taking effect on July 1, 2023, the law prohibits the consideration of ESG factors in state and local investment decisions and procurement processes, among other things.²⁰⁰ The announcement of HB 3's passage reflects political entrepreneurs signaling their positions and intentions to a broader audience: "Today, Governor Ron DeSantis signed comprehensive legislation to protect Floridians from the corporatist environmental, social, and corporate governance (ESG) movement—a worldwide effort to inject woke political ideology across the financial

¹⁹⁷ Press Release, Off. of Governor Ron DeSantis, Governor Ron DeSantis Leads Alliance of 18 States to Fight Against Biden's ESG Financial Fraud (Mar. 16, 2023), <https://www.flgov.com/2023/03/16/governor-ron-desantis-leads-alliance-of-18-states-to-fight-against-bidens-esg-financial-fraud> [<https://perma.cc/BEC8-2YD2>] ("At the time I said we would spearhead an initiative to join with other like-minded states to send an even louder message to the financial industry that the American people have rejected ESG at the ballot box, and ideologues cannot and should not circumnavigate the will of the people. Today, we have delivered on that promise. Florida has emerged as America's economic engine, with an unemployment rate consistently lower than the nation's and the highest rate of business formations of any other state. We will not stand idly by as the stability of our country's economy is threatened by woke executives who put their political agenda ahead of their clients' finances.").

¹⁹⁸ *Id.*

¹⁹⁹ See Letter from Mark Brnovich, Ariz. Att'y Gen., to Laurence D. Fink, CEO, BlackRock Inc. (Aug. 4, 2022), <https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/BlackRock%20Letter.pdf> [<https://perma.cc/EP8B-83ZJ>]. Additional signatories include attorney generals from Alabama, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Utah, and West Virginia. *Id.*

²⁰⁰ Press Release, Off. of Governor Ron DeSantis, Governor Ron DeSantis Signs Legislation to Protect Floridians' Financial Future & Economic Liberty (May 2, 2023), <https://www.flgov.com/2023/05/02/governor-ron-desantis-signs-legislation-to-protect-floridians-financial-future-economic-liberty> [<https://perma.cc/VM4C-9UAJ>]; H.B. 3, 2023 Legis. (Fla. 2023).

sector, placing politics above the fiduciary duty to make the best financial decisions for beneficiaries.”²⁰¹ DeSantis doubled down on the motivation behind HB 3: “Through this legislation, Florida will continue to lead the nation against big banks and corporate activists who’ve colluded to inject woke ideology into the global marketplace, regardless of the financial interests of beneficiaries.”²⁰²

HB 3 is among the most far-reaching anti-ESG legislation to date, consolidating an array of anti-ESG efforts in a single piece of legislation.²⁰³ It does the following:

- (1) amends existing legislation to require the Chief Financial Officer or other party authorized to invest on their behalf to make decisions based solely on financial factors, and not to sacrifice investment return or undertake additional investment risk to promote any nonpecuniary factor;
- (2) requires retirement systems or plans to consider only financial factors when making shareholder rights-related decisions and requires retirement systems or plans to report the governance policies concerning decision-making and adherence to the fiduciary standards;
- (3) prohibits the issue of any ESG bonds, expending public funds, or using moneys derived from the issuance of bonds to pay for the services of a third-party verifier related to ESG bonds, or entering into a contract with any rating agency whose ESG scores for such an issuer will have a direct, negative impact on the issuer’s bond ratings;
- (4) requires any investment manager of public funds to include an ESG disclaimer in any written communication that discusses social, political, or ideological interests with a company;
- (5) amends the definition of *qualified public depository* to exclude institutions that discriminate against a person based on political opinion, religious belief, firearm ownership, or ESG scores, and provides similar limitations on state licensees and financial institutions; and
- (6) prohibits state and local governments from considering vendors based on ESG factors.²⁰⁴

HB 3 and other anti-ESG measures capitalize on a narrative that progressive forces have gone too far; powerful corporate forces are subverting the democratic will of citizens with a leftist or a “woke”

²⁰¹ Press Release, Off. of Governor Ron DeSantis, *supra* note 200.

²⁰² *Id.*

²⁰³ See discussion *infra* Sections III.B.1–III.B.4.

²⁰⁴ Press Release, Off. of Governor Ron DeSantis, *supra* note 171; H.B. 3, 2023 Legis. (Fla. 2023).

agenda. Ironically, socially conscious investing and its infrastructure has been around for decades. Investment screening processes, divestment from “sin” industries, procurement codes, and other mechanisms are not novel or new as Florida’s political entrepreneurs claim.²⁰⁵ Further, the justifications for HB 3 are paternalistic in tone and substance and hyperbolic.²⁰⁶ DeSantis and his accomplices overstate the risk and at minimum do not provide ample justification for their anti-ESG fervor.²⁰⁷

HB 3 is not the product of a grassroots effort or necessity. Florida has a number of pressing issues, such as climate change, rising seas, and uninsurable properties.²⁰⁸ Left alone, in the absence of political entrepreneurship, the public would not clamor for a bill to eradicate the ills of ESG. HB 3 attempts to subvert market forces and governance. Political entrepreneurs like DeSantis and the billionaire donors who support them do not represent “the public will.”²⁰⁹ Roughly sixty percent of the U.S. population holds a single stock directly or indirectly.²¹⁰ Despite touting HB 3 as a significant victory for Republicans, some researchers call it “a ‘sheep in wolf’s clothing.’”²¹¹ They are correct in terms of substance; however, the greater value of these anti-ESG measures is their ability to generate outrage and grievance.

²⁰⁵ See discussion *infra* Section III.C.

²⁰⁶ See discussion *infra* Section III.C.

²⁰⁷ See discussion *infra* Section III.C.

²⁰⁸ Mario Ariza, *Climate Change Drives Up Insurance Costs—and Missed Mortgage Payments*, MIA. HERALD (Dec. 27, 2024, 6:00 AM), <https://www.miamiherald.com/news/local/environment/climate-change/article297501718.html> [<https://web.archive.org/web/20241227141400/https://www.miamiherald.com/news/local/environment/climate-change/article297501718.html>].

²⁰⁹ Laura Davison & Bill Allison, *Harlan Crow, Other Billionaires Donate to DeSantis Campaign*, BLOOMBERG (July 15, 2023, 6:34 PM), <https://www.bloomberg.com/news/articles/2023-07-15/harlan-crow-other-billionaires-donate-to-desantis-campaign> [<https://perma.cc/X739-U73Z>]; Langston Taylor & Emily L. Mahoney, *Pro-DeSantis Super PAC Buoyed by Billionaires, New Records Show*, TAMPA BAY TIMES (Aug. 1, 2023), <https://www.tampabay.com/news/florida-politics/2023/08/01/ron-desantis-never-back-down-super-pac-money-donors-donald-trump> [<https://perma.cc/B9ZB-JTUE>].

²¹⁰ See *supra* note 51; see also Hannah Miao, *More Americans Than Ever Own Stocks*, WALL ST. J. (Dec. 18, 2023, 5:30 AM), <https://www.wsj.com/finance/stocks/stocks-americans-own-most-ever-9f6fd963> [<https://web.archive.org/web/20250117060741/https://www.wsj.com/finance/stocks/stock-americans-own-most-ever-9f6fd963>] (citing a Federal Reserve study on consumer finances that stated: “About 58% of households owned stocks in 2022”). But see Drew DeSilver, *A Booming U.S. Stock Market Doesn’t Benefit All Racial and Ethnic Groups Equally*, PEW RSCH. CTR. (Mar. 6, 2024), <https://pewresearch.org/short-reads/2024/03/06/a-booming-us-stock-market-doesnt-benefit-all-racial-and-ethnic-groups-equally> [<https://perma.cc/YZ9W-WRD6>].

²¹¹ Robert G. Eccles, *Florida’s Anti-ESG House Bill 3 Is a Sheep in Wolf’s Clothing*, FORBES (May 29, 2023, 6:17 AM), <https://www.forbes.com/sites/bobeccles/2023/05/29/floridas-anti-esg-house-bill-3-is-a-sheep-in-wolfs-clothing> [<https://perma.cc/AL3F-FZGK>].

C. *Florida, Political Entrepreneurship, and the Backlash Paradigm*

Florida's expansive anti-ESG efforts provide a template for how political entrepreneurship can set alight backlash in other states and perhaps at the federal level. They demonstrate the elements of political backlash: (1) reversionary objectives; (2) extraordinary claims, goals, strategies, and tactics to challenge the dominant script or exaggerating the dominant script's impact to spark outrage; (3) arrogation of the public discourse; and (4) political entrepreneurship and other accelerants.²¹²

1. Reversionary Objectives

Governor DeSantis and other Florida lawmakers envision a past when shareholders, companies, executives, asset managers, and pension fund managers focused exclusively on profits without paying attention to externalities.²¹³ They seek to reverse dominant trends toward sustainability, external stakeholder regulation, heightened managerial oversight, diversity programs, and expanded employee rights. However, the SRI infrastructure and ethical investing has been around for decades. Florida's political entrepreneurs' aims are bold; they seek to reverse the trajectory of contemporary corporate governance.

