THE FIGHT FOR LEGITIMACY IN CORPORATE GOVERNANCE

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Corporate managers are increasingly cast in an unexpected role: social reformer. Investors, employees, and other stakeholders are calling on companies to "take a stand" on controversial social issues and managers are struggling to respond. Retreating into the neutrality of profit maximization to try to avoid the fray are no longer viable options. But while corporate initiatives are garnering enthusiasm from some, they are sparking a wave of recriminations from others. Progressives accuse companies of "greenwashing" and not going far enough; conservatives warn that a "woke" and unelected elite is imposing its unpopular values on the public. Ultimately, both critics on the left and right are asking whether managers should be making such important social decisions.

This phenomenon, we argue in this Article, amounts to a legitimacy challenge against managerial authority, arise once the far-reaching societal implications of corporate choices are laid bare to stakeholders. But corporate law's fiduciary duty doctrine has largely focused on weeding out managers' self-serving behavior, which neither provides helpful guidance to managers as social leaders, nor does much to gain stakeholders' trust. Thankfully, other institutions have developed mechanisms to improve the legitimacy of their decisions on controversial social issues – administrative agencies. For decades, administrative law has honed a sophisticated toolkit of mechanisms for boosting the legitimacy of agency decisions. We reveal heretofore unnoticed parallels between administrative law and corporate governance to show how corporate leaders can adjust these administrative tools to improve their legitimacy with stakeholders.

We identify corporate governance equivalents to well-known legitimating devices employed by administrative agencies and explore how they can produce similar legitimating effects for managers. In doing so, we also examine legitimacy challenges on the ground by providing real world illustrations of our argument. We show that in responding to climate change, #MeToo, and Black Lives Matter, many corporations gained better acceptance from stakeholders when they implemented these tools to establish their legitimacy. But when companies strayed too far from the legitimacy toolkit, they often experienced backlash from stakeholder groups, including investors and employees.

Our argument has a clear normative payoff. The legitimacy-enhancing tools we identify should become standard corporate governance practice during managerial decision-making on business issues with far-reaching social implications. Systematically embracing our proposed tools will improve relations with stakeholders, reduce the likelihood of costly legitimacy challenges, and improve firm value in a manner appealing to proponents of both stakeholderism and shareholder primacy.

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I. INTRODUCTION

Corporations have become our era's unexpected social reformers. From climate change[1] and workplace gender equality[2] to embracing Black Lives Matter[3] and fighting for voting rights,[4] corporations have launched a myriad of initiatives to promote key social goals.[5] But instead of receiving acclaim for their social reform zeal, corporate managers are facing mounting waves of criticism across the ideological spectrum.[6] Progressives denounce corporate initiatives as mere facades aimed to deflect from the lack of desired progress, illustrated by their familiar "greenwashing" critique of corporate actions on climate change.[7] Regulators, like the SEC, concerned with the skyrocketing flow of funds into vehicles purportedly investing in socially responsible companies, have proposed stricter disclosure standards to constrain managers keen on overpromising to stakeholders.[8] Meanwhile, conservatives bemoan companies' newfound enthusiasm for social causes as out-of-bounds for profit-making entities and castigate managers as mouthpieces of "woke" elites who are imposing their values on an unwilling public.[9] Republican policymakers are retaliating against corporate choices they see as an attack to their values.[10] Just

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[1] *See* WORLD WILDLIFE FUND (WWF), POWER FORWARD 4.0, A PROGRESS REPORT OF THE FORTUNE 500'S TRANSITION TO A NET-ZERO ECONOMY, (Jun. 2021).

[2] *See* Jean Sahadi*, For the First Time, There's a Woman on Every S&P 500 Board. But They're Still in the Minority*, CNN (Dec. 17, 2020), https://www.cnn.com/2020/12/16/success/women-sp-500-board-directors/index.html.

[3] *See* Levi Sumagaysay, *Companies Declared "Black Lives Matter" Last Year, and Now They're Being Asked to Prove It*, MARKETWATCH (Mar. 5, 2021), https://www.marketwatch.com/story/companies-declared-black-lives-matter-last-year-and-now-theyre-being-asked-to-prove-it-11614972986

[4] *See* David Gelles and Andrew Ross Sorkin, *Hundreds of Companies Unite to Oppose Voting Limits, but Others Abstain*, N.Y. TIMES (Apr. 14, 2021), https://www.nytimes.com/2021/04/14/business/ceos-corporate-america-voting-rights.html

[5] *See infra* Part III.

[6] *See* Gerald F. Seib, *How Corporate America Became a Political Orphan*, WALL ST. J. (July 23, 2021), https://www.wsj.com/articles/how-corporate-america-became-a-political-orphan-11627052148; Adam Serwer, *Don't Buy the Conservative Rebellion Against Corporations*, THE ATLANTIC (Apr. 6, 2021), https://www.theatlantic.com/ideas/archive/2021/04/dont-buy-conservative-rebellion-against-corporations/618519/

[7] *See* Robinson Meyer, *Climate Advocates Are Gambling With Fate*, THE ATLANTIC (Dec. 1, 2021), https://www.theatlantic.com/science/archive/2021/12/2-uneasy-alliances-are-remaking-climate-policy/620871/; *see also infra* Section II.C.1.

[8] U.S. Securities and Exchange Commission, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors (March 21, 2022), https://www.sec.gov/news/press-release/2022-46. *See also* Amanda M. Rose, *A Response to Calls for SEC-Mandated ESG Disclosure*, 98 WASH. U. L. REV. 1821, 1828 (2021).

[9] *See infra* Section II.C.2.

[10] *See, e.g.*, Anthony Izaguirre, *Florida Legislature Votes to strip Disney of self-government after opposition to 'Don't Say Gay' Bill*, PBS NEWSHOUR (April 21, 2022), https://www.pbs.org/newshour/economy/florida-legislature-votes-to-strip-disney-of-self-government (quoting Florida Governor Ron DeSantis stating, "Disney and other woke corporations won't get away with peddling their unchecked pressure campaigns any longer"); Andrew Ross Sorkin, et al. *Targeting 'Woke Capital*,' N.Y. TIMES (July 29, 2022),

as companies are increasingly faced with social issues, critics from the left and the right alike are wondering whether corporate managers should wield such wide-ranging authority over them.

At this perilous crossroads, this Article argues, corporate law should look beyond the conventional fiduciary duty analysis to identify ways in which managerial decision-making can gain broader acceptance by corporate stakeholders. These fights over managerial choices and society conform with what public law theorists readily recognize as legitimacy challenges.[11] Administrative law in particular has honed a toolbox of institutional design and policy mechanisms to bolster the legitimacy of agency decision-making by offering substantive and procedural justifications for agency authority over controversial social issues.[12] Analogous tools, we argue, can also help corporate managers get better guidance during their decision-making, boost the legitimacy of their choices, and gain wider acceptance with their stakeholders. In fact, we identify some corporations that have voluntarily adopted some of these governance tools to achieve similar legitimating effects during periods of social upheaval. Thus, we urge corporate governance scholars and practitioners to embrace similar legitimacy-enhancing measures.

Conventional corporate law approaches managerial decisions through the lens of fiduciary duty doctrine in a principal-agent setting, which helps illuminate agents' self-serving or shirking behavior. Faced with calls to consider the impact of corporate choices on stakeholders,[13] corporate law scholars are wary that an expansive new social mandate will provide managers with grounds for further abuses and conflicts of interest.[14] From a fiduciary duty perspective, as long as a managerial choice does not violate any laws and falls within the broad confines of the business judgment rule,[15] it represents a legally justified exercise of managerial discretion.

But merely providing the legal justification for a managerial decision does little to quell the criticisms from stakeholders currently facing managers: inadequate credentials and lack of competence on social issues, doubts about

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https://www.nytimes.com/2022/07/29/business/dealbook/west-virginia-wall-street-woke-capital-desantis.html.

[11] *See infra* Section III.A.

[12] *Id.*

[13] *See generally* Business Roundtable, *Business Roundtable Redefines the Purpose of the Corporation to Promote 'An Economy That Serves All Americans*," (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans; ALEX EDMANS, GROW THE PIE: CREATING PROFIT FOR INVESTORS AND VALUE FOR SOCIETY (2020); REBECCA HENDERSON, REIMAGINING CAPITALISM IN A WORLD OF FIRE (2020); COLIN MAYER, PROSPERITY (2018).

[14] *See* Lucian A. Bebchuk & Roberto Tallarita, *Will Corporations Deliver Value to All Stakeholders?*, 75 VAND. L. REV. 1, 4-5 (*Forthcoming*, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3899421; Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 768 (2015).

[15] *See* Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2566 (2021).

their representativeness and accountability, and fears about their elitist biases and ideological motivations. Rather, these public grievances are targeting managers as social leaders who hold massive power over our society, a role that current corporate governance is struggling to accommodate. The purpose of this Article is to chart a path forward for corporate law that will appeal to managers and stakeholders alike.

We liken attacks against socially impactful management decisions to doubts that have perpetually surrounded administrative policymaking since the emergence of the modern administrative state: lack of democratic authorization, concerns about an overpowerful rule-setter, unease at the delegation of important policy choices to unaccountable and unrepresentative officials, and opaqueness of decision-making processes.[16] To contend with these fears, public law does not stop at legal justifications for the exercise of an agency's authority, but has developed a sophisticated toolkit of legitimacy-enhancing mechanisms to also emphasize the social and moral criteria for legitimacy.[17] From a sociological standpoint, a decision is legitimate when it is accepted and respected by key stakeholders and the wider public, regardless of its legality.[18] Moral legitimacy arises from the substantive justifications and processes used to reach the decision, which is seen as "the right thing to do" even in the face of objections by societal forces or limitations in legal authority.[19] If corporate law seeks to help managerial choices regain social endorsement and moral affirmation, it must reorient its governance tools toward improving the sociological and moral legitimacy of managerial decision-making.

This is the main theoretical project of this Article. We begin with widely used legitimacy-enhancing devices used by administrative agencies, such as notice-and-comment, disclosure and transparency, independent monitoring mechanisms, scientific and technocratic expertise, standardizing policymaking, and securing enforcement.[20] We then identify the equivalent of these tools in corporate law and explore how they can produce similar legitimating effects.[21] For example, the notice-and-comment process during agency informal rulemaking shares many features with companies' stakeholder outreach efforts that seek input from potentially affected parties. Just like notice and comment, stakeholder participation fosters deliberation to help inform decisionmakers' perspectives and formulate solutions better suited to realities on the ground,

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[16] *See infra* Section III.A.

[17] *See infra* Part III. *See also e.g.*, Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794-1801 (2005); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 527 (2003)(discussing how agencies' choice of procedures address the lack of majoritarian legitimacy).

[18] *See infra* Section II.A.

[19] Id.

[20] *See infra* Section III.A

[21] *See infra* Part III.

thus boosting moral legitimacy.[22] Moreover, through the resulting dialogue and reasoned exchange of views, both notice and comment and stakeholder participation help encourage affected parties to embrace the final rule, thus improving sociological legitimacy. We draw similar comparisons between other administrative procedures and corporate governance, such as transparency and sustainability disclosure, agency expertise and corporate reliance on professionals, and the choice between adjudication and rulemaking for agencies compared to standardization for private companies.

Throughout this Article, we apply our legitimacy-based theoretical framework to analyze the responses that firms adopted in response to challenges from stakeholders.[23] Drawing examples from climate change,[24] #MeToo,[25] Black Lives Matter,[26] and other instances, we show how some managers have imperiled their position by neglecting the legitimacy of their decision-making. On the other hand, other companies responded to heated social challenges by reforming internal governance through institutional mechanisms that can be better understood through a legitimacy framework rather than a fiduciary duty lens. We find that when companies use these legitimating devices, such as stakeholder participation, expert consultation, and increased transparency, they are more likely to gain broad acceptance from stakeholders. Particularly when companies' past actions become the target of intense turmoil among stakeholders, managers are more likely to embrace measures inspired by the legitimacy values in our proposed toolkit.[27]

Our analysis brings valuable normative implications for managers, investors, and other stakeholders alike.[28] As the social impacts of corporate choices becomes increasingly exposed, managers are better off by turning to our proposed toolkit to improve their decision-making process and bolster their legitimacy. We argue that, to help companies run better, managers should proactively adopt our proposed legitimacy-enhancing framework in a systematic manner by incorporating these tools into corporate governance.[29] A systematic consideration of stakeholder viewpoints will help managers grasp emerging concerns in a broader set of issues and help them gather intelligence on the ground. By informing themselves about upcoming issues, companies can put in motion the effort to address them early and convincingly, offer solutions where possible, and negotiate compromises. Administrative law teaches us that our proposed legitimacy-enhancing tools work better systematically

[22] *See* Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1720 (2007)(discussing the goal of notice-and-comment as ensuring that agencies face public input before producing important policies).
[23] *See infra* Part III.
[24] *See infra* Sections III.C & III.D.
[25] *See infra* Sections III.B & III.G.
[26] *See infra* Sections III.B & III.E.
[27] *See, e.g.*, James D. Cox &Randall S. Thomas, *A Revised Monitoring Model Confronts Today's Movement Toward Managerialism*, 99 TEX. L. REV. 1275, 1303-4 (2021).
[28] *See infra* Part IV.
[29] *See infra* Section IV.C.

because they are mutually reinforcing and complementary.[30] For example, improved disclosures without the opportunity for feedback and consultation often do not provide the desired disciplining effect of managers.