2. Extraordinary Claims, Goals, Strategies, and Tactics

To reverse the dominant corporate governance script or exaggerate it to spark outrage, political entrepreneurs have targeted juggernaut asset managers like BlackRock and corporations like Disney. Ironically, they embraced an anti-business platform, challenging Florida's most powerful employer, taking retaliatory measures to restrict its longstanding control over the Reedy Creek Improvement District.²¹⁴ To discredit the company and its executives, DeSantis and his allies even accused Disney of grooming children.²¹⁵ Additionally, Florida's political entrepreneurs

²¹² See discussion *infra* Section III.A.

²¹³ See Press Release, Off. of Governor Ron DeSantis, Governor Ron DeSantis Further Prohibits Woke ESG Considerations from State Investments (Jan. 17, 2023), <https://www.flgov.com/2023/01/17/governor-ron-desantis-further-prohibits-woke-esg-considerations-from-state-investments> [<https://perma.cc/8YWB-DAGD>].

²¹⁴ See discussion *supra* Section III.A.

²¹⁵ See Kevin Breuninger, *DeSantis Claims That Disney Sexualizes Children Are 'Preposterous,' CEO Bob Iger Says*, CNBC (July 13, 2023, 4:27 PM), <https://www.cnbc.com/2023/07/13/desantis-attacks-on-disney-are-preposterous-ceo-bob-iger-says.html> [<https://perma.cc/8E8W-QF22>].

distort and exaggerate the dominant script. For example, asset managers like BlackRock pay more attention to financial considerations than other factors.²¹⁶ Also, ESG considerations, under certain circumstances, may enhance investment and corporate performance.²¹⁷ ESG research is inconclusive, and more is needed before making hasty pronouncements and taking aggressive steps.²¹⁸

3. Entering Mainstream Public Discourse

As part of their coordinated campaign to disrupt the prevailing ESG narrative, Florida's backslashers incite outrage and exploit the public for political gain. Governor DeSantis and other lawmakers have aggressively used their respective platforms to catapult the ESG acronym into public discourse. The rationales for anti-ESG measures come in two flavors—economic and political—although disentangling them is difficult. Political entrepreneurs justify their objections to ESG, first, as an effort to protect the economic security of retirement plan participants and beneficiaries from costly investments and overreach. Nearly two-thirds of American workers “have access to an employer sponsored retirement plan.”²¹⁹ Economic claims assert that investment and pension fund managers pursue their personal preferences at the expense of people who hold shares in their retirement accounts. In essence, the anti-ESG argument posits that retirement fund fiduciaries subordinate the interests of participants to other nonfinancial objectives.²²⁰ They also make a

²¹⁶ See discussion *infra* Section III.B.3; Kerber, *supra* note 181.

²¹⁷ See *supra* Section I.C.

²¹⁸ See *supra* Section I.C.

²¹⁹ Natalya Shnitser, *The 401(k) Conundrum in Corporate Law*, 13 HARV. BUS. L. REV. 289, 312 (2023).

²²⁰ See discussion *supra* Section I.E (examining how ERISA requires fiduciaries to place the interests of plan beneficiaries above their own); see also Complaint for Declaratory and Injunctive Relief, *supra* note 62, ¶ 2 (alleging that the Department of Labor Rule “undermines key protections for retirement savings of 152 million workers—approximately two-thirds of the U.S. adult population and totaling \$12 trillion in assets—in the name of promoting environmental, social, and governance (‘ESG’) factors in investing, including the Biden administration’s stated desire to address climate change.” (footnote omitted) (citing U.S. DEP’T OF LAB, FACT SHEET: EBSA RESTORES OVER 1.4 BILLION TO EMPLOYEE BENEFIT PLANS, PARTICIPANTS, AND BENEFICIARIES (2022), <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/ebsa-monetary-results-2022.pdf> [<https://perma.cc/HF9T-Z3CV>])); Letter from Mark Brnovich to Laurence D. Fink, *supra* note 199 (“Whether mixed motives arise from a desire to save the world or attract investment from European or left-leaning pension funds, is ultimately irrelevant to the legal violation. Investors have wide latitude over their own money, but our state pensions must be invested only to earn a financial return.”); Jed Rubenfeld & William P. Barr, *ESG Can’t Square with Fiduciary Duty*, WALL. ST. J. (Sept. 6, 2022, 6:31 PM), <https://www.wsj.com/>

general claim that ESG initiatives raise costs for consumers. Irrespective of accuracy, political entrepreneurs have crafted a narrative that ESG undermines the economic security of retirees, other investors, and consumers.

Second, the ESG backlash has a strong political component. Political entrepreneurs link ESG to constituencies with a range of hot-button grievances. They are “Americans who fill up their gas tanks,” “[Second] Amendment supporters,” “Soon to be retirees,” “Victims of the Biden Border Crisis,” “Conservative Americans,” and “Americans with strong held religious beliefs.”²²¹ DeSantis’s embrace of the anti-ESG banner and participation in multistate anti-ESG efforts reflect an awareness of the national political climate and his own political aspirations.²²²

4. Political Entrepreneurs and Other Accelerants

In addition to satisfying the threshold backlash elements, Florida’s ESG backlash enlists political entrepreneurs and other accelerants, including emotive appeals, taboo breaking, new political strategies, and challenges to procedures and institutions associated with the dominant script.²²³ To evoke an emotional response, political entrepreneurs use the ESG acronym to portray certain corporations—Disney, BlackRock, Budweiser—as immoral.²²⁴ In Florida, political entrepreneurs are boldly making taboo-breaking, anti-business claims against the state’s largest employer and others.²²⁵ These aggressive forms of political entrepreneurship are not confined to Florida and resonate nationwide.²²⁶ They reflect a pattern of extraordinary and aggressive actions targeting established institutions. These attacks extend to institutions associated

articles/esg-cant-square-with-fiduciary-duty-blackrock-vanguard-state-stree-the-big-three-violations-china-conflict-of-interest-investors-11662496552 [https://web.archive.org/web/20241001064445/https://www.wsj.com/articles/esg-cant-square-with-fiduciary-duty-blackrock-vanguard-state-stree-the-big-three-violations-china-conflict-of-interest-investors-11662496552].

²²¹ OFF. OF GOVERNOR RON DESANTIS, *supra* note 166.

²²² In addition to Governor DeSantis, a number of Florida politicians have recently been appointed to high-level positions within the federal government including U.S. Attorney General and Secretary of State. Aoife Walsh, *Who Is Pam Bondi, Trump’s Nominee for Attorney General?*, BBC (Nov. 22, 2024), <https://www.bbc.com/news/articles/c079y0r1j8po> [https://perma.cc/BT85-MX69]; Marco Rubio, U.S. Dep’t of State, <https://www.state.gov/biographies/marco-rubio> [https://perma.cc/TF23-GCXU].

²²³ See Alter & Zürn, *Theorising Backlash Politics*, *supra* note 109, at 740, 742.

²²⁴ See discussion *infra* Sections I.A.1, I.D, III.A–III.B; *infra* Part IV.

²²⁵ See discussion *supra* Section II.B.1.d.

²²⁶ See Letter from Mark Brnovich to Laurence D. Fink, *supra* note 199; see also *supra* Section II.A.

with ESG integration, such as the SEC, climate coalitions, asset managers, and even Delaware business courts.²²⁷

D. Outcomes

The confluence of political entrepreneurship and backlash politics can contribute to a range of outcomes.²²⁸ It can change nothing. Because backlash ostensibly challenges the status quo, it often sparks a counterreaction, which can limit its progression. It can create new divisions and factions. It can also spark fundamental political and social transformations.²²⁹

The pace of ESG and sustainability advancement in the United States may inevitably hinge on politics. President Trump's electoral victory in 2024 likely signals reversion and greater anti-ESG hostility in the United States.²³⁰ Yet the prospects for domestic countermovements and pro-ESG developments abroad, where there is significantly less hostility toward the ESG concept, remain. Politics aside, the United States risks being an outlier, creating a potential lack of harmony and predictability for global companies.²³¹

IV. EVOLUTIONARY TENSIONS AND CORPORATE GOVERNANCE THEORY

Corporate law and governance debates are not simply about shareholder or stakeholder primacy. The anti-ESG narrative's nostalgia and hostility to change points to other tensions about the trajectory of corporate governance: evolution versus stasis, expansion versus reversion. Change is uncomfortable and triggers anxiety among

²²⁷ See discussion *infra* Section VI.A.2.b.

²²⁸ Scholars propose varied outcomes associated with backlash: "(1) *no change*: backlash politics can be repressed, and it can peter out; (2) *fundamental change* in the form of new cleavages, factions, or dominant scripts that incorporate backlash movements and objectives into ordinary politics, or (3) *social reversion*: backlash politics can contribute to fundamental social and political changes." Alter & Zürn, *Conceptualising Backlash Politics*, *supra* note 109, at 564–65.

²²⁹ See *id.*

²³⁰ Levi McAllister, Celia Soehner & Daja Apetz-Dreier, *Top 5 ESG Considerations for US Investors Under the Trump-Vance Administration*, REUTERS (Feb. 11, 2025, 10:05 AM), <https://www.reuters.com/legal/legalindustry/top-5-esg-considerations-us-investors-under-trump-vance-administration-2025-02-11> [<https://perma.cc/L75X-Y292>].

²³¹ See generally ANU BRADFORD, *THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD* (2020) [hereinafter BRADFORD, *THE BRUSSELS EFFECT*]; ANU BRADFORD, *DIGITAL EMPIRES: THE GLOBAL BATTLE TO REGULATE TECHNOLOGY* (2023); DAVID VOGEL, *CALIFORNIA GREENIN': HOW THE GOLDEN STATE BECAME AN ENVIRONMENTAL LEADER* (2018) (discussing "the California Effect" on environmental regulation).

politicians, the public, and even scholars. Corporate governance debates are not only a function of substantive differences. They have a strong directional component.

Few can argue with the proposition that today's corporate directors shoulder significantly more responsibilities than directors of the past.²³² Their dual oversight and strategy roles require time, attention, and expertise. Rising expectations similarly affect C-suite executives. The corporate evolution theory captures the directionality of corporate governance and law. It maintains that expectations for corporate managers, particularly directors and officers, will evolve in response to changes in the business environment. The trajectory of corporate governance is not a straight line, as reversionary backlash dynamics reveal, but trends forward. Corporate evolution theory finds support in common law doctrine, regulatory changes, corporate governance practices, and organizational and new governance theory.²³³ Former Delaware Supreme Court Justice E. Norman Veasey opined on the evolutionary trajectory of corporate law and governance:

Our courts do not have a political agenda that vacillates from time to time to favor one litigant over the other. Delaware courts today are not any more "pro-stockholder" and less "pro-director" than they were in the past, or vice versa. The expectations of director conduct have evolved over the years, including in the post-Enron era, but that does not mean the courts have begun to take on a political agenda to favor stockholders over directors. That evolution in director expectations is a function of the development of the common law reflecting changing business mores and sharper pleading in corporate litigation, focusing more precisely on process. Delaware courts are balanced and objective, and the business judgment rule is alive and well.²³⁴

This perspective embraces the expanding scope of directorial duties and responsibilities over time. Similarly, the Federal Sentencing Guidelines for Organizations, *Caremark* duties under state law, certain aspects of SOX, and the Dodd-Frank Act have all led to an expansion of board oversight responsibilities under federal and state law as well as

²³² See Veasey, *supra* note 4, at 2140 ("The expectations of director conduct have evolved to the point where, today, it goes without saying that directors must be careful and work hard to understand the facts behind that which they are deciding.").

²³³ See Simmons, *supra* note 24, at 1152 ("General systems theory, a branch of organizational theory characterized by a loose analogy between social and biological systems, provides an instructive view of firm responses to regulation." (citing Edward Rubin, *The Regulatizing Process and the Boundaries of New Public Governance*, 2010 WIS. L. REV. 535, 551–52; Donald C. Langevoort, *Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk, and the Financial Crisis*, 2012 WIS. L. REV. 495, 515)).

²³⁴ E. Norman Veasey, *Musings from the Center of the Corporate Universe*, 7 DEL. L. REV. 153, 169 (2004).

adaptive company responses.²³⁵ The expansion of director oversight duties from *Graham v. Allis-Chalmers Manufacturing Co.* to *In re Caremark International Inc. Derivative Litigation* and beyond is a prime example.²³⁶ *Caremark's* legacy illustrates how evolving expectations can lead to changes in corporate governance practices and law.²³⁷

Understanding corporate evolution requires taking a step back and a temporary detour from the protracted debates on shareholder primacy and stakeholder governance to consider trajectory. Those two visions of corporate governance reflect the tension between an acute focus on investor return versus a panoramic view encompassing various constituencies affected by the corporate enterprise. Case law and the academic literature capture both perspectives.²³⁸ However, the current wave of anti-ESG backlash insists on a nonexistent form of purity where distinctions among financial, nonfinancial, economic, and socio-political perspectives are sometimes blurred. The contemporary context calls for a flexible and adaptive framework, neither overinclusive nor underinclusive, elucidating the ground-level dynamics of modern

²³⁵ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 7, 12, 15, 18, 22, and 45 U.S.C.); Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 and 18 U.S.C.); *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996); U.S. SENT'G GUIDELINES MANUAL ch. 8 (U.S. SENT'G COMM'N 2021).

²³⁶ *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125 (Del. Ch. 1963); *Caremark*, 698 A.2d 959.

²³⁷ See discussion *infra* Section VI.B.2.

²³⁸ See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) ("Although such considerations [of other corporate constituencies] may be permissible, there are fundamental limitations upon that prerogative. A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders."); *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 20 (Del. Ch. 2013) ("Directors of a Delaware corporation owe fiduciary duties to the corporation and its stockholders which require that they strive prudently and in good faith to maximize the value of the corporation for the benefit of its residual claimants."); *eBay Dom. Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010) ("Having chosen a for-profit corporate form . . . directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders."); *Katz v. Oak Indus. Inc.*, 508 A.2d 873, 879 (Del. Ch. 1986) ("It is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation's stockholders . . ."). But see *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1150 (Del. 1989) ("[A] board of directors . . . is not under any *per se* duty to maximize shareholder value in the short term, even in the context of a takeover."); *Unocal Corp. v. Mesa Petrol. Co.*, 493 A.2d 946, 955 (Del. 1985) (noting that directors can consider "the impact on 'constituencies' other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally)"); *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 112 (Del. Ch. 2011) ("[A] board of directors 'is not under any *per se* duty to maximize shareholder value in the short term, even in the context of a takeover.'" (quoting *Paramount Commc'ns*, 571 A.2d at 1150)); *TW Servs., Inc. v. SWT Acquisition Corp.*, No. 10427, 1989 WL 20290, at *7 (Del. Ch. Mar. 2, 1989) ("[D]irectors in pursuit of long run corporate (and shareholder) value may be sensitive to the claims of other 'corporate constituencies.' . . . There is a time, however, when the board's duty becomes more targeted and specific and its range of options becomes narrower.").

companies and integrating different yet connected domains—profits, people, and planet.²³⁹ If scholarly bias prefers stability over instability and neat over messy variables, an effective corporate governance theory must account for both.²⁴⁰ The theory of corporate evolution offers a useful lens to explain the trajectory of corporate governance.

V. POLITICAL ENTREPRENEURSHIP RISKS FOR CORPORATE FIRMS

Political entrepreneurship can bring opportunities and risks. An important question emerges from the intense flurry of ESG backlash: What is its impact on companies?²⁴¹ Companies confront a minefield of complex political risks before legislatures, agencies, courts of law, and courts of public opinion.²⁴² They must also navigate a shifting business environment and the demands of shareholders, customers, employees, and other stakeholders whose interests, at times, may diverge.

A. “Greenwashers,” “Greenhushing,” Metrics, and Social Demand

In the current business environment, companies feel pressured to drop out of global climate initiatives, dismantle DEI programming, and take other reactive measures as a potential byproduct of aggressive political backlash.²⁴³ Backlash and scrutiny from political entrepreneurs

²³⁹ See Christopher M. Bruner, *Corporate Governance Reform and the Sustainability Imperative*, 131 YALE L.J. 1217 (2022).

²⁴⁰ Over the past decade, populism has made inroads. Identifying strategies addressing populism within the context of multinational enterprises in developed countries is a newer challenge confounding firms and researchers. Christopher A. Hartwell & Timothy Devinney, *Populism, Political Risk, and Pandemics: The Challenges of Political Leadership for Business in a Post-COVID World*, 56 J. WORLD BUS., June 2021, at 1, 8.

²⁴¹ Masters & Temple-West, *supra* note 78.

²⁴² See Simmons, *supra* note 47. Political risk broadly refers to “the probability that political decisions, events or conditions at the geopolitical, country, regulatory or societal level will impact the performance of a company, market or economy.” COURTNEY RICKERT MCCAFFREY, JON SHAMES & OLIVER JONES, *GEOSTRATEGY IN PRACTICE* 2021, at 30 (2021), https://assets.ey.com/content/dam/ey-sites/ey-com/en_gl/topics/geostrategy/ey-ceo-imperative-geostrategy-in-practice-2021.pdf [https://web.archive.org/web/20240627121012/https://assets.ey.com/content/dam/ey-sites/ey-com/en_gl/topics/geostrategy/ey-ceo-imperative-geostrategy-in-practice-2021.pdf]; see also Hartwell & Devinney, *supra* note 240, at 6 (“Political risk is fundamentally a statistically stationary concept that posits unknowns which can be characterized (and hence managed and financially hedged).”).

²⁴³ Outside pressure has led certain companies to exit climate alliances. Stephen Morris, Kenza Bryan & Owen Walker, *US Banks Threaten to Leave Mark Carney’s Green Alliance over Legal Risks*, FIN. TIMES (Sept. 21, 2022), <https://www.ft.com/content/0affeaa-c62a-49d1-9b44->

can also “smoke out” greenwashers—companies that only pretend to be environmentally or socially responsible, but lack a serious commitment. It might also inspire even well-intentioned companies to downplay their ESG profile, or “greenhushing,” to avoid scrutiny.²⁴⁴

However, in companies where ESG already contributes significantly to the bottom line, initiatives will likely remain intact with less emphasis.²⁴⁵ If quantifying ESG impact remains a challenge, further critique will lead to improved data and analytics and stronger metrics.²⁴⁶ Despite ESG backlash, preliminary anecdotal evidence attests that corporate managers may still persist in sustainability initiatives,²⁴⁷ incentivized by significant social demand.²⁴⁸ Scholars argue that large millennial and Gen Z populations are more inclined to make economic decisions based on their political and social values.²⁴⁹ Many investors will pay a premium for investments and companies with strong ESG profiles.²⁵⁰

b9d27f0b5600 [https://perma.cc/5VDS-9EFE]; Lee Harris, Can Climate Action 100+ Bring Back Its Defectors?, *FIN. TIMES* (May 15, 2024), <https://www.ft.com/content/6ae809be-2b87-48e9-bac2-d243155fbb49> [https://perma.cc/MYK9-Z748]; Attracta Mooney, *New Climate Coalition Urges Stronger Targets as ‘Greenlash’ Fears Mount*, *FIN. TIMES* (June 23, 2024), <https://www.ft.com/content/8540ac9a-5d36-45f7-bcc3-8459f86d3f14> [https://perma.cc/U9N7-KFSF]; Kenza Bryan & Attracta Mooney, *How Companies Are Starting to Back Away from Green Targets*, *FIN. TIMES* (June 21, 2024), <https://www.ft.com/content/c9fee776-1471-442c-aae8-8d78fe60faeb> [https://perma.cc/7FD3-TN7P].