We recognize that instituting the governance mechanisms we propose will require significant commitment of resources and effort for companies. But far from an outlandish suggestion unrelated to corporate practice, our proposal relies on solutions that some companies are already putting in place, indicating that managers are already gauging that the costs outweigh the benefits. In the alternative, if managers fail to adopt such measures in time, then there is an increased possibility that disgruntled stakeholders may mobilize legitimacy challenges that can severely hurt the firm's value and managers' standing as social leaders. In these situations, it is clear from the examples we discuss below that regaining lost stakeholder trust is an uphill battle for managers, often requiring costlier and more extensive interventions into corporate governance than the reforms that we propose.[31]

While we stress that addressing core social challenges is hard to imagine without specific measures within each company, this Article does not make the case for generally reorienting corporate law toward a more socially responsible capitalism. Rather, our normative mission is more measured. We argue that when corporate leaders make business choices on issues with broad social implications, they should borrow legitimacy-enhancing mechanisms established in administrative law. Adopting such mechanisms will improve the quality and responsiveness of their decisions to stakeholder considerations, boost the legitimacy of their decisions, and minimize the potential for backlash by stakeholder groups.[32] Thus, our argument speaks both to proponents of stakeholderism, to whom it offers a blueprint for intervening into corporate decision-making, and to shareholder primacy loyalists, who see social upheaval as threatening companies' value.

Our argument for increasing the legitimacy of corporate managerial decision-making proceeds in the following steps. Part II lays out the framework built by public law and political theory for understanding the legitimacy of political institutions. We explore the distinction between legal, sociological, and moral criteria for legitimacy. We show how corporate law's current legitimating framework focuses on legal justifications but falls short on sociological and moral grounds. Part III illustrates our argument for adjusting administrative law tools designed to enhance moral and sociological legitimacy to corporate governance. Throughout this Part, we offer concrete illustrations of legitimacy challenges on the ground by stakeholders and assess managerial responses against the outlined template of legitimacy-enhancing tools. Part IV examines our main descriptive takeaways from these case studies of stakeholder-driven legitimacy challenges and makes the normative case for corporate managers to ex ante adopt legitimacy-enhancing tools in a systematic manner. We argue doing so is likely to improve long-term firm value in a

[30] *See infra* Section IV.C.2.
[31] *See infra* Part III.
[32] *Id*.

manner that is appealing to both shareholder primacy and stakeholderism advocates. Part V offers our concluding thoughts.

II. POLITICAL AND CORPORATE LEGITIMACY

The justification of why institutions should wield power over citizens is a perennial concern in public law and political theory.[33] Through the concept of legitimacy, scholars in these fields have developed an analytical framework for understanding and categorizing justifications for the exercise of power by political actors over citizens. This Part begins by outlining the public law approach to legitimacy. We then discuss why legitimacy concerns apply to corporate law and how corporate governance is a battleground for contrasting views of legitimacy. Today, as corporations are pushed to take a stand on a variety of social issues, the real extent of managerial power is laid bare for all stakeholders. This has resulted in the fight for legitimacy in corporate law beginning anew.

A. Legitimacy in the Political Context

Polarization – in political, religious, or moral beliefs – has come to define our moment in time. However, all democratic societies must grapple with differences of opinion among the various groups they bring together, with their mismatched ideological commitments, material needs, societal backgrounds, and cultural origins. What reasons, then, do citizens have to abide by decisions of their government, particularly if some citizens disagree with these decisions because they violate their deeply held convictions? This puzzle, known to political theorists as moral pluralism,[34] makes reaching consensus on most policy outcomes difficult, if not impossible.[35]

Moral pluralism creates two challenges for any political institution that holds power over citizens. Ex ante, there will be conflicts between opposing groups during decision-making, both about the inputs relevant to the decision

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[33] *See generally, e.g.*, JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT (1978); Allen Buchanan, *Political Legitimacy and Democracy*, 112 Ethics 689 (2002); Fallon, *supra* note 17; Michel Rosenfeld, The *Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307 (2000). *See also infra* note 111.

[34] For discussions of moral pluralism, which is also called ethical pluralism, *see generally* JACK KNIGHT AND JAMES JOHNSON, THE PRIORITY OF DEMOCRACY: POLITICAL CONSEQUENCES OF PRAGMATISM (2011); JEREMY WALDRON, LAW AND DISAGREEMENT (1999); JOSHUA COHEN, MORAL PLURALISM AND POLITICAL CONSENSUS, IN PHILOSOPHY, POLITICS, AND DEMOCRACY (1993).

[35] *See generally* John A. Dryzek & Simon Niemeyer, *Reconciling Pluralism and Consensus as Political Ideals*, 50 AM. J. POLI. SCI. 624 (2006)(discussing the importance of consensus and why it is difficult to achieve given moral pluralism). The difficulty of reaching consensus in actual democratic politics given moral pluralism often grounds why deliberative democrats access the necessity of using majority rule as a decision-making procedure. *See e.g.*, JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 174 (1996); William A. Galston, *Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory*, 40 WM. & MARY L. REV. 869 (1999).

and about the process used to reach the decision. These conflicts impede the exercise of governance and can paralyze decision-making. Ex post, moral pluralism creates the possibility that those who lost out in the decision-making process will refuse to follow the chosen course of action.

One possible response is coercion.[36] But coercive enforcement, through sanctions, lawsuits, or other mechanisms, saps state resources,[37] diverts policymakers' attention, and is likely to cause anger, frustration, or even resistance among those who disagree with the government.[38] Rather than depleting their coffers and inciting hostility, decisionmakers are better off justifying their decisions to citizens.[39] The hope is that these justifications may help, if not sway opposing groups to their position, at least satisfy these groups into going along with the chosen decision.[40] The value of legitimacy, then, lies in helping divergent societal forces coalesce under a single goal set by an institution that is justified in holding power over them.

These justifications come in three distinct types. Legal legitimacy, as we will use the term, determines whether a decision satisfies the proper procedural and substantive requirements established by the legal system.[41] This form of legitimacy puts the law at the heart of the inquiry, examining whether the chosen outcome is within the procedural and substantive boundaries set by law.

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[36] This is the classic answer provided by Hobbes and has been revived in its contemporary form by Jean Hampton, whereby legitimacy is generated by the sovereign's ability to effectively enforce the social contract. JEAN HAMPTON, POLITICAL PHILOSOPHY (1998); THOMAS HOBBES, LEVIATHAN ([1651] 1996).

[37] United States city and county governments spent on 15% and 19% of their budgets on police, corrections, and courts in 2018, respectively. Urban Institute, *Criminal Justice Expenditures: Police, Corrections, and Courts*, https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/criminal-justice-police-corrections-courts-expenditures.

[38] For discussion on the connection between legitimacy, coercion, and civil disobedience, *see* BRUCE GILLEY, THE RIGHT TO RULE: HOW STATES WIN AND LOSE LEGITIMACY (2009)("Vast military and material reserves cannot counter the power of a citizen's belief, and the more widespread the crisis of a state's legitimacy, the greater the threat to its stability."); Margaret Levi & Audrey Sacks, *Legitimating Beliefs: Sources and Indicators* 3 REG. & GOV. 311, 311 (2009)("The more a government is effective and reliable, the more legitimacy that government is likely to attain and, the more it will possess the potential to elicit compliance without excessive monitoring or punitive action.").

[39] For positive theoretical and quantitative discussion on the stability created by institutions acquiring legitimacy, *see generally, e.g.*, Alex Bitekine & Patrick Haack, *The "Macro" and the "Micro" of Legitimacy: Towards A Multi-Level Theory of the Legitimacy Process*, 40 ACAD. MGMT. REV. 49 (2015); Bruce Gilley, *The Meaning and Measure of State Legitimacy: Results from 72 Countries*, 45 EUR. J. POL. RES. 499 (2005); Maykel Verkuyten & Arjan Reijerse, *Intergroup Structure and Identity Management Among Ethnic Minority and Majority Groups: The Interactive Effects of Perceived Stability, Legitimacy, and Permeability*, 38 EUR. J. SOC. PSYCH. 106 (2008).

[40] For discussion of how legitimacy mitigates the problem of moral pluralism, *see generally* note 34; Simon Caney, *Liberal Legitimacy, Reasonable Disagreement and Justice*, 1 CRIT. REV. INT'L SOC. & POL. PHIL. 3 (1998); Jonathan Quong, *Disagreement, Asymmetry, and Liberal Illegitimacy*, 4 POL. PHIL. & ECON. 301 (1005).

[41] Some also speak of the authoritative legal legitimacy of decisions, which denotes whether a decision in question is legally binding in character. Fallon, *supra* note 17, at 1795-96.

Not all legal errors raise a question of illegitimacy; rather, such claim denotes a strong, persistent, or systematic deviation from established practice.

Sociological legitimacy focuses on the citizens' perceptions regarding an institution or its decisions.[42] If the public regards the institution or decision as justified or appropriate under their own belief systems and opinions, they are likely to follow it for some reason beyond the mere threat of sanction. As Max Weber articulated, "[T]he basis of every system of authority, and correspondingly of every kind of willingness to obey, is a belief, a belief by virtue of which persons exercising authority are lent prestige."[43] Because sociological legitimacy is a subjective concept, expressed according to the individual beliefs of citizens, it can change over time as the public transfers its loyalties elsewhere.[44]

Finally, moral legitimacy asks whether an institution or decision is normatively acceptable or justifiable to citizens in society. From a substantive standpoint, the institution or decision may fall in line with some standard of moral evaluation or a set of beliefs, say utilitarianism or a conception of justice.[45] Alternatively, some theorists argue that an institution or decision can build moral legitimacy by following a normatively acceptable procedure, such as through a process of deliberating with constituents, even when that procedure is not mandated by law.[46] Other theorists combine the substantive and procedural perspectives, advocating for procedural moral legitimacy within a bound of reasonable outcomes.[47] In our analysis below, we employ both procedural and substantive criteria for moral legitimacy.[48]

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[42] For discussions of sociological legitimacy, which is also called descriptive legitimacy, *see id.* at 1795-96; Gillian E. Metzger, *Considering Legitimacy*, 18 GEO. J. LAW & PUB. POL'Y 353, 357-59 (2020); James Weinstein, *Hate Speech Bans, Democracy, and Political Legitimacy*, 32 CONST. COMMENT. 527, 534 (2017).

[43] MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 364 (Talcott Parsons, ed. 1964).

[44] Some consider effective, or *de facto*, political authority as similar to sociological legitimacy. *See generally, e.g.*, JOSEPH RAZ, THE MORALITY OF FREEDOM (1986). We need not get into the theoretical debate concerning the relationship between authority and legitimacy for our purposes in this article.

[45] For accounts of democratic instrumentalism, whereby institutions are legitimate if they lead to better outcomes for the citizenry, *see generally* Richard Arneson, *Defending a Purely Instrumental Account of Democratic Legitimacy*, 11 J. POL. PHIL. 122 (2003); Steven Wall, *Democracy and Equality*, 57 PHIL. Q. 416 (2007).

[46] For accounts of pure proceduralism, *see generally* JAMES BOHMAN, PUBLIC DELIBERATION (1996); Bernard Manin, *On Legitimacy and Political Deliberation*, 15 *POL. THEORY* 338 (1987).

[47] For accounts of rational proceduralism, *see generally* AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996); Habermas, *supra* note 35; JOHN RAWLS, POLITICAL LIBERALISM (1993).

[48] For the purposes of this article, we remain agnostic regarding whether some form of moral legitimacy is the "correct" form in the political or corporate setting, as we recognize many will view substantive and/or procedural legitimacy is important to analyzing managerial decision-making. In other writing, one author has adopted rational proceduralism in the political context. Christopher S. Havasy, *Relational Fairness in the Administrative State*, 109 VA. L. REV (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4164125.