²⁴⁴ Maxine Joselow, ‘Greenhushing’: Why Some Companies Quietly Hide Their Climate Pledges, *WASH. POST* (July 13, 2023), <https://www.washingtonpost.com/climate-environment/2023/07/13/greenhushing-climate-trend-corporations> [https://web.archive.org/web/20240225163159/https://www.washingtonpost.com/climate-environment/2023/07/13/greenhushing-climate-trend-corporations].

²⁴⁵ Boyde, *supra* note 68.

²⁴⁶ Chris Newlands, *Data Shortfall Undermines ESG Investment, Asset Managers Warn*, *FIN. TIMES* (Dec. 9, 2024), <https://www.ft.com/content/41125a1b-f12e-4f4f-b8e1-c11ca1fce952> [https://perma.cc/8ABU-T4QF].

²⁴⁷ See Alan Murray & David Meyer, *Coca-Cola and Novartis’s CEOs Don’t Care if ‘ESG’ Has Become a Toxic Phrase Among Some*, *FORTUNE* (Jan. 23, 2023, 6:22 AM), <https://fortune.com/2023/01/23/coca-cola-novartis-ceos-esg-quincey-narasimhan> [https://perma.cc/ZEL3-36V7].

²⁴⁸ See Michal Barzuza, Quinn Curtis & David H. Webber, *ESG and Private Ordering*, 1 U. CHI. BUS. L. REV. 1, 14 (2022). The rise of ESG has been attributed to a significant “shift in demand[] and . . . incentives[,] . . . particular[ly from] corporate stakeholders and . . . millennial[s].” *Id.* These groups are increasingly focused on the “social, environmental, and worker-welfare [impact]s of corporate actions.” *Id.* Influenced by social media, this shift has given more power to non-shareholder stakeholders, compelling managers to focus on ESG to “preserv[e] traditional firm value . . . and . . . their . . . careers.” *Id.*

²⁴⁹ See *id.* at 15–16.

²⁵⁰ See *id.* at 5. Millennials, born between 1981 and 1996, form “the largest generation in US history” and, along with Gen Z, constitute a majority of the population. *Id.* at 15. They possess considerable wealth and are set to inherit even more, drawing the attention of asset managers. *Id.* They are distinct in their willingness to make economic decisions, including consumer choices,

B. *Undermining Internal Governance and Private Ordering*

Political entrepreneur driven anti-ESG backlash seeks to disrupt existing corporate practices. It reflects a hostility toward new governance and integrative governance approaches, which may undermine the corporate immune system.²⁵¹ This internal regulatory function provides mechanisms, such as a monitoring board, compliance and risk management systems, contractual devices, and roles, such as chief sustainability officer, to lower monitoring costs for government regulators.²⁵² These internal structures evolve to help companies navigate a complex business environment and diverse internal and external threats. Most ESG-related reforms proposed in the United States are disclosure-based.²⁵³ This approach is moderate among regulatory options, allowing companies to preserve a greater degree of discretion compared to more prescriptive forms of regulation. From this vantage point, the anti-ESG rhetoric is overstated. Ironically, ESG, as a risk management tool, is intended to limit transaction costs from diverse risks. Still, anti-ESG political entrepreneurs attack it for creating transaction costs they leave largely unquantified.²⁵⁴ Their claims ignore business practice, which requires options, trade-offs, priorities, experimentation, and flexibility. Companies want options and managerial discretion over their strategies.

VI. POLITICAL ENTREPRENEURSHIP RISKS FOR THE CORPORATE-GOVERNANCE REGIME

Political entrepreneur-driven anti-ESG backlash uniquely challenges corporate governance. Its prescriptive approach to corporate governance restricts corporate options and may stifle experimentation and innovation. These restrictions may also negate features that facilitate

employment preferences, and investment decisions, based on their political and social values. *Id.* They are also known for boycotting brands and “us[ing] social media to promote their [value]s.” *Id.* at 14–16.

²⁵¹ See Simmons, *supra* note 24; Lisa Blomgren Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance*, 2010 WIS. L. REV. 297; Gráinne de Búrca, *New Governance and Experimentalism: An Introduction*, 2010 WIS. L. REV. 227; Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).

²⁵² See Simmons, *supra* note 24; Robert G. Eccles & Alison Taylor, *The Evolving Social Role of Chief Sustainability Officers*, HARV. BUS. REV. (July–Aug. 2023), <https://hbr.org/2023/07/the-evolving-role-of-chief-sustainability-officers> [<https://perma.cc/AU5P-YUSU>].

²⁵³ See, e.g., GIBSON DUNN, *supra* note 63.

²⁵⁴ See discussion *supra* Part III.

business planning, such as flexibility, predictability, and stability. Given the gridlock at the federal level, state legislatures dominated by a single party have acted to limit corporate discretion related to ESG and sustainability.²⁵⁵ The second Trump administration is likely to continue anti-ESG advocacy.²⁵⁶ These aggressive attempts may come at a cost. They threaten to undermine or restrict central tenets of corporate law, such as the business judgment rule, meaningful contemporary oversight obligations for corporate managers, and fairness.

Political entrepreneurs' efforts also threaten to undermine U.S. regulatory dominance abandoning the country's role as a global corporate governance-regulator to the EU and other countries. This risk is present across multiple domains: sustainability, corporate governance, and technology. A couple of race-to-the-top theories are relevant to this question. First, the California Effect, characterized by a shift in regulation toward jurisdictions with stricter regulatory standards, may allow jurisdictions to impose regulations on others indirectly.²⁵⁷ Although additional regulatory burdens bring costs, additional regulations address externalities that may advance the public good and improve the overall business climate. Second, the Brussels Effect refers to the EU's unilateral *de facto* regulatory globalization, which uses market mechanisms to externalize its laws outside its borders.²⁵⁸ It explains how the EU's higher standards may appeal to companies operating across different regulatory environments because it helps facilitate business operations.²⁵⁹

A. *Jurisdictional Competitiveness, Corporate Migration, and Capital Mobilization*

The U.S. corporate-governance regime derives from four sources: (1) state corporate law (e.g., Delaware); (2) the Securities Act of 1933, the Securities and Exchange Act of 1934, and regulations of the SEC; (3) stock exchange listing rules (e.g., NYSE and NASDAQ); and (4) other statutes related to business operations (e.g., Clean Air Act, Federal Food, Drug,

²⁵⁵ See discussion *supra* Part III.

²⁵⁶ Saijel Kishan & Tasneem Hanfi Brögger, Why ESG Faces Backlash and Its Future Under Trump 2.0, Bloomberg (Mar. 3, 2025, 6:33 AM), <https://www.bloomberg.com/news/articles/2025-03-03/why-esg-faces-backlash-under-trump-2-0>.

²⁵⁷ DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY 5–6 (1995).

²⁵⁸ BRADFORD, THE BRUSSELS EFFECT, *supra* note 231, at 37–38.

²⁵⁹ *Id.*

and Cosmetic Act, and Sherman Antitrust Act).²⁶⁰ The primary regulators are the state of Delaware and the SEC.²⁶¹ Historically, state corporate law via Delaware and federal law via the SEC occupied separate fields of influence.²⁶² State corporate law governs the internal affairs of corporations, whereas U.S. securities regulation is primarily an external, disclosure-based regime.²⁶³

1. U.S. Jurisdictional Competitiveness

When firms make jurisdictional choices about where to invest and settle disputes, they and their advisors account for legal content, institutional structures, and dispute resolution. In essence, the decision to invest in the United States is akin to the purchase of a bundled product.²⁶⁴ Backlash and political entrepreneurship can have implications for regulatory competition. The symbiotic federalism characterizing the U.S. corporate governance regime is a strength.²⁶⁵ One of the longstanding debates among corporate law scholars seeks to explain the preeminence of Delaware as a site of incorporation and dispute settlement.²⁶⁶ Damage to Delaware's reputation and performance as part of the two-legged system, including the federal securities regulation overlay, could damage the entire corporate governance regime and potentially trigger corporate migration to other jurisdictions abroad or a domestic race-to-the-bottom.²⁶⁷ Moreover, the crackdown on, or

²⁶⁰ See, e.g., Clean Air Act, 42 U.S.C. §§ 7401–7438; Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387; Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301–399i; Sherman Antitrust Act, 15 U.S.C. §§ 1–7.

²⁶¹ Omari S. Simmons, *Branding the Small Wonder: Delaware's Dominance and the Market for Corporate Law*, 42 U. RICH. L. REV. 1129, 1190 (2008).

²⁶² *Id.*

²⁶³ See, e.g., William B. Chandler III & Leo E. Strine Jr., *The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State*, 152 U. PA. L. REV. 953, 973 (2003).

²⁶⁴ See Omari Scott Simmons, *Delaware's Global Threat*, 41 J. CORP. L. 217, 224, 226 (2015); Simmons, *supra* note 261, at 1133–34.

²⁶⁵ See Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1576 (2005) (“These limitations explain how Delaware responded to corporate scandals and, in turn, create a space where the relationship between federal rules and Delaware law is symbiotic, rather than competitive as depicted by the classical state-competition debate.”).

²⁶⁶ See Simmons, *supra* note 264.

²⁶⁷ See Michal Barzuza, *Nevada v. Delaware: The New Market for Corporate Law* 9–11 (Eur. Corp. Governance Inst., Working Paper No. 677/2251, 2024), <https://papers.ssrn.com/abstract=4746878> [https://perma.cc/SJ2F-5QGC]; Stephen M. Bainbridge, *DExit Drivers: Is Delaware's Dominance Threatened?* 45–46 (UCLA Sch. L., Research Paper No. 24-04, 2024), <https://papers.ssrn.com/abstract=4909689> [https://perma.cc/M646-KK7H].

singling out of, companies like Disney and large financial firms like BlackRock could discourage capital mobilization and third-party investment.

2. Attacks on Federal and State Institutions

In the anti-ESG context, many recent attempts by political entrepreneurs reflect anti-market and anti-business sentiment. They seek to undermine corporate discretion, especially on sustainability issues, and aggressively seek to disrupt established legal and institutional architecture, which contribute to U.S. attractiveness for firm investment. Political responses to exogenous shocks, such as the crisis that contributed to SOX and Dodd-Frank legislation, are distinct from endogenous opportunistic behavior, where political entrepreneurs create or elevate a political issue on the public radar. In the former case, observers have noted problems stemming from “knee-jerk” regulation and “quack corporate governance.”²⁶⁸ The SOX and Dodd-Frank Acts have been criticized at length, but political entrepreneurs manufacturing an ESG crisis in the absence of an exogenous shock, while acting with haste, seem to have escaped notice.

a. Federal Dynamics

Over the past two decades, federal law has expanded beyond disclosure and incrementally encroached on the internal affairs of corporations, altering the historical balance.²⁶⁹ Most of the action in the corporate governance arena during this time has occurred at the federal, rather than the state level. Political activity at the federal level regarding sustainability and ESG strategies and disclosures is vigorous. Recently, SEC disclosure rules and proposals in the areas of climate, human capital, and diversity have garnered considerable opposition and criticism, including challenges to its authority.²⁷⁰ These challenges extend to ESG disclosure regulation and the viability of the longstanding shareholder proposal process. Through lawsuits and other mechanisms, critics contend that Biden administration ERISA rules hurt investors,

²⁶⁸ See Romano, *supra* note 96, at 1544.

²⁶⁹ See E. Norman Veasey, *What Would Madison Think? The Irony of the Twists and Turns of Federalism*, 34 DEL. J. CORP. L. 35, 46 (2009) (“Placed in historical context, Sarbanes-Oxley represents a federal incursion into discrete areas of regulation of corporate governance that had been traditionally left to the states under the internal affairs doctrine.”); Veasey, *supra* note 4, at 2137 (“The reach of the Sarbanes-Oxley Act and the proposed listing requirements of the self-regulatory organizations (‘SROs’) exemplified by the NYSE and NASDAQ into the internal affairs of Delaware corporations is extensive.”).

²⁷⁰ See discussion *supra* Section I.E.

particularly retirees.²⁷¹ Republican-dominated congressional committees look for evidence of collusion among ESG-supportive companies that they contend violates antitrust law.²⁷² An aggressive and broad-based political onslaught targeting ESG seeks to rewind the decades-long trend.

b. Delaware Dynamics

Facing more limited interest-group considerations, state constitutional barriers to hyper-partisan activity, and a plaintiff-driven system of common law adjudication, Delaware, as a de facto national regulator, has historically moved slowly, incrementally, and conservatively in a value-neutral way.²⁷³ Its ascendance as the premiere situs of incorporation is a migration story influenced by political entrepreneurship. New Jersey Governor Woodrow Wilson, with the U.S. presidency in his sights, advanced the Seven Sisters legislation, which helped inspire the migration of corporate entities to Delaware.²⁷⁴

In a recent *Wall Street Journal* op-ed, former U.S. Attorney General William Barr and Jonathan Berry criticized Delaware for what they perceived as a movement toward politically driven ESG.²⁷⁵ It received well-reasoned responses.²⁷⁶ Their op-ed politicized Delaware business court judges and mischaracterized decades of precedent: the business judgment rule and *Caremark* doctrine.²⁷⁷ In doing so, they overstate the risk to firms, investors, and the public. They warn that Delaware will lose its preeminence to other state jurisdictions if it does not shift course.²⁷⁸

²⁷¹ See discussion *supra* Section 1.A.1.

²⁷² See discussion *supra* Section I.E.

²⁷³ See Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1013–16, 1105 (1997). See generally Omari Scott Simmons, *The Federal Option: Delaware as a De Facto Agency*, 96 WASH. L. REV. 935, 939–50 (2021).

²⁷⁴ Simmons, *supra* note 273, at 953.

²⁷⁵ William P. Barr & Jonathan Berry, *Delaware Is Trying Hard to Drive Away Corporations*, WALL ST. J. (Nov. 24, 2023, 3:12 PM), <https://www.wsj.com/articles/delaware-is-trying-hard-to-drive-away-corporations-business-environmental-social-governance-investing-780f812a> [<https://web.archive.org/web/20240430172937/https://www.wsj.com/articles/delaware-is-trying-hard-to-drive-away-corporations-business-environmental-social-governance-investing-780f812a>] (asserting that the federal government and many Democrat-led states are incorporating ESG principles into corporate governance to advance progressive policies on issues like climate and race, and Delaware, governed by Democrats, is following this trend).

²⁷⁶ Lawrence A. Cunningham & Joseph P. Petito, *Delaware Won't Fully Adopt the ESG Agenda*, WALL ST. J. (Nov. 28, 2023, 5:27 PM), <https://www.wsj.com/articles/delaware-wont-fully-adopt-the-esg-agenda-shareholder-stakeholder-c39983ed> [<https://web.archive.org/web/20231219122349/https://www.wsj.com/articles/delaware-wont-fully-adopt-the-esg-agenda-shareholder-stakeholder-c39983ed>]; Travis Laster, *Attorney General Barr Could Use Some Help on Delaware Law*, LINKEDIN (Nov. 26, 2023), <https://www.linkedin.com/pulse/attorney-general-barr-could-use-some-help-delaware-law-travis-laster-kwcse> [<https://perma.cc/6SZV-8DUW>].

²⁷⁷ See Barr & Berry, *supra* note 275.

²⁷⁸ *Id.*

This claim is not in accord with the weight of scholarship on jurisdictional competition or prevailing trends.²⁷⁹ Moreover, the Delaware Constitution mandates political balancing on its business courts to depoliticize its appointed judiciary.²⁸⁰ In another *Wall Street Journal* op-ed, Jeb Bush and Joe Lonsdale, co-founder of Palantir, criticized the Delaware Court of Chancery's recent decision in *Tornetta v. Musk*, invalidating Elon Musk's pay package.²⁸¹ Collectively, these op-eds targeting Delaware and its jurists reflect a wave of ESG backlash that questions corporate expertise, oversight, discretion, legal precedent, and judicial autonomy. Elon Musk has notoriously criticized Delaware courts on social media to over 200 million followers and threatened to reincorporate his companies outside of Delaware following unfavorable court decisions.²⁸² In response to these strong critiques, Delaware judges have largely exercised restraint to avoid being drawn into broader culture wars.

Recently, however, the normally quiet environment in Delaware changed following the Delaware Court of Chancery's decision in *West Palm Beach Firefighters' Pension Fund v. Moelis & Company*, which

²⁷⁹ See, e.g., Jody Godoy, *Chancellor Says Ex-Trump Official Got Delaware's ESG Stance Wrong*, REUTERS (Nov. 27, 2023, 4:22 PM), <https://www.reuters.com/legal/government/chancellor-says-ex-trump-official-got-delawares-esg-stance-wrong-2023-11-27/> [<https://web.archive.org/web/20231128013834/https://www.reuters.com/legal/government/chancellor-says-ex-trump-official-got-delawares-esg-stance-wrong-2023-11-27/>]; Laster, *supra* note 276; Leslie A. Pappas, *Delaware Trends and Cases to Watch in 2024*, LAW360 (Jan. 1, 2024, 8:02 AM), <https://www.law360.com/articles/1777985/delaware-trends-and-cases-to-watch-in-2024> [<https://perma.cc/7446-BPP2>].

²⁸⁰ DEL. CONST. art. IV, § 3; see also *Adams v. Governor of Del.*, 922 F.3d 166, 170–73 (3d Cir. 2019) (analyzing Delaware's judicial political balancing provisions and their history), *vacated and remanded sub nom.*, *Carney v. Adams*, 592 U.S. 53 (2020).

²⁸¹ Jeb Bush & Joe Lonsdale, *Elon Musk and Donald Trump Cases Imperil the Rule of Law*, WALL ST. J. (Feb. 21, 2024, 2:14 PM), <https://www.wsj.com/articles/trump-and-musk-cases-imperil-the-rule-of-law-new-york-delaware-courts-business-266a5559> [<https://web.archive.org/web/20250209205752/https://www.wsj.com/articles/trump-and-musk-cases-imperil-the-rule-of-law-new-york-delaware-courts-business-266a5559>]; *Tornetta v. Musk*, 310 A.3d 430 (Del. Ch. 2024). Interestingly, Jeb Bush, who has been relatively silent since being vanquished as a presidential contender by President Donald Trump, was moved to critique the *Tornetta* decision as a threat to the rule of law and as evidence of an unfair dual system of justice for billionaires. Bush & Lonsdale, *supra*.