At this point, one might wonder why three different sources of legitimacy are analytically necessary. But consider the implications when a decision holds one type of legitimacy without necessary succeeding in establishing the other two. For example, a law can be validly generated through the legislative process, but it may face widespread opposition and backlash by the public.[49] Alternatively, this law might enjoy the support of a large percentage of the public, but disproportionately harm the rights of a protected minority group, which might render it morally illegitimate.[50] While distinct, legal, sociological, and moral legitimacy also have the potential to be mutually reinforcing concepts. For example, a decision validly taken in accordance with the law might satisfy procedural criteria that enhance its appeal to constituents and comport with core substantive values, ultimately convincing the public more handily that it is worthy of respect.

B. Legitimacy in Corporate Law

Legitimacy discussions have primarily focused on public institutions, whose sweeping authority to alter the rights and obligations of ordinary citizens demands appropriate justification. More recently, theorists have utilized the legitimacy framework to analyze the power and authority of certain private organizations in contexts such as public-private partnerships, private standard-setting, and government subcontracting.[51] But corporations, these creatures of the marketplace that nurture private initiative, seem at first glance far removed from the exercise of power typically seeking justification in legitimacy.

In fact, the agglomeration of resources in large public companies, their influence on social and political decision-making, and the agenda of those running them has long worried academics, policymakers, and the public, who saw this managerial power as demanding justification.[52] We first narrow our focus to define which types of corporate decisions invoke the type of legitimacy claims we are concerned with in this article. We then argue that, by

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[49] Constitutional law scholars and lawyers have long debated the sociological legitimacy of Supreme Court decisions by determining whether the decision was accepted by the citizenry or provoked a backlash among segments of the populace. *See generally, e.g.*, Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185 (1992)(arguing that the Supreme Court intervening too early the abortion debate by deciding Roe v. Wade provoked a backlash among the populace); Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994)(arguing that Supreme Court involvement in race relations by deciding Brown v. Board provoked a backlash among the populace).

[50] *See* ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION 1-66 (2010)(discussing the moral and democratic harms of segregation).

[51] *See generally, e.g.*, CHIARA CORDELLI, THE PRIVATIZED STATE (2021); Kenneth A. Bamberger, *Regulation As Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377 (2006); Benjamin Cashore, *Legitimacy and the Privatization of Environmental Governance: How Non-State Market Driven (NSMD) Governance Systems Gain Rule-Making Authority*, 15 GOVERNANCE 503 (2002). *See also* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 549–56 (2000); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369 (2003).

[52] *See infra* notes 56-58.

understanding these conversations as legitimacy claims, we can help explain the turmoil surrounding public corporations today. For decades, corporate law had emphasized legal legitimacy, which kept companies far from social controversies and focused on internal agency conflicts and governance mechanisms. However, the true power of corporate executives to affect the rights and freedoms of various stakeholders is increasingly being laid bare as the social implications of companies' choices are becoming exposed and as companies themselves are gearing up their social and environmental initiatives. As a result, we show that corporate managers ensuring their decisions only satisfy legal legitimacy are failing to adequately justify their decisions and resulting in widespread controversies.

1. Corporate Actions That Demand Legitimacy

Through corporate law, our society entrusts vast resources and power to corporate institutions tasked with organizing production in every sector of our economy, harnessing the forces of innovation, building, and running our infrastructure, and providing livelihood for millions. The choices companies make, the priorities they set, and the effort they spend in addressing these tasks has far-reaching implications for many constituents. Consumers, employees, investors, creditors, and suppliers can find their fortunes, rights, and life prospects directly shaped by corporate policies. As key economic actors, corporations impact the prosperity of the communities in which they exist, the environment in which they set up production, and the cultural space their products and activities dominate. Lawmakers and regulators often direct corporate action toward specific policy goals or establish constraints, but they typically leave a wide sphere of activity for corporate choice.

Corporate law has entrusted the power to steer corporate choice to few elite managers whose latitude, though not boundless, is still virtually "unfettered."[53] To encourage entrepreneurial initiatives, the business judgment rule allows managers to act as they see fit for the interests of the corporation and its shareholders, provided there are no conflicts of interest and they do not otherwise violate the law.[54] Corporate governance mechanisms, both internal ones such as monitoring by independent directors, and external ones, such as

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[53] John C. Coffee, Jr., *Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1643 (1999)("[D]irectors possess unfettered discretion."). *See also* Jeffrey N. Gordon, *Corporations, Markets, and Courts,* 91 COLUM. L. REV. 1931, 1963 (1991)("[Delaware] corporate law [is] generally favorable toward management prerogative..."); Lynn A. Stout, *The Problem of Corporate Purpose*, 48 ISSUES IN GOV. STUD. 1, 5 (2012)("[D]irectors of public companies enjoy virtually unfettered legal discretion to determine the corporation's goals.").

[54] The business judgement rule protects managers from liability for decisions made for "any rational business purpose." Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985). *See also* Gagliardi v. TriFoods Int'l, Inc., 683 A.2d 1049, 1051 (Del. Ch. 1996)("[I]n the absence of facts showing self-dealing or improper motive, a corporate officer or director is not legally responsible to the corporation for losses that may be suffered as a result of a decision that an officer made or that directors authorized in good faith.").

gatekeeper oversight and securities disclosure, are also oriented toward shareholders, leave alternative inputs outside the decision-making process.[55] As members of the board, managers need to gain reelection annually and so at least theoretically shareholder voting could provide a check on managerial decision-making. However, in practice, mobilizing a shareholder majority against the board is a highly costly and procedurally burdensome effort, particularly in large public companies with a dispersed shareholder base.[56] For this reason, Adolf Berle, who helped define the modern corporation, worried that managers constitute an "automatic self-perpetuating oligarchy."[57] As he provocatively put the problem, "Power without responsibility is, philosophically, a perilous matter."[58] Even though managerial discretion is subject to competitive market forces and regulatory commands, a leading corporate jurist conceded that the mere perception of such power calls for a theory to legitimate it.[59]

With broad managerial power extending over a wide variety of societal issues that can radically impact many stakeholders' prospects, controversies are bound to arise. Competing values and conflicting interest groups vie for their positions to win out during managerial decision-making, and absent a win-win solution, tradeoffs may become necessary. Harmed parties can raise substantive disagreements and procedural contestations, questioning corporations' moral commitments and refuse to go along with management directives. This constitutes a quintessential problem of moral pluralism. Given the ability of corporate managers to alter the rights and liberties of others and the diversity of ideological viewpoints among the stakeholders, corporate law has long been concerned with the legitimacy of managerial decision-making.[60] As we explain

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[55] Procedurally, Delaware courts generally allow corporations to resort to private ordering regarding how they wish to structure their internal decision-making procedures through bylaws and other mechanisms. *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 234-35 (Del. 2008). ("[I]t is well-established Delaware law that a proper function of bylaws is not to mandate how the board should decide specific substantive business decisions, but rather, to define the process and procedures by which those decisions are made.").

[56] *See* Bo Becker, Daniel Bergstresser & Guhan Subramanian, *Does Shareholder Proxy Access Improve Firm Value? Evidence from the Business Roundtable Challenge*, 56 J. LAW & ECON. 127, 131 (2013); Michael Kang, *Shareholder Voting as Veto*, 99 IND. L. REV. 1299, 1304 (2013)

[57] Adolf A. Berle, Jr., ECONOMIC POWER AND THE FREE SOCIETY 9 (1958).

[58] Adolf A. Berle, Jr., *Non- Voting Stock and "Bankers' Control,"* 39 HARV. L. REV. 673, 674 (1925-26).

[59] William T. Allen, *The Mysterious Art of Corporate Governance*, 22 CORP. BOARD 1 (Sept./Oct. 2001).

[60] *See generally* JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970 (1970). *See also* Adolf Berle, *Economic Power and the Free Society*, in THE CORPORATION TAKEOVER 98 (Andrew Hacker, ed. 1965)("[W]henever there is a question of power there is a question of legitimacy. As things stand now, these instrumentalities of tremendous power have the slenderest claim of legitimacy…..They must find some claim of legitimacy, which also means finding a field of responsibility and a field of accountability. Legitimacy, responsibility, and accountability are essential to any power system if it is to endure."); Bayless Manning, *Corporate Power and Individual Freedom: Some General Analysis and Particular Reservations*, 38 NW. L. REV. 38, 42 (1969)("Corporate Power has therefore become illegitimate power, and we must be alarmed at the threat of the corporation

below,[61] corporate law has settled on a framework that emphasized legal legitimacy, justifying managerial decisions as appropriate if allowed by lawmakers and taken in furtherance of shareholder interests. As the corporate governance machine made this viewpoint dominant, the preponderance of this framework was seldom questioned. As a result, even the language of legitimacy has gradually faded from corporate law scholarship. But the shortcomings of this framework are becoming increasingly clear, as we discuss in the next two sections.

Before this discussion, two further clarifications are necessary. First, legitimacy inquiries may involve the legitimacy of the corporation as a system for organizing resources and production in a society or overall legitimacy of a specific corporation.[62] Such inquiries are not the focus of this Article. Instead, we analyze the legitimacy of specific corporate decisions that, though taken by managers in the context of running their business, produce large-scale societal implications and exemplify the company's power over the rights and liberties of stakeholders.[63] Not all corporate decisions invite legitimacy claims. Some managerial decisions may make business sense but lack broader societal imprint, while others may involve the interests of some stakeholders without meaningfully altering their liberties. The deeper the social and moral resonance of a corporate choice, the starker will be the challenge for its legitimacy.

We choose specific managerial decisions as our level of analysis because each action may involve distinct values and justifications that can be addressed through each company's decision-making processes. Ultimately, the sum of individual corporate actions plays a role in determining the overall legitimacy of a specific firm or, more generally, the legitimacy of corporations writ large in society. But these alternative legitimacy debates would ultimately unfold through broader political and constitutional processes, into which we do not seek to intervene here.

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and the unlegitimated acts of an unpropertied management, no longer "accountable" to propertied shareholders, the owners.").

[61] *See infra* Section II.B.2.

[62] For discussions regarding the legitimacy of corporations in society, *see generally* ERIC W. ORTS, BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM (2013); William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471 (1989); Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987); Joseph L. Weiner, *The Berle-Dodd Dialogue on the Concept of the Corporation*, 64 COLUM. L. REV. 1458 (1964).

[63] By focusing on the legitimacy of corporate decisions under the current prevailing socio-legal system, this Article operates in the realm of non-ideal theorizing of a situated socio-economic institution. *See generally* Laura Valentini, *Ideal vs. Non-Ideal Theory: A Conceptual Map*, 7 PHIL. COMPASS 654 (2012)(discussing various questions regarding the ideal vs. non-ideal theory debates within political theory). Therefore, this Article will not engage in ideal theorizing of how we would design corporation governance structures. *See generally, e.g.*, ELIZABETH ANDERSON, PRIVATE GOVERNMENT (2017); ABRAHAM SINGER, THE FORM OF THE FIRM: A NORMATIVE POLITICAL THEORY OF THE CORPORATION (2018); David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 AM. POLI. SCI. REV. 139 (2013).

Second, corporations lack enforcement powers typically associated with governments such as imprisonment or monetary sanctions.[64] But even though they do not normally impose their will through brute force,[65] corporations can systematically alter the way millions of people pursue their lives and enjoy their rights. For example, by setting workplace conditions, from the use of restroom breaks to the pursuit of sexual harassment allegations, companies not only affect their employees' livelihood and personal growth, but they also set the tone for industry-wide practices.[66] Technology companies have revolutionized communication and connectivity, but for those concerned about the cost to their privacy, fully opting out of these outlets is highly impracticable and terrifyingly isolating.[67] Platforms like Uber and Airbnb are transforming the urban experience in ways affecting even those who do not use them, from displacing low-income renters to municipalities reconceptualizing their services.[68] One could add many examples to this list, but the conclusion is

[64] The philosophical literature has debated how closely firms are analogous to governments, which is called the "firm-state analog." While there is a minority view that firms and states are sufficiently disanalogous such that comparison is inapt, the majority view is that there are enough similarities that firms can be compared to states for the purposes of theorizing the legitimacy of firms. *Compare* Richard Arneson, "Democratic Rights at National and Workplace Levels," in THE IDEA OF DEMOCRACY 118-48 (David Copp, Jean Hampton, and John E. Roemer, eds. 1993)(arguing the inaptness of the firm-state analogy); Jan Narveson, *Democracy and Economic Rights*, 9 SOC. PHIL & POL'Y 29-61 (1992)(same), with Hélène Landemore and Isabelle Ferreras, *In Defense of Workplace Democracy: Towards a Justification of the Firm–State Analogy*, 44 POLITICAL THEORY 53 (2016)(arguing the aptness of the firm-state analogy). *See also* Roberto Frega, Lisa Herzog, and Christian Neuhäuser, *Workplace Democracy – The Recent Debate*, 14 PHIL. COMPASS, 1, 4-5 (2019)(listing a number of theorists who believe the state-firm analogy is appropriate).

[65] There is a long history of American corporations using force on various types of stakeholders during policy disagreements, such as anti-union violence. For discussion, *see generally* GRAHAM ADAMS, JR., AGE OF INDUSTRIAL VIOLENCE, 1910-15 (1966); William F. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1185-95 (1988).

[66] For example, Amazon has come under such widespread scrutiny regarding their regulation of warehouse worker bathroom breaks that 15 U.S. senators sent a letter to then CEO Jeff Bezos criticizing Amazon's treatment of their warehouse workers and seeking reform. Letter from United States Senator Sherrod Brown et al. to Amazon CEO Jeff Bezos, Feb. 7, 2020, available at: https://s3.documentcloud.org/documents/6772867/AmazonWorkerSafetyLetterFeb72020.pdf. For discussion regarding the longstanding criticism regarding Amazon's regulation of when their warehouse workers can use the restroom, *see* David Streitfeld, *Amazon's Clashes with Labor: Days of Conflict and Control*, N.Y. TIMES(April 5, 2021), https://www.nytimes.com/2021/04/05/technology/amazon-control-bathroom-breaks.html.

[67] *See* Woodrow Hartzog & Evan Selinger, *Quitters Never Win: The Costs of Leaving Social Media*, THE ATLANTIC (Feb. 15, 2013), https://www.theatlantic.com/technology/archive/2013/02/quitters-never-win-the-costs-of-leaving-social-media/273139/.

[68] Studies have found that increases in Airbnb listings leads to increased rental prices. Kyle Barron, Edward Kung & David Proserpio, *The Effect of Home-Sharing on Housing Prices and Rents: Evidence from Airbnb*, 40 MKTG. SCI. 23, 23 (2020). (analyzing a nation-wide dataset of Airbnb listings to find that "[a]t the median owner-occupancy rate zip code, we find that a 1% increase in Airbnb listings leads to a 0.018% increase in rents and a 0.026% increase in house prices."); Keren Horn & Mark Merante, *Is Home Sharing Driving Up Rents? Evidence from*

inescapable. To the extent that corporations must compete in labor markets, appeal to consumers, and coexist with other impacted parties, they will need to ensure that their decisions are not only economically efficient, but also justifiable to a broader set of stakeholders.

Sometimes, corporations are criticized for utilizing their power in an irresponsible, or even sinister manner, such as Facebook's mishandling of privacy data, or the fossil fuel industry's attempt to suppress climate impact information. Other times, corporations mobilize their resources to achieve positive change, either due to sheer conviction, or because they seek to appeal to a socially-conscious consumer group or workforce. In either case, corporate choices have a direct, and even lasting, effect on stakeholders' rights, liberties, and freedoms. In addition to these discrete stakeholder groups, the wider public is also becoming increasingly attuned to corporate choices, which they may view as emanating from the empowerment of a few elite managers, enthroned through the corporate hierarchy as chieftains over global resources. This growing public awareness of the many channels and spheres of corporate influence underwrites calls for legitimacy.

2. The Shortcomings of Corporate Law's Current Legitimacy Framework

For many decades, the prevailing answer for justifying corporate activity was through the norm of shareholder primacy: corporations' sole aim is to maximize wealth for their shareholders, within the confounds of the law.[69] Because managers are shareholders' agents, they can only be accountable to them (more on that below), and not to any other constituency. It was the lawmakers' job to protect societal interests through statutes and regulations. Of course, nothing prevented managers from assisting other constituents when it was also in the shareholders' interests, as the social responsibility movement declared.[70] But if one company veered too much toward costly constituent-

Airbnb in Boston, 38 J. HOUS. ECON. 14, 14 (2017)(analyzing Boston housing prices to find that "a one standard deviation increase in Airbnb listings is associated with an increase in asking rents of 0.4%."). Over the past few years, many cities have enacted legislation to separately regulate Airbnb or make them de facto illegal in the city. *See* Mihir Zaveri, *Facing Housing Crisis, Targets Owners of Illegal Airbnbs*, N. Y. TIMES (Dec. 9, 2021), https://www.nytimes.com/2021/12/09/nyregion/nyc-illegal-airbnb-regulation.html.

[69] For discussions of shareholder primacy in corporate law, *see generally, e.g.*, Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423 (1993); Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 122 MINN. L. REV. 1951 (2018). *See also* Norman Veasey, *Should Corporation Law Inform Aspirations for Good Corporate Governance Practices—or Vice Versa?*, 149 U. PA. L. REV. 2179, 2184 (2001)(discussing how Delaware law adopts shareholder primacy).

[70] The rise of constituency statutes during the 1980s and 1990s sought to give corporate managers explicit legal protection for considering the interests of stakeholders other than shareholders during managerial decision-making. *See generally* Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14 (1992); Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971 (1992); Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 N.Y.U. ANN. SURV. AM. L. 85 (1999).

friendly practices, the belief was that another competitor would jump in to undercut it, leaving managers with no other option but to recenter their efforts toward their sole principals, shareholders, and their profits.

Portraying managers as shareholders' agents, corporate legitimacy has relied on accountability through annual elections as its key justification. Delaware's most celebrated ruling on annual elections, *Blasius Indus. v. Atlas Corp.*,[71] declares the shareholder franchise as "*the ideological underpinning upon which the legitimacy of directorial power rests*."[72] According to Chancellor Allen in *Blasius*, shareholder voting "is critical to the theory that legitimates the exercise of power by some (directors and officers) over vast aggregations of property that they do not own."[73] Endorsing advocacy from leading academics and large institutional investors, corporations have shed practices that shielded directors from shareholder pressures to improve the legitimacy of managerial decision-making, such as declassifying boards, enabling proxy access, and replacing plurality thresholds for elections with majority ones.[74] Independent directors, who have no other connection to management and are thought to boost responsiveness to market preferences, have gained a greater role in resolving self-dealing conflicts, nominating directors, setting executive compensation, and overseeing finances.[75]

Assessing this approach to corporate legitimacy under the public law framework previously discussed, the emphasis is on legal authority, in the hopes that moral and sociological legitimacy will follow suit through managerial decision-making attuned to shareholder primacy. Agency law, as the foundational block for the claim that managers' chief responsibility is to shareholders, becomes the mechanism of legitimating managerial discretion within the firm. Meanwhile, external laws and regulations are entrusted with circumscribing the outer limits of managers' discretion. As long as this neat division of legal authority between managers and lawmakers works reasonably well in achieving desired social goals, i.e., maximize wealth while appropriately safeguarding constituents' interests, this legitimacy framework was held and widely accepted by society.

Yet, cracks in the foundation of this division are growing bigger to ignore, threatening its moral and sociological support. For years, companies have been lobbying policymakers for their interests, while using cost-benefit

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[71] 564 A.2d 651 (Del. Chan. 1988).
[72] *Id.* at 659.
[73] *Id.*
[74] *See generally, e.g.*, Lucian A. Bebchuk & Scott Hirst, *Private Ordering and the Proxy Access Debate*, 65 BUS. L. 329 (2010); Lucian Bebchuk, Scott Hirst & June Rhee, *Towards the Declassification of S&P 500 Boards*, 3 HARV. BUS. L. REV. 157 (2013); Stephen J. Choi et al., *Does Majority Voting Improve Board Accountability?*, 83 U. CHI. L. REV. 1119 (2016); David Yermack, *Shareholder Voting and Corporate Governance*, 2 ANN. REV. FIN. ECON. 2.1 (2010).
[75] *See generally, e.g.*, Lucian A. Bebchuk & Michael S. Weisbach, *The State of Corporate Governance Research*, 23 REV. FIN. STUD. 939 (2010); Sanjai Bhagat & Bernard Black, *Independent Directors*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 283-87 (Paul Newman, ed. 1998); Jeffrey N. Gordon, *Independent Directors and Stock Market Prices: The New Corporate Governance Paradigm*, 59 STAN. L. REV. 1465 (2007).

analysis to invalidate restrictive regulations, often resorting to litigation to achieve their goals. But to address key challenges of our era, like climate change or gender equality in the workplace, lawmaking activity is hardly sufficient.[76] This is especially the case in our current political climate of widespread polarization and dysfunction.[77] However, even when the political system works well, elected leaders can only set general directions or goals. They cannot devise one-size-fits-all solutions applicable across companies, nor can they mandate the organizational changes necessary to translate distant, abstract objectives into everyday practices.[78] As a result, companies are increasingly under pressure to take action on a range of controversial social and political issues, from transforming employees' daily experience in the workplace to solving global challenges like climate change and human rights abuses.[79] To plan and implement such changes, academics have been urging companies to abandon their exclusive focus on shareholders and invite a broader set of stakeholder inputs into their decision-making process.

Surprisingly, some powerful shareholders are themselves embracing these calls. Large asset managers and pension funds have begun to dominate U.S. equity markets. Index funds now own, according to some estimates, 30%

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[76] For extended discussion of why both political and corporate reforms are beneficial to stakeholders, *see generally* Aneil Kovvali, *Stark Choices for Corporate Reform*, 123 COLUM. L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4067505.

[77] Larry Fink in his 2019 letter to CEOs mentioned political dysfunction in his discussion of reinvigorating the concept of corporate purpose. Larry Fink, *Larry Fink's 2019 Letter to CEOs: Profit & Purpose*, BLACKROCK, https://www.blackrock.com/americas-offshore/en/2019-larry-fink-ceo-letter. *See also* Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1561-62 (2018)("Given the gridlock in the federal government, change via corporate social activism can prove to be much more appealing and effective."); Edward B. Rock, *For Whom Is the Corporation Managed in 2020? The Debate over Corporate Purpose*, 76 BUS. LAW. 363, 368 (2021)("Political dysfunction raises fundamental questions for the traditional view. If the legislature will not enact reasonable environmental regulation to control carbon, and we face imminent and irreversible environmental degradation, perhaps corporate law and governance should do more to control climate change...").

[78] The inability of general lawmaking to efficiently tailor policies to particular corporate circumstances has been widely pointed out in the corporate law literature as one of the arguments in favor of the private ordering of corporate governance arrangements. For discussion, *see* STEPHEN M. BAINBRIDGE, CORPORATE GOVERNANCE AFTER THE FINANCIAL CRISIS 129 (2011)(criticizing "one-size-fits-all" law being applied to corporations); Jill E. Fisch, *Leave It to Delaware: Why Congress Should Stay out of Corporate Governance*, 37 DEL. J. CORP. L. 731, 735 (2013)("…[M]arket developments have enabled investors to use moderated responses and private ordering to address perceived problems, without incurring excessive costs or destabilizing management authority. In contrast, Dodd-Frank's reforms reduce the opportunity for issuer-specific tailoring and experimentation, while crafting procedures that are unlikely to provide investors with meaningful value."); Joseph A. Grundfest, *The SEC's Proposed Proxy Access Rules: Politics, Economics, and the Law*, 65 BUS. LAW. 361, 361–62 (2010). For criticism of the argument that private ordering leads to the efficient tailoring of corporate governance arrangements, *see generally* Michael Barzuza, *Inefficient Tailoring: The Private Ordering Paradox in Corporate Law*, 8 HARV. BUS. L. REV. 131 (2018).

[79] Vivian Hunt, Bruce Simpson & Yuito Yamada, *The case for stakeholder capitalism*, MCKINSEY & CO. (Nov. 12, 2020), https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/the-case-for-stakeholder-capitalism

or more of all public equity in the U.S., while the Big Three asset managers – Blackrock, Vanguard, and State Street – collectively control about 15-20% in each company on average.[80] A growing literature in corporate law and antitrust is debating the policy implications of this type of concentrated ownership but, from a legitimacy standpoint, some critical takeaways are clear. Initial predictions that index funds lack incentives to monitor companies whose shares they cannot sell proved largely a miscalculation.[81] In fact, these shareholders can achieve economies of scale by creating specialized monitoring teams that engage directly with managers and directors behind closed doors, working with proxy advisors and other expert groups and NGOs, and building coalitions with other investors. In these powerful new players' agendas, ESG issues feature prominently, whether it is because they are more concerned about risks generally,[82] or because they are more attuned to portfolio-level externalities.[83] These investors are vocal in demanding management to use their discretion to achieve social goals and are increasingly using their voting power to support shareholder resolutions in that direction.[84]

As a result, the powerful voice of these influential investors has joined the chorus of stakeholderism proponents in pushing management to embrace social and environmental priorities and show their commitment with tangible

[80] Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 735 (2019)("[A]s of 2017 the Big Three held an average combined stake exceeding 20% of S&P 500 companies and 16.5% of Russell 3000 companies."); Davidson Heath et al., *Do Index Funds Monitor?*, 35 REV. FIN. STUD. 91, 91 (2022)("Passively managed index funds now hold over 30% of U.S. equity fund assets…").