²⁸² Andrew Ross Sorkin et al., *Elon Musk Extends His Anywhere-but-Delaware Campaign*, N.Y. TIMES (Feb. 15, 2024), <https://www.nytimes.com/2024/02/15/business/dealbook/musk-spacex-delaware-tesla.html> [<https://web.archive.org/web/20250104100333/https://www.nytimes.com/2024/02/15/business/dealbook/musk-spacex-delaware-tesla.html>]; Elon Musk (@elonmusk), X (Jan. 30, 2024, 5:14 PM), <https://www.x.com/elonmusk/status/1752455348106166598?lang=en> [<https://pema.cc/K5JL-GJKA>] (“Never incorporate your company in Delaware.”); Elon Musk (@elonmusk), X (Feb. 12, 2024, 12:48 PM), <https://www.x.com/elonmusk/status/1757099432078639228?lang=en> [<https://perma.cc/E89D-PHDL>] (“Move your company out of Delaware before they lock the doors . . .”).

invalidated a shareholder agreement between a company and its controlling shareholder, reinforcing minority shareholder protections.²⁸³ In response to the *Moelis* decision, the Corporation Law Council of the Delaware State Bar Association, dominated by lawyers from law firms serving powerful corporate clients, lobbied the Delaware General Assembly to adopt its proposed amendments to undercut the *Moelis* decision before the Delaware Supreme Court could review it on appeal.²⁸⁴ According to a cadre of legal experts:

The bill passed by Delaware's general assembly jettisons the state's traditional approach of protecting investors. . . . [I]t would allow the management of companies to strike secret side deals with big shareholders, bypassing the board on governance questions previously reserved for directors. For example, the bill would allow agreements giving a single shareholder veto power over the hiring or firing of a chief executive.²⁸⁵

The new amendments to the Delaware General Corporation Law (DGCL) favor controlling shareholders over minority public investors.²⁸⁶ Despite academic and other expert opposition to the amendments on substantive and procedural grounds, the bill passed and was signed into law by Delaware's governor.²⁸⁷

The unprecedented hastily formulated amendments following the *Moelis* decision circumventing review by Delaware's respected business courts and judges are controversial. During this contentious episode, "the [Delaware] judiciary was unfairly attacked and maligned by the bill's proponents."²⁸⁸ This episode brought negative attention to a state's often sleepy lawmaking process. For years, despite external criticism, Delaware

²⁸³ 311 A.3d 809, 881 (Del. Ch. 2024); Jill E. Fisch & Anat Alon-Beck, *Does the Moelis Decision Warrant a Quick Legislative Fix?*, CLS BLUE SKY BLOG (June 10, 2024), <https://clsbluesky.law.columbia.edu/2024/06/10/does-the-moelis-decision-warrant-a-quick-legislative-fix> [https://perma.cc/W5LX-5NCR]; see also Jill E. Fisch, *Stealth Governance: Shareholder Agreements and Private Ordering*, 99 WASH. U. L. REV. 913, 916–19 (2021) (analyzing dynamics involving shareholder agreements).

²⁸⁴ See Charles Elson, *Delaware Is Jettisoning Its Traditional Approach of Protecting Investors*, FIN. TIMES (July 10, 2024), <https://www.ft.com/content/727c3850-335b-4a30-b59b-399e611aec07> [https://perma.cc/88TJ-99PR].

²⁸⁵ *Id.*

²⁸⁶ DEL. CODE ANN. tit. 8, § 122(18) (2024).

²⁸⁷ *Id.*; Cydney Posner, *Controversial Delaware Legislation Breezes Through Delaware Senate*, COOLEY (June 17, 2024), <https://cooleypubco.com/2024/06/17/delaware-legislation-through-senate> [https://perma.cc/E524-AHLL]; Jordan Howell, *Sparks Fly in Final Hearing on Corporate Law Amendments*, DEL. CALL (June 22, 2024), <https://delawarecall.com/2024/06/22/sparks-fly-in-final-hearing-on-corporate-law-amendments> [https://perma.cc/3GYT-K5WQ].

²⁸⁸ Elson, *supra* note 284; see also Joel Edan Friedlander, *Former Chancellor Chandler's Unjust Criticism of Chancellor McCormick and Vice Chancellor Laster: What Does It Signify?*, 51 J. CORP. L. (forthcoming), <https://ssrn.com/abstract=4901375> [https://perma.cc/TVZ2-HHQC].

avoided the perception of hyper-politicization and bias.²⁸⁹ This characterization may no longer be accurate. Commentators allege that financially powerful law firm clients balked at the *Moelis* decision and then lobbied prominent members of the Delaware Bar to undermine a Chancery Court decision before it could receive appellate review.²⁹⁰ In a more recent twist, the Delaware General Assembly, influenced by a law firm representing Elon Musk and other financially powerful clients, proposed a bill which would insulate controlling shareholders to a greater degree from minority shareholder suits and limit shareholder access to records.²⁹¹ This bill, if passed, would nullify Delaware court decisions.²⁹² This bold move also circumvents Delaware's business courts and the Corporation Law Council in their traditional corporate lawmaking role.²⁹³

Irrespective of merits and legal arguments, these breaks from longstanding processes create the appearance that Delaware is potentially up for sale—favoring certain powerful clients and is susceptible to aggressive lobbying and pressures from market participants (e.g., clients) seeking favorable outcomes. This state of affairs, if not rectified, threatens to undermine Delaware's brand, which is intimately tied to its judiciary.²⁹⁴ Legislatures indeed have the prerogative to make law. But the potential conflicts presented by clients and their representatives “pushing through” legislation, which overturns the impact of unfavorable judicial decisions, seem ominous.

For over a century, Delaware has been a critical part of the U.S. corporate governance regime. Delaware's legal regime is characterized by common law adjudication with statutory guideposts. Its business courts have been praised by a prominent bipartisan group of government

²⁸⁹ See generally Lawrence Hamermesh, *How We Make Law in Delaware, and What to Expect from Us in the Future*, 2 J. BUS. & TECH. L. 409 (2007); Rock, *supra* note 273; Demetrios G. Kaouris, *Is Delaware Still a Haven for Incorporation?*, 20 DEL. J. CORP. L. 965, 971–75 (1995).

²⁹⁰ See Friedlander, *supra* note 281; Howell, *supra* note 287; Gladriel Shobe, Jarrod Shobe & William W. Clayton, *Moelis and Private Equity in Public Market*, YALE J. REG. (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5160684 [<https://perma.cc/GBF2-DWL4>].

²⁹¹ S.B. 21, 153 Gen. Assemb. (Del. 2025); Sujeet Indap, *Delaware Lawmakers Propose New Bill to Stem Corporate Defections*, FIN. TIMES (Feb. 17, 2024), <https://www.ft.com/content/82e970d5-ea60-4932-81b5-2b6d5c28b86b> [<https://perma.cc/H8XF-Z7LC>]; Lora Kolodny, *Tesla's Law Firm Drafts Delaware Bill That Could Salvage Musk Pay Package*, CNBC (Feb. 25, 2025, 1:52 PM), <https://www.cnbc.com/2025/02/18/firm-representing-musk-tesla-drafts-bill-for-delaware-corporate-law.html> [<https://perma.cc/Z5A2-579K>].

²⁹² Sujeet Indap, *Delaware Braced for Change After Attacks from Elon Musk and Others*, FIN. TIMES (Mar. 4, 2025), <https://www.ft.com/content/ec6d8ad9-46cf-4347-8e43-c8d02882ff00> [<https://perma.cc/TKX2-FDA2>].

²⁹³ See Elson, *supra* note 284.

²⁹⁴ See generally Simmons, *supra* note 261.

officials and jurists.²⁹⁵ Delaware embraces a deferential, enabling approach to business decision-making and allows for extensive private ordering. Its law and adjudication advance business virtues, such as stability, predictability, flexibility, political agnosticism, and neutrality, to optimize business planning. Inevitably, Delaware court decisions will not satisfy all parties. Institutional legitimacy encourages party acquiescence to Delaware's judicial decisions regardless of a particular decisional outcome. Delaware critics, despite highlighting alternatives to Delaware's jurisdiction, such as Nevada and Wyoming, have not made a compelling case.²⁹⁶ Attempts to politicize and diminish the contributions and legitimacy of Delaware courts to U.S. corporate governance are disruptive and could weaken corporate governance nationwide.²⁹⁷

B. *Hostility to Well-Established Laws and Evolutionary Trends*

Political entrepreneurs pursuing an anti-ESG agenda are launching aggressive challenges to well-established fixtures of corporate law. This hostility is reflected in three main areas: (1) the business judgment rule, (2) oversight standards under *Caremark*, (3) independent director protection of public investors, and (4) judicial independence and legitimacy. These critiques challenge the direction and trajectory of corporate law and governance.