[81] For early concerns, *see, e.g.*, John C. Coates, *The Future of Corporate Governance Part I: The Problem of Twelve* 14 (Working Paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3247337. For recent discussion of index fund monitoring, *see* Ryan Bubb & Emiliano Catan, *The Party Structure of Mutual Funds* 4-5 (Working Paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3124039; Quinn Curtis, Jill E. Fisch & Adriana Robertson, *Do ESG Mutual Funds Delivers on Their Promises?* MICH. L. REV. 33-44 (Forthcoming); Jie (Jack) He, Jiekun Huang & Shan Zhao, *Internalizing Governance Externalities: The Role of Institutional Cross-Ownership*, 134 J. FIN. ECON. 400, 403-16 (2019)

[82] For this argument, see generally Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1426-39 (2020)

[83] For this argument, *see generally* Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1 (2020); Jeffrey N. Gordon, *Systematic Stewardship*, 47 J. CORP. L. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782814.

[84] *See* Caleb N. Griffin, *Environmental & Social Voting at Index Funds*, 44 DEL. J. CORP. L. 167, 204-05 (2020)(summarizing index funds' overall support of environmental and social proposals). Executives at the Big Three (BlackRock, State Street, and Vanguard) have all publicly stated that they will increasingly use their votes to support ESG proposals. *See, e.g.*, Glenn Booraem, *What We Do. How We Do It. Why It Matters.*, VANGUARD 13 (Apr. 2019), https://about.vanguard.com/investment-stewardship/per spectives-and-commentary/what_how_why.pdf Fink, *Larry Fink's 2020 Letter to CEOs: A Fundamental Reshaping of Finance*, BLACKROCK, https://www.blackrock.com/corporate/investorrelations/2020-larry-fink-ceo-letter; STATE STREET GLOBAL ADVISORS, STEWARDSHIP REPORT 2018–19, at 25 (2019), https://www.ssga.com/library-content/products/esg/annual-ass et-stewardship-report-2018-19.pdf

acts. Due to influential investors joining other stakeholders to advocate for reform, corporate managers have been increasingly embracing their newly found role of addressing social needs to improve stakeholder welfare.[85] However, this shift has also laid bare the true extent of managerial power, not simply as a means of maximizing wealth, but also as an arbiter of social and political disagreements that can create large-scale changes for both stakeholders and society at large. Managers, accustomed to the capacious permissiveness of the business judgment rule, have simply followed the same approach for social issues. However, this approach left them largely unprepared for the controversies that have ensued when their decision-making processes and outcomes lacked proper justification on controversial social and environmental issues. Unsurprisingly, they found themselves in turmoil, as the next section shows.

C. New Legitimacy Challenges Against Corporate Decisions

Faced with increasing pressure to "take a stand" on a broad swath of social and political issues, corporate managers have found themselves at a crossroads. With stakeholders often outraged and shareholders pushing related resolutions, managers' inaction rings hollow amidst the turbulence and may even appear tantamount to acquiescence. Weary of endangering the moral and sociological legitimacy of their decision-making, and emboldened by their peers' example, managers spur into action. Yet, reactions to managerial initiatives often prove as divisive as the causes to which they profess support. Many stakeholders end up unhappy with the stand that managers eventually take, question whether business leaders should be trusted to make decisions on issues that affect important individual freedoms, and pledge to resist them.

Below, we discuss this typical legitimacy challenge in two popular incarnations, each with distinct ideological provenance: the "greenwashing" critique by progressives, and the "wokeness" label by conservatives. In both these lines of argumentation, stakeholders do not simply attack an irksome outcome. Rather, they seek to connect that outcome with features of the manager decision-maker, as well as the decision-making process, which they deem as disqualifying. This denunciation of managers signals the launch of a legitimacy challenge.

1. Greenwashing: Managerial Hypocrisy and Inadequacy

Activists on the left often wonder whether the hurried enlightenment of America's corporate elite to a particular problem is genuine, or whether grand progressive gestures are used to mask the lack of any real reform.[86] By casting

[85] *See supra* note 13.
[86] Helen Lewis, *How Capitalism Drives Cancel Culture*, *The Atlantic* (July 14, 2020), https://www.theatlantic.com/international/archive/2020/07/cancel-culture-and-problem-woke-capitalism/614086/.

managers as hypocritical and self-serving, these critics attack their suitability as leaders on issues involving broad societal implications. "Greenwashing," which exemplifies this critique in climate change, castigates companies for adopting token actions that are failing to move the needle to slow down climate change. Companies' well-advertised sustainability plans, critics note, often lack specific measures and objectives, as only over a third of S&P 500 companies have set detailed targets and timelines.[87] Others criticize companies that continue to resist science-based climate policies despite their climate pledges.[88] Further, state authorities around the U.S. have launched a wave of lawsuits against Big Oil companies arguing they deceived consumers[89] when managers chose to seed doubts about the evidence and steer public debate about climate change in their favor.[90] Constrained as managers are by their allegiance to profit-making, progressives fear that their choices cannot go as far as necessary in tackling the dire consequences of climate change.

To explain why companies are rushing to declare their fealty to environmental priorities, critics point to shifting market preferences. As consumers become more conscious about the impact of their buying preferences, they are increasingly willing to channel their purchases towards environmentally responsible products and companies.[91] For progressives, corporations are simply signaling the values of their clientele,[92] engaging in a ruthless marketing campaign without any intention to follow up, which they see as performative and, ultimately, hypocritical.

Claims of hypocrisy can be catastrophic for managers' sociological legitimacy because they threaten the bonds of trust and goodwill that managers must establish with stakeholders and the public. Greenwashing charges by stakeholders are claims that managerial decision-making is sociologically illegitimate because these stakeholders doubt the reasoning and decisions

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[87] Peter Eavis & Clifford Krauss, *What's Really Behind Corporate Promises on Climate Change?*, N.Y. TIMES (Feb. 22, 2021), https://www.nytimes.com/2021/02/22/business/energy-environment/corporations-climate-change.html.

[88] *See, e.g.*, Ceres's evaluation of Netflix. Ceres, *Netflix*, https://www.ceres.org/practicingRPE/netflix.

[89] For summaries of some of these lawsuits, *see* Rebecca Hersher, *Lawsuit alleging oil companies misled public about climate change moves forward*, NPR (Jan. 25, 2022), https://www.npr.org/2022/01/25/1075560742/oil-lawsuit-climate-change-baltimore State Energy & Environmental Impact Center, *State Suits Against Oil Companies*, NYU SCH. OF L., https://www.law.nyu.edu/centers/state-impact/issues/climate-action/suits-against-oil-companies.

[90] Chris McGreal, *Big oil and gas kept a dirty secret for decades. Now they may pay the price*, THE GUARDIAN (June 30, 2021), https://www.theguardian.com/environment/2021/jun/30/climate-crimes-oil-and-gas-environment.

[91] Adam Winkler, *Corporate Political Conscience*, THE NEW REPUBLIC (April 30, 2018), https://newrepublic.com/article/147796/corporate-conscience-big-business-liberal-politics.

[92] Isabella Burton, *Are Corporations Becoming the New Arbiters of Public Morality?*, VOX (Aug. 17, 2017), https://www.vox.com/identities/2017/8/17/16162226/corporations-replacing-churches-americas-conscience ("Once, a company might have sold sex, or wealth; the opportunity that buying this product would make you into the person you want to be …. Now, they sell a community-based form of virtue.").

provided by corporate executives regarding how they are going to tackle climate change. In this manner, there is a *lack* of belief among stakeholders regarding managerial decisions on climate issues. When faced with social activists' misgivings and lackluster press reports of their efforts, managers are unlikely to convince their stakeholders that they have taken credible steps in the right direction.

Stakeholders concerned about greenwashing also question the moral legitimacy of managerial decision-making due to their doubts that companies are making good faith and science-based decisions around these issues. Further, stakeholder concern of managerial hypocrisy argument potentially sullies managers' moral legitimacy because it portrays managers as duplicitous by providing false public reasons to justify their decisions. Uncaring and untrustworthy, climate activists fear that managers are not in a position to show appropriate leadership in such core societal issues.

While "greenwashing" itself refers to climate change, similar progressive mistrust about managers' motivations and commitments appears in other subject-matters too. For example, while progressives applaud managerial efforts to improve racial and gender diversity in the workplace, they worry that managerial statements regarding the importance of diversity do not reflect a true shift in managers' convictions, but a desire to attract high-quality employees. As a result, progressives are concerned that managers are likely to implement proposed workplace diversity changes only partially and quickly abandon these efforts when public attention fades.[93] They point to recent data from Silicon Valley, as managers of technology companies have preached the importance of increasing diversity for years without much shift in racial or gender diversity numbers.[94]

Similarly, when corporations rallied to proclaim that they support racial equality efforts in the immediate aftermath of George Floyd's tragic murder, many stakeholders pointed that their treatment of minority employees was far from blemish and challenged companies to do more.[95] Employees of many companies were also quick to go public with their experiences of managerial misbehavior when external pronouncements of support by corporate executives

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[93] Gerald F. Seib, *How Corporate America Became a Political Orphan*, WALL ST. J. (July 23, 2021), https://www.wsj.com/articles/how-corporate-america-became-a-political-orphan-11627052148.

[94] Lori Ioannou, *Silicon Valley's Achilles' heel threatens to topple its supremacy in innovation*, CNBC (June 20, 2018), https://www.cnbc.com/2018/06/20/silicon-valleys-diversity-problem-is-its-achilles-heel.html ("[A]ll the top CEOs today loudly proclaim a commitment to "diversity and inclusion" — but in other ways not much has changed in almost two decades."); Jennifer Sor, *Silicon Valley pledged to become more diverse. A year later, has anything changed?*, S.F. CHRONICLE (*last updated* Aug. 29, 2021), https://www.sfchronicle.com/tech/article/Silicon-Valley-pledged-to-become-more-diverse-A-16414178.php ("The percentage of tech employees who are female climbed slightly from 33.6% in 2014 to 35.7% in 2021. Gains among non-white races have also been slow…").

[95] Tracy Jan et al., *As Big Corporations Say "Black Lives Matter," Their Track Records Raise Skepticism*, WASH. POST (Jun. 13, 2020), https://www.washingtonpost.com/business/2020/06/13/after-years-marginalizing-black-employees-customers-corporate-america-says-black-lives-matter/.

appeared hypocritical compared to how executives mistreated minority staffers within the company.[96] One year after, many progressives are wondering whether managers' statements have actually translated into meaningful action.[97]

2. The "Woke" Label: Elitist Bias of Unelected and Unaccountable Managers

Conservatives, corporations' traditional allies, are just as critical of the direction managers are taking regarding many ESG issues. Conservatives have increasingly adopted the pejorative use of the term "woke,"[98] first popularized by Ross Douthat in an opinion piece in 2018, to denounce companies' social initiatives which they view as biased and politicized.[99] They portray "woke" corporations as mouthpieces of the progressive left, ruled by an Ivy-League educated elite steeped in the mantel of liberal teachings.[100] Like the criticism from progressives, conservatives are suspicious of managers' motivations, seeing companies' embrace of a social justice agenda as an attempt to lure Democrats in light of their recent electoral gains.[101] In turn, conservatives cast themselves as protectors of people's traditional freedoms and liberties,[102] at risk by the onslaught of "woke" capital keen to dictate, regulate, and constrain.

Echoing these claims in a press conference a few weeks after the passage of a controversial voting law in Georgia, Minority Leader Mitch McConnell (R-KY) attacked companies for getting involved in "election law to environmentalism to radical social agendas to the Second Amendment,"

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[96] *See infra* Section III.B.

[97] Yume Murphy, *One year after #BlackoutTuesday, What Have Companies Really Done for Racial Justice?*, Vox (June 2, 2021), https://www.vox.com/the-goods/22463723/blackout-tuesday-blm-sephora-starbucks-nike-glossier.

[98] By embracing the term "woke" as a pejorative term to denote liberal or progressive social values, conservatives have coopted a term that has a long history of usage by the African-American community to denote the awareness of racial discrimination and injustice within American society. For discussion of this cooption of the term "woke" by conservatives, *see* Jeffrey Barg, *How the right stole 'woke' and turned it into a derisive insult*, PHIL. INQUIRER (Aug. 4, 2021), https://www.inquirer.com/opinion/woke-bill-maher-olympics-republicans-right-language-20210804.html; Allan Smith & Sahil Kapur, *Republicans are crusading against 'woke,'* NBC NEWS (May 2, 2021), https://www.nbcnews.com/politics/congress/republicans-are-crusading-against-woke-n1264811.

[99] Ross Douthat, *The Rise of Woke Capital*, N.Y. TIMES (Feb. 28, 21018), https://www.nytimes.com/2018/02/28/opinion/corporate-america-activism.html.

[100] For recent books on "woke capitalism" from conservative commentators, *see generally* VIVEK RAMASWAMY, WOKE, INC.: INSIDE CORPORATE AMERICA'S SOCIAL JUSTICE SCAM (2021); STEPHEN R. SOUKUP, THE DICTATORSHIP OF WOKE CAPITAL: HOW POLITICAL CORRECTNESS CAPTURED BIG BUSINESS (2021).

[101] *See* Douthat, *supra* note 99.

[102] Senator Rubio introduced legislation, called the "Mind Your Business Act," which would amend the Securities and Exchange Act of 1934 to allow certain shareholders to sue that company if it promotes certain "divisive concepts" for reasons unrelated to any pecuniary interest. https://www.govtrack.us/congress/bills/117/s2829/text

thereby "dabbling in behaving like a woke parallel government."[103] He warned, "[c]orporations will invite serious consequences" if they become "a vehicle for far-left mobs to hijack our country from outside the constitutional order."[104] The express analogy of corporate initiative to government power and the charge of absolutism and constitutional defiance are emblematic of how deeply some conservatives perceive these corporate choices as challenging the legitimacy of corporate managers.

The circumstances that led to such strong protestations illustrate how fundamental the challenge of moral pluralism poses for the legitimacy of managerial decision-making. For example, the CEOs of prominent Georgia-based companies, like the Atlanta-headquartered Delta Airlines and Coca-Cola, backtracked on previous support by subsequently denouncing the Republican-sponsored voting law as unduly restricting access of Black Georgians to vote.[105] These announcements were not knee-jerk reactions, but a result of direct lobbying efforts by prominent black executives,[106] as well as a wave of appeals from employees[107] and pressure from dozens of voting rights organizations on corporate executives at these firms.[108] Many other companies, including Amazon, Facebook, Ford, GM, Netflix, Starbucks, Target, United Airlines, and ViacomCBS, either explicitly denounced the law or made more general comments criticizing attempts to restrict the right to vote.[109]

The backlash from conservatives was just as swift. Conservative consumers called on a counter boycott of Delta, encouraged by former President Trump. Meanwhile, a Wall-Street Journal editorial criticized "woke and weak CEOs" that have "bowed to the woke mob."[110] These attacks note

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[103] Burgess Everett, *McConnell: Big Business acting like 'woke parallel government*,' POLITICO (April 5, 2021), https://www.politico.com/news/2021/04/05/mcconnell-corporate-america-woke-parallel-government-479042.

[104] *Id.*

[105] Quinn Scanlan, *Delta, Coca-Cola forcefully condemn Georgia elections bill as activists ramp up pressure on CEOs*, ABC NEWS (March 31, 2021), https://abcnews.go.com/Politics/delta-now-opposes-georgias-elections-bill-activists-ramp/story?id=76789220; Kelly Yamanouchi, Greg Bluestein & Matt Kempner, *Coke, Delta, oppose Georgia's 'unacceptable' voting law*, ATLANTA J. CONST. (March 31, 2021), https://www.ajc.com/news/business/delta-ceo-calls-georgia-voting-legislation-unacceptable/HZYG2CTB3RH5JBD5EDWVE52KDM/.

[106] David Gelles, *Inside Corporate America's Frantic Response to the Georgia Voting Law*, N.Y. Times (April 5, 2021), www.nytimes.com/2021/04/05/business/voting-rights-ceos.html.

[107] *Id.*

[108] For discussion of the stakeholder pressures on Delta and Coca-Cola*, see* Hannah Sampson, *Delta faces boycott threats for stance on new Georgia voting law*, WASH. POST (March 29, 2021), https://www.washingtonpost.com/travel/2021/03/29/delta-georgia-voting-law-boycott/; Quinn Scanlan, *Advocacy groups target Georgia companies in campaign against restrictive voting bills*, ABC NEWS (March 18, 2021), https://abcnews.go.com/Politics/advocacy-groups-target-georgia-companies-campaign-restrictive-voting/story?id=76509179.

[109] Todd C. Frankel, Josh Dawsey & Jena McGregor, *Mounting corporate opposition to proposed voting restrictions tests long-standing alliance with GOP*, WASH. POST (April 14, 2021), https://www.washingtonpost.com/business/2021/04/14/letter-voting-georgia-buffet-target-netflix-amazon/

[110] Editorial, *Woke and Weak CEOs*, WALL ST. J. (April 1, 2021), https://www.wsj.com/articles/woke-and-weak-ceos-11617316767?mod=opinion_lead_pos1.

how forcible CEOs' influence can be and proceed to directly challenge their decision-making process as undemocratic and therefore illegitimate.

Voting rights legislation undoubtedly affects corporate stakeholders as members of our political society given that it concerns core political rights and liberties of citizens in a democratic state. In this sense, both the liberal and conservative responses to corporate managerial engagement regarding the Georgia voting rights bill concerned the legitimacy of managerial decision-making. From the perspective of conservatives, the accusation of elitist bias and "wokeness" towards managerial decision-making on the voting rights bill formulates a textbook legitimacy challenge on sociological and moral grounds. Sociologically, conservatives argued that managerial decisions to denounce the bill was out-of-sync with the underlying societal values on voting rights issues. Morally, these critics attacked managers' decisions to speak out against the bill as wrong-headed on its merits by diverting corporate attention from profit maximization and stepping outside of core corporate activities that corporate managers had no business getting involved.

Voting rights is not the only issue are where accusations of "wokeness" encapsulate conservative claims of illegitimacy. Big Tech and social media companies are under fire for exhibiting anti-conservative bias, particularly after decisions from Facebook and Twitter to remove Donald Trump from their platforms. Companies that have spoken in favor of stricter gun laws and transgender rights are also targets of similar attacks.[111]

III. HOW STAKEHOLDER GOVERNANCE BOOSTS CORPORATE LEGITIMACY

Distinguishing between legal, sociological, and moral legitimacy provides us with an analytical lens through which we can examine how decision-makers who hold authority justify the exercise of their powers. This need is particularly acute for decisionmakers who have not been elected by the population affected by their choices, and thus can neither claim a direct bond with their audience, nor profess to operate in accordance with their audience's preferences. In our modern constitutional setting, this problem has been at the core of debates about the legitimacy of the administrative state, giving rise to an extensive literature on its legitimacy in public law and political theory.[112] This literature has examined tools used by administrative agencies to establish the legitimacy of their actions, highlighting successes and pitfalls. The resulting template for administrative law's legitimacy toolkit has already found applications in other areas of law that also face legitimacy concerns. For example, International Law adapted this toolkit to address the proliferation of

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[111] *See* Ben Casselman & Jim Tankersley, *Looking for Bipartisan Accord? Just Ask About Big Business*, N.Y. TIMES (Mary 14, 2021), https://www.nytimes.com/2021/05/14/business/economy/big-business-politics-economy.html.

[112] *See infra* note 109.

decisions by international bodies that were often created outside the formalities of international treaties.[113]

In this Part, we use the administrative law toolkit of legitimacy-enhancing mechanisms as a comparison to illustrate how stakeholder governance can employ well-established methods to boost the legitimacy of corporate decisions. Because analogizing corporations to administrative agencies is unusual, we defend our choice by exploring their parallels and noting where their legitimacy trajectories converge and where they move in different directions. We examine different tools used in administrative law, identify their parallel in corporate governance, and explore their success and failures in addressing legitimacy concerns. Using this theoretical framework, we also analyze real-world examples from companies' responses to mounting stakeholder-driven grievances and show that, to best address them, companies are embracing the legitimacy-enhancing tools that we advocate. Our theoretical framework can better explain company actions than a fiduciary duty analysis.

A. From Administrative Legitimacy to Corporate Legitimacy

Legal scholars, judges, and commentators have discussed the problem of legitimating the administrative state for over a century.[114] Administrative agencies lack the institutional structure that we associate with democratic governance: they are not mentioned in the U.S. Constitution; agency staff are not elected; and while electoral supervision can exercised through the firing of agency heads, it can be circumscribed through the use of for-cause protection.[115] However, agencies are tasked with powers typically afforded to institutions with democratic credentials, such as creating binding legal rules.[116] As a result, some label administrative agencies as illiberal and undemocratic, essentially questioning their sociological and moral legitimacy.[117] In response, administrative law has adopted multiple procedural and substantive tools to

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[113] For discussion, *see generally, e.g.*, Michael S. Barr & Geoffrey P. Miller, *Global Administrative Law: The View from Basel*, 17 EURO. J. INT'L L. 15 (2006); Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EURO. J. INT'L L. 1 (2006); Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 L. & CONTEMP. PROBS. 63 (2005).

[114] *See generally, e.g.*, Freedman, *supra* note 33 ; JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975); Havasy, *supra* note 48.

[115] For discussion of agency insulation through for cause removal protection, *see e.g.*, Rachel Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 27-30 (2010); Paul R. Verkuil, *Separation of Powers, The Rule of Law, and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 330-36 (1989).

[116] Administrative Procedure Act, 5 U.S.C. §551-559.

[117] For recent criticism of the administrative state, *see generally e.g.*, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW LAWFUL? (2014); D.A. Candeub, *Tyranny and Administrative Law*, 59 ARIZ. L. REV. 49 (2017); Douglas H. Ginsburg and Steven Menashi, *Our Illiberal Administrative Law*, 10 NYU J. L. & LIBERTY 475 (2016); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

improve its legitimacy.[118] These tools prominently include the APA's requirements for informal rulemaking to establish notice-and-comment procedures, the participatory and procedural rights according to parties during formal rulemaking and adjudications, agency formalization of their internal ex parte communications procedures, legal doctrines aimed to improve the substantive outcomes of administrative policymaking, as well as numerous other statutes and regulations that require agency transparency and disclosure of information to interested parties.[119]

Like agency actions, corporate decisions affect different stakeholders that have varying abilities to provide input to managerial decision-making processes. In administrative governance, the different stakeholder groups can range from a small number of interested parties up to millions of individuals, other state and federal institutions, and the general public. Corporate decisions similarly affect multiple internal stakeholder groups, including managers, employees, and shareholders, as well as large numbers of stakeholders outside the corporation, including consumers, other businesses, local communities, and the general public.[120] Similar to agency decisions, these stakeholders may criticize the soundness of corporate decisions that affect them and fault company management for decision-making processes that exclude alternative viewpoints. This is the core of the legitimacy demand that corporate managers must answer through their decision-making processes and outcomes.

When relying on legal legitimacy alone to justify their choices, corporations have faced pushback that echoes the criticisms leveled against administrative agencies. Corporations are creatures of legal fiction, established by statutes that allow wide discretion to management to do as it pleases.[121] Such

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[118] *See* Lisa Schultz Bressman, *Procedure as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1758-66 (2007)(discussing the various procedural requirements to agency rulemaking adopted by 20th Century judges to improve the legitimacy of agency policymaking); Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718, 771-72 (2016)(book review)(same).

[119] *See, e.g.*, Administrative Procedure Act, 5 U.S.C. §551-559; Freedom of Information Act (FOIA), 5 U.S.C. §552 (2012). Federal Advisory Committee Act (FACA), 5 U.S.C. app. §§ 1–16 (2012), and the Government in the Sunshine Act, 5 U.S.C. § 552(b)(2012) Guidance on Ex parte Communications, 74 Fed. Reg. 52,795 (Oct. 14, 2009)(Department of Energy internal rules for disclosing ex parte communications). For discussion about the use and abuse of these statutes and regulations, *see generally, e.g.*, Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361 (2016); Richard Murphy, *Enhancing the Role of Public Interest Organizations in Rulemaking via Pre-Notice Transparency*, 47 WAKE FOREST L. REV. 681 (2012); Richard J. Pierce, Jr., *Legislative Reform of Judicial Review of Agency Actions*, 44 DUKE L.J. 1110 (1994).