1. Business Judgment Rule

The business judgment rule, the touchstone of corporate law, provides strong protections for countless business decisions. It has lasted

²⁹⁵ See *Adams v. Governor of Del.* 922 F.3d 166, 186 (3d Cir. 2019) (McKee, J., concurring) ("Praise for the Delaware judiciary is nearly universal, and it is well deserved. Scholars and academics routinely refer to Delaware's courts as the preeminent forum for litigation, particularly for cases involving business disputes."), *vacated and remanded sum nom.*, *Carney v. Adams*, 592 U.S. 53 (2020); William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 BUS. LAW. 351, 354 (1992) ("In light of its 200 year history, the Delaware Court of Chancery deserves our celebration, not only as a unique and vibrant Delaware institution, but as an important contributor to our national system of justice."). *But see* Sorkin et al., *supra* note 282 (discussing Elon Musk's attempts to launch a campaign to convince companies to leave Delaware).

²⁹⁶ Wendy Gerwick Couture, *Nevadaware Divergence in Corporate Law*, 19 VA. L. & BUS. REV. (forthcoming), <https://ssrn.com/abstract=4913124> [<https://perma.cc/329C-DY4C>]; Pierluigi Matera, *Delaware's Dominance, Wyoming's Dare: New Challenge, Same Outcome?*, 27 FORDHAM J. CORP. & FIN. L. 73 (2022).

²⁹⁷ See Simmons, *supra* note 273, at 940–47.

centuries due to its flexibility and dynamism.²⁹⁸ It allows for evolution. It presumes that directors act independently, in good faith, on an informed basis, honestly believing that their decisions are in the corporation's best interests.²⁹⁹ The rule can be rebutted if the process, independence, or good faith of directors and officers is compromised or the decision cannot be attributed to a rational business purpose.³⁰⁰ Business judgment rule protection accommodates an array of decisions, mixed objectives, diverse rationales, and motives.³⁰¹ It is pragmatic and enduring, contributing to the flexibility and stability of corporate law. It anticipates shifting business environments and accommodates failing corporate strategies, risk-management decisions, extensive philanthropic endeavors, lobbying efforts, political contributions, ESG, corporate social responsibility, and sustainability measures.³⁰² It also largely prevents courts from second-guessing strategic business decisions that prove unsuccessful.³⁰³

²⁹⁸ See Randy J. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty*, 11 U. PA. J. BUS. L. 675, 679–80 (2009) (“The business judgment rule also traces its origins to the 1742 decision of the Lord Chancellor in *Charitable Corp. v. Sutton*. In that decision, the Lord Chancellor of England . . . articulated what is considered to be the first pronouncement of the business judgment rule.” (footnote omitted) (citing (1742) 26 E.R. 642; 1 DENNIS J. BLOCK, NANCY E. BARTON & STEPHEN A. RADIN, *THE BUSINESS JUDGMENT RULE: FIDUCIARY DUTIES OF CORPORATE DIRECTORS* 9 (5th ed. 1998 & Supp. 2002))).

²⁹⁹ ROBERT CHARLES CLARK, *CORPORATE LAW* § 3.4, at 123–24 (2d ed. 1986). Functionally, it is a doctrine of “judicial abstention” protecting directors and officers from personal liability for their decisions unless such decisions are fraudulent, corrupt, illegal, violate fiduciary duties, or lack a business purpose. FRANKLIN A. GEVURTZ, *CORPORATION LAW* § 4.1.2, at 278–79 (2000).

³⁰⁰ See CLARK, *supra* note 299, § 3.4, at 123. Robert Clark describes the business judgment rule as follows:

The rule is simply 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.

Id.; see also *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984); GEVURTZ, *supra* note 298, § 4.1.2, at 278–79 (“The idea underlying the rule is that courts should exercise restraint in holding directors liable for (or otherwise second guessing) 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.”).

³⁰¹ See Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 764–70 (2005) (arguing corporate social responsibility initiatives are permitted pursuant to the broad discretion under Delaware law).

³⁰² See *id.*

³⁰³ For example, the Court of Chancery recently dismissed a lawsuit against Jack Dorsey and his company Block, Inc. alleging breaches of fiduciary duties and other claims. *City of Coral Springs Police Officers' Pension Plan v. Dorsey*, No. 2022-0091, 2023 WL 3316246, at *1, *5–10 (Del. Ch. May 9, 2023), *aff'd*, 308 A.3d 1189 (Del. 2023). The court's order asserted that “the [Block] board was within its rights to buy Jay-Z's music streaming service Tidal, even if the decision was objectively ‘terrible.’” Maxwell Strachan, *Judge Affirms Jack Dorsey's Right to Make Objectively*

Interventionist anti-ESG political entrepreneurs are hostile to the business judgment rule, particularly because it provides significant protection to directors and officers to pursue ESG, sustainability, and other initiatives they disfavor.³⁰⁴ Economic conservatives historically touted the virtues of business judgment rule insulating management decisions, but their “hands off” support has waned with the advancement of ESG and sustainability.

The Delaware Court of Chancery’s recent decision in *Simeone v. Walt Disney Company* reinforced the business judgment rule as a central tenet of corporate law that will withstand ESG backlash.³⁰⁵ Plaintiff shareholder sued Disney’s board and CEO regarding decisions they made concerning Florida’s “Don’t Say Gay” bill.³⁰⁶ The decision is noteworthy:

Delaware law vests directors with significant discretion to guide corporate strategy—including on social and political issues. Given the diversity of viewpoints held by directors, management, stockholders, and other stakeholders, corporate speech on external policy matters brings both risks and opportunities. The board is empowered to weigh these competing considerations and decide whether it is in the corporation’s best interest to act (or not act).³⁰⁷

The *Simeone* case signals the direction that Delaware courts will take toward claims alleging breaches of fiduciary duty on the part of directors and officers who make decisions related to sustainability, ESG, or politics. *Simeone* is a Section 220 book and records case.³⁰⁸ Such actions are often precursors to litigation. The *Simeone* decision signals against abusing this process to pursue nuisance lawsuits that lack an adequate legal basis, and it signals the court’s general approach to future cases. The business judgment rule endures, protecting director and officer decision-making from investors and political entrepreneurs seeking to use the courts to air political grievances. An enduring and redeeming quality of the business judgment rule is that it is politically neutral and resistant to backlash politics. Its long history of application supports the theory of corporate evolution.

‘Terrible’ Business Decisions, VICE (May 10, 2023, 12:54 PM), <https://www.vice.com/en/article/g5yq7q/judge-affirms-jack-dorseys-right-to-make-objectively-terrible-business-decisions> [<https://perma.cc/NY96-Z24H>]; see *Dorsey*, 2023 WL 3316246. Further, the court noted that “a board comprised of a majority of disinterested and independent directors is free to make a terrible business decision without any meaningful threat of liability, so long as the directors approve the action in good faith.” *Dorsey*, 2023 WL 3316246, at *1; Strachan, *supra*.

³⁰⁴ See discussion *infra* Section III.A.

³⁰⁵ 302 A.3d 956 (Del. Ch. 2023).

³⁰⁶ *Id.* at 958.

³⁰⁷ *Id.* at 958–59.

³⁰⁸ See *id.* at 966.

2. Caremark, ESG, and Evolution

The origins and evolution of *Caremark* indicate a trend. Before *Caremark*, the *Graham* standard prevailed: directors had no affirmative obligation to implement a system of controls or, in the words of that decision, a “system of [corporate] espionage.”³⁰⁹ *Caremark* followed significant changes to corporate regulation. The questionable payments era led to the promulgation of the Foreign Corrupt Practices Act (FCPA),³¹⁰ which recognizes that the prohibited conduct of bribery is often difficult to identify; acts of bribery are usually identified in hindsight after financial records covering up the bribery have been investigated.³¹¹ The FCPA prompted companies to install an internal system of controls for bribery and corruption.³¹² In the 1990s, the evolution continued with the Federal Sentencing Guidelines for corporations.³¹³ They allowed some degree of amnesty for companies implementing compliance programs.³¹⁴

In drafting the 1996 *Caremark* decision, the late Chancellor William Allen understood that the context in which companies were operating

³⁰⁹ *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125, 130 (Del. 1963) (“[A]bsent cause for suspicion there is no duty upon the directors to install and operate a corporate system of espionage to ferret out wrongdoing which they have no reason to suspect exists.”); see Arthur W. Hahn & Carol B. Manzoni, *The Monitoring Committee and Outside Directors’ Evolving Duty of Care*, 9 LOY. U. CHI. L.J. 587, 589 (1978) (discussing the holding of *Graham* and stating that “[d]irectors were said to have no obligation to establish a system of corporate espionage”).

³¹⁰ Foreign Corrupt Practices Act (FCPA) of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.); see Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 930 (2012) (“The FCPA was a pioneering statute and the first law in the world governing domestic business conduct with foreign government officials in foreign market.”); Rebecca Koch, Note, *The Foreign Corrupt Practices Act: It’s Time to Cut Back the Grease and Add Some Guidance*, 28 B.C. INT’L & COMPAR. L. REV. 379, 379 (2005) (“Congress enacted the Foreign Corrupt Practices Act (FCPA) in an unprecedented attempt to combat the epidemic of illicit payments by U.S. businesses and individuals to foreign government officials.”).

³¹¹ See Koehler, *supra* note 311, at 932–33 (describing how investigation of financial records for various corporations uncovered significant bribes being paid to foreign officials).