[120] For discussion about the various corporate stakeholders, *see* R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH 8-22 (1984); Archie B. Carroll, *The Pyramid of Corporate Social Responsibility: Towards the Moral Management of Organizational Stakeholders*, 34 BUS. HORIZONS 39, 44 (1991); David K. Millon, *Redefining Corporate Law*, 24 IND. L. REV. 233, 234 (1991).

[121] *See* Carl Kaysen, *The Corporation: How Much Power? What Scope?*, *in* THE CORPORATION IN MODERN SOCIETY 90 (Edward S. Mason, ed., 1959)("[T]ypically, the large corporation in which we are interested operates in a situation in which the constraints imposed by market forces are loose, and the scope for managerial choice is considerable."); MARK ROE, STRONG

malleability rings hollow for those looking to constrain corporate action. And like agencies, corporations' links to democratic legitimation are quite fragile and indirect. While corporate choices impact a large swath of different actors, only shareholders vote in corporate elections. Even so, several collective action problems and financial constraints discourage shareholders from banding against management absent large-scale, systemic, or high salience problems in the company.[122] Additionally, incumbent directors and other corporate officials hold a great deal of influence over shareholder meetings under existing corporate law.[123] The rise of dual-stock systems and other mechanisms that limit the influence of shareholders further strengthens the power of corporate managers.[124]

The hierarchical structure of corporations, with management at the top of an extensive chain of command, also resembles the makeup of administrative agencies, which are typically led by politically appointed heads or commissions presiding over a hierarchically organized career staff. This structural resemblance generates similar legitimacy challenges. Both systems need to ensure that information flows smoothly bottom-up, so that management is appraised of developments and remains connected to concerns on the ground. Conversely, both agencies and corporations must also monitor the implementation of leadership directives top-down to constrain shirking and minimize conflicts of interest.[125]

However, the line of accountability in corporate structures ends with the board of directors.[126] In contrast, administrative agencies remain part of the

MANAGERS, WEAK OWNERS 235 (1994)("American managers have often not been held accountable for their performance.").

[122] *See* Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029, 2050-59 (2019); Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 626-29 (1990)

[123] *See* LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION 80-83 (2006)(discussing CEO influence over the appointment of independent directors); Lee Harris, *The Politics of Shareholder Voting*, 86 N.Y.U. L. Rev. 1761, 1770-71 (2011)(discussing how directors can exclude various shareholder proposals); Yermack, *supra* note 74, at 2.4-2.6 (discussing the various benefits held by managers and directors to influence shareholder voting).

[124] For discussions of how dual class stock reduces the influence of shareholders, *see* Lucian A. Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 VA. L. REV. 585, 602-07 (2017); Tian Wen, *Comment, You Can't Sell Your Firm and Own It Too: Disallowing Dual-Stock Companies from Listing on the Securities Exchanges*, 162 U. PA. L. REV. 1495, 1496 (2014).

[125] For discussions of information flow in agencies and the executive branch, *see* Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 LAW & CONTEMP. PROBS. 57, 90-97 (1991)(discussing the flow of information under both team and hierarchical models of internal agency decision-making). For discussion of information flow in corporations, *see generally* Stephen M. Bainbridge, *Participatory Management Within a Theory of the Firm*, 21 J. CORP. L. 657 (1996); Lawrence E. Mitchell, *Structural Holes, CEOs, and Informational Monopolies: The Missing Link in Corporate Governance*, 70 BROOK. L. REV. 1313 (2005).

[126] *See* Stephen Bainbridge, *The Board of Directors as a Nexus of Contracts*, 88 IOWA L. REV. 1, 25-26 (2002)("[T]he board of directors emerged as a governance institution capable of exercising fiat power…"). Barring, of course, the possibility of holding shareholders accountable through piercing the corporate veil or agency doctrines, which plaintiffs have typically failed to use

government, subject to political supervision.[127] Because their political superiors are democratically elected, agencies are subject to pressure to justify their actions to the electorate in a limited capacity. Corporate managers, on the other hand, are not exposed to electoral winds to a similar degree. Still, one can easily imagine state or federal legislators intervening to alter aspects of corporate governance they find problematic, as Congress did with Sarbanes-Oxley[128] and Dodd-Frank.[129] And of course, the state can always regulate corporate conduct. In that respect, by defending the legitimacy of specific corporate choices, corporations are also protecting their social license to operate.[130]

For these reasons, the legitimacy toolkit employed by administrative agencies can guide how companies can utilize similar approaches to improve their legitimacy. Each Section below in this Part explores how administrative law approaches translate into corporate governance. Table 1 summarizes our argument.

Table 1. The Moral and Sociological Legitimacy of Stakeholder Governance

Administrative Procedure	**Corporate Governance**	**Moral Legitimacy**	**Sociological Legitimacy**
Notice and Comment	Stakeholder Participation	Getting input from those likely to be affected improves outcome	Affected parties are more receptive after participating
Transparency	Sustainability Disclosure	Companies declare commitments that are hard to renege	All parties can follow companies promises and confirm credibility

against publicly traded companies. Richmond McPherson & Nader Raja, Comment, *Corporate Justice: An Empirical Study of Piercing Rates and Factors Courts Consider When Piercing the Corporate Veil*, 45 WAKE FOREST L. REV. 931, 943 (2010)("[T]here are no cases in which courts pierced the corporate veil of a public corporation—piercing the corporate veil is limited to close corporations"); Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1039 (1991)(same).

[127] For discussions of executive branch oversight of agencies, *see generally, e.g.*, Kagan, *supra* note 1114; Stuart Shapiro, *OIRA Inside and Out*, 63 ADMIN. L. REV. 135 (2011). For discussions of congressional oversight of agencies, *see generally, e.g.*, JOEL D. AUERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT (2001); Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POLI. SCI. 165 (1984).

[128] 15 U.S.C. § 1514A(a)(2012).

[129] 15 U.S.C. § 78u-6 (2012)

[130] On the social license to operate of public corporations, *see generally* Neil Gunningham, Robert A. Kagan & Dorothy Thornton, *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 LAW & SOC. INQUIRY 307 (2004); Hillary A. Sale, *The Corporate Purpose of Social License*, 94 S. CAL. L. REV. 785 (2020).

Internal Controls, Gatekeepers, Compliance	Sustainability and Ethics Departments	Accurate information improves quality of deliberation	Enhances credibility and trust from stakeholders
Technocrats	Private Experts	Well-researched policies are more likely to be effective	Reduces concerns about biases and arbitrariness
Ad hoc determination v. Rulemaking	Standardization	Pooling resources to get it right	Reduces concerns about equity, free-riding, competition
Enforcement	Board Oversight and Accountability	Decision-making takes into account considerations out of the process so far	Stakeholders see their interests reflected in the board's mandate

B. From Notice-and-Comment to Stakeholder Participation

The notice-and-comment process was a key innovation of the Administrative Procedure Act, which requires agencies to publicly announce their intended rulemaking to the public and provide interested parties the opportunity to submit reactions.[131] Notice-and-comment efforts seek to cast a wide net, attracting constituencies ranging from individual citizens and NGOs to well-resourced public companies and industry associations.[132] After hearing their views, the APA drafters felt that agencies will be more willing to address their concerns and less likely to reach arbitrary decisions.[133] By requiring agencies to justify their stance towards constituents' input, the APA cements the obligation to hear from stakeholders before a rule is finalized.[134]

Notice-and-comment has had a profound impact on administrative rulemaking. Input from varied participants has often proved formative for the proposed rules, as agencies frequently make substantial changes in response to commentary.[135] Faced with a negative reception, some agencies withdraw the proposal, or amend and circulate it anew. To avoid backlash, agencies will often seek feedback at an early stage, asking for views regarding the advisability of a rule or the key goals and possible directions.[136]

[131] 5 U.S.C. §553(c).

[132] For empirical studies of who participates in notice-and-comment rulemaking, *see generally* Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 144 (2011); Jason Webb Yackee & Susan Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the US Bureaucracy*, 68 J. POLI. 128 (2006).

[133] *See* Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 223 (1986).

[134] Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 473-4 (2013).

[135] *See* Wagner, Barnes & Peters, *supra* note 132, at 132; Yackee & Yackee, *supra* note 132, at 134 (showing agencies change the content of their rules between the notice of proposed rulemaking and final rule).

[136] *See* Jennifer Nou & Edward H. Stiglitz, *Strategic Rulemaking Disclosure*, 89 S. CAL. L. REV. 733, 751-55 (2016); Wagner, Barnes & Peters, *supra* note 127, at 124-28.

Mirroring the notice-and-comment process are companies' efforts to reach out to stakeholders and get their feedback on company decisions. A key step in many ESG initiatives involves convening consultations with stakeholders who may be impacted by company activities on issues ranging from launching new products to reassessing workplace relationships.[137] Measures like employee and consumer surveys are well established tools for helping companies grasp their constituents' reactions, but in recent years firms have also been experimenting with different direct outreach methods.[138]

The value of corporate communications with stakeholders lies in similar legitimacy considerations that animate notice-and-comment. From a moral perspective, learning from affected parties can reveal hitherto unknown concerns that companies can address, hidden costs that the company can avoid, or suggest areas of improvement.[139] In addition, stakeholder outreach efforts boost the sociological legitimacy of management choices. After an opportunity to communicate their concerns to management, to hear different views, and to discuss company options, stakeholders are likely to be more accepting of management's ultimate choices, even when those decisions go against their personal preferences.[140] Moreover, direct communication between management and stakeholders helps bridge gaps between the executive suite and the company's production line, or between a company and its surrounding community.

These moral and sociological legitimacy motivations are evident in companies' efforts to address social movements that rocked workplace relationships, like #MeToo and Black Lives Matter.[141] Companies at the heart of #MeToo scandals, like Uber and Wynn, put together town hall meetings with thousands of employees, hoping to provide a voice to those that have felt

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[137] *See* Gadinis & Miazad, *supra* note 82, at 1426-39 (2020)(discussing the epistemic benefits from managerial engagement with stakeholders).

[138] *Id.* at 1435.

[139] For discussions regarding the benefits of communication between managers and employees, *see generally* Ethan R. Burris, James R. Detert & Alexander C. Romney, *Speaking Up vs. Being Heard: The Disagreement Around and Outcomes of Employee Voice*, 24 ORG. SCI. 22 (2013); James R. Detert et al., *First Voice Flows to and Around Leaders: Understanding When Units Are Helped or Hurt by Employee Voice*, 58 ADMIN. SCI. Q. 624 (2013); Chak Fu Lam & David M. Mayer*, When Do Employees Speak Up for Their Customers? A Model of Voice in a Customer Service Context*, 67 PERS. PSYCH. 637 (2014).

[140] *See* MARK J. EPSTEIN, MAKING SUSTAINABILITY WORK 178-80 (2nd Ed. 2017); Steve Hoeffler, Paul N. Bloom & Kevin Lane Keller, *Understanding Stakeholder Responses to Corporate Citizenship Initiatives: Managerial Guidelines and Research Directions*, 29 J. OF PUB. POL'Y & MKT. 78, 85 (2010); John Peloza et al., *Sustainability: How Stakeholder Perceptions Differ From Corporate Reality*, 55 CAL. MGMT. REV. 74, 88-89 (2012); James D.C. Barrall, *Building Relationships with Your Shareholders Through Effective Communication*, HARV. L. F. ON CORP. GOVERNANCE (Nov. 13, 2012), https://corpgov.law.harvard.edu/2012/11/13/building-relationships-with-your-shareholders-through-effective-communication/.