³¹² See *Foreign Corrupt Practices Act (FCPA)*, U.S. SEC (Sept. 13, 2023), <https://www.sec.gov/enforcement/foreign-corrupt-practices-act> [<https://perma.cc/M9NW-73LF>] (“The FCPA also requires issuers to maintain accurate books and records and to have a system of internal controls sufficient to, among other things, provide reasonable assurances that transactions are executed and assets are accessed and accounted for in accordance with management’s authorization.”).

³¹³ U.S. SENT’G COMM’N, THE ORGANIZATIONAL SENTENCING GUIDELINES: THIRTY YEARS OF INNOVATION AND INFLUENCE 7–8 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220829_Organizational-Guidelines.pdf [<https://perma.cc/8AVG-AFHX>]; U.S. SENT’G GUIDELINES MANUAL ch. 8 (U.S. SENT’G COMM’N 2024) (“The two factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility.”).

³¹⁴ See *id.*

had changed considerably since the *Graham* decision. He was also aware of criticisms from legal commentators, such as William Cary.³¹⁵ To fully embrace *Graham* would be to ignore the contemporary business environment, legal landscape, and the expectations the law places upon companies. Although one of the most difficult legal theories upon which plaintiffs can prevail, *Caremark* can indirectly make companies susceptible to lawsuits for legal violations. Specifically, liability under the *Caremark* standard attaches in two situations: (1) an utter failure to implement a system of controls and (2) a conscious disregard for known red flags.³¹⁶

Although the *Caremark* standard of oversight has been a fixture of Delaware corporate law for over a quarter century, recent decisions, such as *Marchand v. Barnhill*,³¹⁷ *In re Boeing*,³¹⁸ and *In re McDonald's*,³¹⁹ have generated concerns regarding its extension to risk management, ESG, and sustainability. Critics express concern that violations of expanded ESG-related disclosure and other regulations may indirectly make them vulnerable to shareholder class action and derivative suits or, more generally, that failure to oversee risks in the ESG context will heighten company exposures.³²⁰

Despite these concerns, Delaware courts are likely to take a measured approach,³²¹ particularly “[i]n the absence of firmer legal and regulatory requirements and uniform standards” regarding ESG.³²² For Delaware courts, “centering legal liability on aspirational standards of political risk or ESG oversight seems risky in itself because companies’ responses may be scattered and inconsistent.”³²³ This could “place corporate managers under considerable pressure and, in some cases, make them potentially liable for best practices or aspirational social norms.”³²⁴

³¹⁵ See William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 702 (1974); see also Hamermesh, *supra* note 289, at 411.

³¹⁶ *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996); see also Stone *ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 371–73 (Del. 2006).

³¹⁷ 212 A.3d 805 (Del. 2019) (en banc).

³¹⁸ No. 2019-0907, 2021 WL 4059934 (Del. Ch. Sept. 7, 2021).

³¹⁹ 291 A.3d 652 (Del. Ch. 2023).

³²⁰ Rubinfeld & Barr, *supra* note 220.

³²¹ See, e.g., *Marchand*, 212 A.3d at 824; see also E. Norman Veasey & Randy J. Holland, *Caremark at the Quarter-Century Watershed: Modern-Day Compliance Realities Frame Corporate Directors’ Duty of Good Faith Oversight, Providing New Dynamics for Respecting Chancellor Allen’s 1996 Caremark Landmark*, 76 BUS. LAW. 1 (2021).

³²² Simmons, *supra* note 47, at 757.

³²³ *Id.*

³²⁴ *Id.*

3. Independent Director Protection of Public Investors

Hallmarks of Delaware law have been its neutrality and attempts to balance the interests of directors and shareholders. However, new amendments to the DGCL, in the wake of the *Moelis* decision, threaten this historic balance.³²⁵ They permit secret company agreements with large powerful shareholders, which disadvantages minority public investors in favor of large shareholders. This was not an isolated incident. Following this episode, financially powerful litigants and potential litigants, through intermediaries, took a bolder step and lobbied the Delaware General Assembly to change the law pertaining to controlling shareholders, which would significantly limit the liability exposure of controlling shareholders.³²⁶ These seemingly hasty attempts to alter the law, outside of the normal process will constrain independent directors' ability to protect all investors, yet independent directors are a linchpin of effective contemporary governance.³²⁷

4. Judicial Independence and Legitimacy

Elon Musk's tweets voicing disagreement with judicial decisions to hundreds of millions of social media followers may seem innocuous and, for some, humorous.³²⁸ Yet they can have the potential to inspire third-party harassment, verbal and potentially physical, against the judiciary. Disagreement and critique of judicial decisions are acceptable and encouraged. Personal attacks and cyberbullying are not. Using financial power and other mechanisms to influence, harass, and intimidate judicial officers are not. The harassment of judges by litigants is a troublesome trend. Delaware judges have been subjected to harassment in recent years at the hands of disappointed litigants.³²⁹ Most litigants, despite losing in court, respect the institutional legitimacy of courts, acquiescing to

³²⁵ See discussion *supra* Section VI.A.2.b.

³²⁶ Jef Feeley & Jennifer Kay, *Musk's War on Delaware Spurs Bill to Hang on to Businesses*, BLOOMBERG (Feb. 19, 2025, 4:33 PM), <https://www.bloomberg.com/news/articles/2025-02-19/musk-s-war-on-delaware-spurs-state-bill-to-hang-on-to-businesses>; Indap, *supra* note 292; Indap, *supra* note 291; Lora Kolodny, *After Elon Musk's Delaware Exit, State Lawmakers Weigh Bill to Overhaul Corporate Law*, CNBC (Mar. 15, 2025, 8:00 AM), <https://www.cnbc.com/2025/03/15/after-elon-musk-delaware-exit-state-weighs-overhaul-of-corporate-law.html> [<https://perma.cc/GQS3-MEDM>].

³²⁷ See sources cited *supra* note 326.

³²⁸ See, e.g., Musk, X (Jan. 30, 2024, 5:14 PM), *supra* note 282; Musk, X (Feb. 12, 2024, 12:48 PM), *supra* note 282.

³²⁹ Friedlander, *supra* note 281.

decisions.³³⁰ Judicial decisions are not above critique, but when these critiques constitute harassment, they can lead to harmful and even tragic outcomes. Chief Justice John Roberts of the U.S. Supreme Court recently warned against attacks on the judiciary, including those “fall[ing] short of violence, including disappointed litigants urging people on the internet to contact a judge, others releasing judges’ personal information and activist groups posting the locations of judges for the purpose of protests.”³³¹ He noted this rising dangers facing judicial officers and “lament[ed] the killings of state judges and family members of federal judges in recent decades.”³³² Short of harassment, there is also the threat of judicial circumvention. Certainly, legislatures have the prerogative to make law. However, legislatures can fall prey to lobbying by the financially powerful.³³³ Irrespective of the normative impact on the law, the legitimacy of the lawmaking process is undermined. What may be favorable to a particular client or group with a financial interest may not be generalizable. What works for financially influential clients may not inspire confidence in systems.

Despite high-profile decisions and controversial amendments, Delaware’s corporate courts still maintain a relatively high level of institutional legitimacy among corporate managers, legal advisors, and investors. For now, Delaware remains a favored venue for dispute settlement, and its brand remains intact.

CONCLUSION

Political entrepreneurs with anti-ESG backlash agendas present unique corporate governance challenges.³³⁴ Their aims are reversionary. They pursue extraordinary goals and tactics to disrupt and even dismantle institutional structures, norms, and established processes. They successfully amplify their grievances into mainstream public discourse, riding the wave of culture wars. They are at odds with

³³⁰ See sources cited *supra* note 326.

³³¹ Justin Jouvenal, *Chief Justice Roberts Warns of Threats to Judges in Year-End Report*, WASH. POST (Dec. 31, 2024), <https://www.washingtonpost.com/politics/2024/12/31/supreme-court-report-year-end-john-roberts> [https://perma.cc/US65-A9JB].

³³² *Id.*

³³³ Kolodny, *supra* note 326; Feeley & Kay, *supra* note 326; Alan Jagolinzer, Stephan Lewandowsky & Sander van der Linden, *The False Crisis Pushing Delaware to Surrender Shareholder Rights*, PROMARKET (Mar. 7, 2025), <https://www.promarket.org/2025/03/07/the-false-crisis-pushing-delaware-to-surrender-shareholder-rights> [https://perma.cc/Q5Y4-Q9WN].

³³⁴ Alice Ross, *Can Sustainable Investing Survive Trump 2.0*, FIN. TIMES (Jan. 17, 2025), <https://www.ft.com/content/14ee5968-79de-42bf-80a4-811531e80de7> [https://perma.cc/LTW6-6QFJ].

prevailing corporate law and governance principles. Most importantly, they threaten to undermine and weaken the prevailing U.S. corporate governance regime.

The analysis of the intersection of political entrepreneurship and backlash sets in motion a new direction in corporate governance scholarship. Rather than protracted arguments regarding shareholder primacy versus stakeholderism, scholars should consider the directionality of corporate governance debates—expansion versus containment, reversion versus progression, and stasis versus evolution. The analysis of contemporary anti-ESG backlash illuminates this evolutionary and directional dimension of corporate governance debates hidden in plain sight.³³⁵ The corporate evolution theory captures the directionality of corporate governance and law. It maintains that expectations for corporate managers, particularly directors and officers, will evolve incrementally in response to changes in the business environment. It provides a useful lens to understand the trajectory of modern corporate governance. This trajectory is not a straight line, as reversionary anti-ESG backlash dynamics reveal, but trends forward and evolves.

³³⁵ See Veasey, *supra* note 234, at 169.