[141] *Id.* at 1443 n. 213 (discussing corporate forums to hear from employees in the wake of #MeToo); Brian S. Lowery, *We need to Stop Tiptoeing Around Race,* STAN. BUS. (October 15, 2020), https://www.gsb.stanford.edu/insights/we-need-stop-tiptoeing-around-race (discussing Genentech's use of dialogue circles to encourage employees and management to talk about issues of race).

silenced for too long.[142] At Wynn, women's leadership forums continued after the scandal broke to become part of the firm's normal operations.[143] To ensure that channels of communication with employees remained open and workplace changes remained on track, many companies established dedicated ombudsmen for hearing complaints and executive committees tasked with focusing on the employee experience that reached out to employees to learn from their experiences.[144] For example, Fox News established a workplace inclusion committee, composed in part of outside diversity experts, that conducts an annual survey of employees and establishes links with company efforts to improve diversity and inclusion. To boost transparency, the committee's reports are made public.[145]

Two examples arising out of companies' response to Black Lives Matter illustrate how stakeholder input can redefine management's perspectives. After Starbucks refused to allow employees to wear Black Lives Matter-related attire at work,[146] employees started a social media campaign against management, and leaked internal documents that contained plainly inadequate reasons for the ban. They pointed that Starbucks encourages store managers to hand out LGBTQ and marriage equality-related attire to store employees,[147] noting the differential treatment between the two social justice causes and asked management to justify the differential treatment, thus making legitimacy demands on managers for their decisions. Faced with demands for accountability, Starbucks managers quickly reversed course.[148]

At Pinterest, stakeholders were determined to expose the company's failures in addressing race and gender inequity in the workplace after the company publicly proclaimed its support for racial equality. Along with many other companies, Pinterest had released statements of solidarity and support for Black Lives Matter in late May 2020. Some black former employees, incensed by the divergence between public messaging and their day-to-day experience, tweeted that they were underpaid and harassed by colleagues, and

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[142] Amelia Miazad, *Sex, Power, and Corporate Governance*, 54 U.C. DAVIS L. REV. 1913, 1961, 1967 (2021).

[143] *Wynn Resorts Holds Second Women's Leadership Forum*, WYNN LAS VEGAS (Aug. 9, 2018), https://press.wynnlasvegas.com/press-releases/wynn-resorts-holds-second-women-s-leadership-forum/s/f30181ef-ef27-42fd-8efb-5aa1edb4c3cd.

[144] Daniel Hemel & Dorothy Shapiro Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1657-1660 (2018).

[145] *Compliance*, FOX NEWS, https://www.foxnews.com/compliance (last visited Feb. 2, 2022).

[146] Brianna Sacks & Albert Samaha, *Starbucks Won't Let Employees Wear Gear That Supports Black Lives Matter Because It Is Political Or Could Incite Violence*, BUZZFEED NEWS (June 10, 2020), https://www.buzzfeednews.com/article/briannasacks/starbucks-is-now-very-pro-black-lives-matter-but-it-wont.

[147] As Calvin Bensen, a 22-year-old Starbucks barista, told Buzzfeed News, Starbuck's decision was, "disappointing in ways I can't express in words. That statement prioritizes those who feel discomfort over Black lives." *Id.*

[148] Heather Murphy, *Starbucks Will Allow Employees to Wear Black Lives Matter Apparel*, N.Y. TIMES, https://www.nytimes.com/2020/06/12/business/starbucks-blm-ban-reversed.html (last updated Oct. 18, 2021).

retaliated against when they brought their concerns to management.[149] Soon after, the company's former COO filed a gender discrimination lawsuit.[150] Public condemnation on social media was swift, upheaval among employees culminated in a walkout, and an influential pension fund filed a fiduciary duty claim arguing that the board had ignored claims of gender and race disparities.

Pinterest's management realized it needed to regain its moral and sociological legitimacy and started by building mechanisms for stakeholder participation. Pinterest announced it would form an inclusion advisory council that would have representatives from external stakeholder groups, including the NAACP, The National Transgender Center for Equality, and Asian Americans Advancing Justice.[151] Moreover, when settling the suit, Pinterest agreed to designate a member of its board to co-sponsor DEI efforts with CEO Ben Silbermann and undergo gender and racial audits twice per year,[152] thus creating mechanisms for stakeholder input to reach the board.

C. From Transparency to Sustainability Disclosure

Transparency has become synonymous with good governance and is an essential corollary of notice-and-comment rulemaking.[153] By opening the decisionmaker's processes to external monitoring, it helps affected parties understand the outcome better and assess any justifications offered. Moreover, it provides the public with the necessary information to make its participation in public rulemaking more meaningful. Finally, it offers a written record of government decisions and rulemakings, which allows outsiders to keep a watchful eye over the government's progress, assess achievements and missteps, and urge for additional action where necessary.[154] As a result, it

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[149] Erin Griffith, *Pinterest Employees Demand Gender and Race Equality,* N.Y. TIMES, www.nytimes.com/2020/08/14/technology/pinterest-walkout-equality.html (last updated Oct. 20, 2021).

[150] Erin Griffith, *Pinterest Accused of Gender Bias in Suit by Former No. 2 Executive*, N.Y. TIMES (Aug. 11, 2020), https://www.nytimes.com/2020/08/11/technology/pinterest-francoise-brougher-gender-discrimination-lawsuit.html.

[151] April Joyner, *Pinterest puts $50 million into diversity programs and releases former employees from NDAs in a settlement with shareholders following harassment claims*, BUS. INSIDER (Nov. 24, 2021), https://www.businessinsider.com/pinterest-50-million-dei-ends-ndas-shareholder-settlement-2021-11.

[152] Id.

[153] On transparency and notice-and-comment rulemaking, *see* Cary Coglianese et al., *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 926-30 (2009). This being said, critics point to how agencies in practice can undermine the transparency of their rulemaking processes. *See* Stephen M. Johnson, *Beyond the Usual Suspects: ACUS, Rulemaking 2.0, and a Vision for Broader, More Informed, and More Transparent Rulemaking*, 65 ADMIN. L. REV. 77, 89-90 (2013); Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 436–37 (2004).

[154] On the ability of external stakeholder to monitor agencies through informal rulemaking, *see* Bressman, *supra* note 118, at 1751-52; Coglianese et al., *supra* note 153, at 928-29; Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 434 (1989)

introduces an additional lever of discipline over government actions, pushing individual agencies to fulfill their promises or account for their failures.

The value of transparency has long been the foundation of securities law, which has in recent years traveled to sustainability disclosures as well.[155] Many companies are voluntarily issuing sustainability reports, which detail the company's efforts to improve their environmental footprints.[156] Initially conceived as marketing vehicles designed to promote companies' social responsibility credentials, sustainability disclosures have recently taken the shape of traditional investor information documents.[157] Today, almost all publicly traded U.S. companies issue sustainability reports, which have gradually expanded in length[158] and cover a broad array of the company's social priorities besides climate. Because of their primarily outward-facing orientation, sustainability reports were conceived as a vehicle for boosting companies' sociological legitimacy.

Such otherwise welcome transparency unearthed a mosaic of company initiatives that signaled a rise in climate consciousness, but often left readers queasy. Piecemeal information could not adequately address the broader question: how was the company adjusting its operations and projections in view of climate change? Responding to this question called for a different type of disclosure. In lieu of vague statements in favor of environmental protection, companies are now providing data about carbon emissions and undertaking specific commitments of net-zero footprints by a specific future date. These specific actions by corporations are harder to renege and thus more credible to stakeholders, in part because stakeholders can track these commitments.[159] Thus, the public can follow company developments and determine corporate

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[155] *See* Merritt B. Fox, *Retaining Mandatory Securities Disclosure: Why Issuer Choice is Not Investor Empowerment*, 85 VA. L. REV. 1335, 1345-46 (1999); Edward Rock, *Securities Regulation as Lobster Trap: A Credible Commitment Theory of Mandatory Disclosure*, 23 CARDOZO L. REV. 675, 676 (2002); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1273-89 (1998).

[156] Subodh Mishra, *Sustainability Reporting: A Gap Between Words and Action*, HARV. L. SCH. F. CORP. ON GOVERNANCE (Oct. 20, 2021), https://corpgov.law.harvard.edu/2021/10/20/sustainability-reporting-a-gap-between-words-and-action/.

[157] *See* Caitlin M. Ajax & Diane Strauss, *Corporate Sustainability Disclosures in American Case Law: Purposeful or Mere "Puffery"?*, 45 ECOLOGY L.Q. 703, 709 (2018)(discussing the standardization of sustainability disclosure information through the Global Reporting Initiative); Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 923, 947–50 (2019)(discussing the history of sustainability disclosures). Over 90% of the 250 largest companies in the world now provide sustainability disclosures. JOSÉ LUIS BLASCO ET. AL., THE ROAD AHEAD: THE KPMG SURVEY OF CORPORATE RESPONSIBILITY REPORTING 2017 9 (2017), https://assets.kpmg/content/dam/kpmg/xx/pdf/2017/10/kpmg-survey-of-corporate-responsibility-reporting-2017.pdf.

[158] Sustainability reports are now about 70 pages on average. Dr. Martha L. Carter et al., We are living in a Material World, Teneo (Sept. 30, 2021), https://www.teneo.com/app/uploads/2021/09/Teneo_The-State-of-U.S.-Sustainability-Reporting.pdf.

[159] For example, 217 companies have signed the Climate Pledge to be net-zero by 2040. The Climate Pledge, *Net Zero Carbon by 2040*, https://www.theclimatepledge.com/.

progress.[160] With their credibility on the line, management is more likely to implement the goals it announced. In this way, the sociological legitimacy achieved through public commitments becomes the foundation for the moral legitimacy gained by the company once it delivers on its promises.

The role of disclosure in boosting accountability in climate is evident in the coalitions built by investors to push for and monitor public corporate commitments. Perhaps the most prominent actor is Climate 100+, an investor coalition currently counting over 600 asset managers from around the world with a combined portfolio of over $60 trillion.[161] The motivation behind Climate 100+ was to target the world's largest industrial emitters, applying pressure on management to adopt reduction strategies.[162] By joining forces, investors could speak with one voice when asking companies to make changes, rather than having different investors push for different reduction approaches.

But Climate 100+ is not just a common pledge, as participants have built a framework for sharing monitoring resources. One participating investor is assigned as the lead for engaging with each company, being responsible for researching, analyzing, and monitoring the data it releases. Moreover, they are designing a new benchmark, which will help them assess each company's efforts more accurately and systematically. To do so, they have partnered with separate data providers to develop their own monitoring tools. Such efforts, which would have been hard without voluntary disclosure of information by companies, help build up investors' monitoring arsenal, a necessary element for the success of any disclosure regime.

The impetus for greater disclosure has also been transformative in other areas of social concern, such as diversity metrics in the workplace through the voluntary release of EEO-1 reports. Companies with over 100 employees must report their workforces' gender, racial, and ethnic diversity across all levels of seniority to the U.S. Equal Employment Opportunity Commission (EEOC).[163] Companies do not need to make these reports public, and before Black Lives Matter, only 6.3% of companies on the Russell 1000 Index did so.[164] But in the last few years, institutional investors have joined calls to publicly disclose that data, and the New York City Comptroller threatened to bring shareholder

[160] On how net-zero targets help improve stakeholder oversight and accountability, *see* Thomas Hale et al., *Assessing the rapidly-emerging landscape of net zero targets*, 22 CLIMATE POL'Y 18, 19 (2021); Albert C. Lin, *Making Net Zero Matter*, WASH. & LEE L. REV. 22-38 (Forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3921225.

[161] Benjamin Colton, Michael Younis & Devika Kaul, *Climate Stewardship,* HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 26, 2021), https://corpgov.law.harvard.edu/2021/10/26/climate-stewardship/.

[162] *About Climate Action* 100+, CLIMATE ACTION 100+, https://www.climateaction100.org/about/ (last visited Feb. 7, 2022).

[163] Dieter Holger, *Companies Make EEOC Diversity Disclosures Public Amid Investor Pressure*, WALL ST. J. (Sept. 1, 2021), https://www.wsj.com/articles/companies-make-eeoc-diversity-disclosures-public-amid-investor-pressure-11630490400.

[164] Kavya Vaghul, *A Small Fraction of Corporations Share Diversity Data, but Disclosure is Rapidly on the Rise*, JUST CAPITAL (Jan. 19, 2021), https://justcapital.com/news/a-small-fraction-of-corporations-share-diversity-data-but-disclosure-is-rapidly-on-the-rise/.

proposals to put pressure on managers.[165] By August 2021, 78 companies in the S&P 100 Index agreed to voluntarily disclose EEO-1 data.[166]

Investors and stakeholders argue that publishing EEO-1 data improves the transparency of managerial decisions on racial equality issues, helping investors gauge the effect of company initiatives on the ground[167] and overcome skepticism about their effectiveness.[168] EEO-1 data provides an objective, standardized metric that allows comparisons across firms and can be traced across time. Intel, which has disclosed EEO-1 data since 2002, explicitly believes that "opening ourselves up to being critiqued" and allowing stakeholders to hold them accountable has improved their decisions on workplace diversity issues.[169] Other companies that publicly release their EEO-1 express similar sentiments – transparency and accountability run together to allow stakeholders to provide meaningful engagement during company decision-making on racial equality issues.[170]

D. From Internal Controls, Gatekeepers, and Compliance to Sustainability Departments and Assurance Providers

Disclosure and transparency obligations often lead to an internal reorganization within a firm, which must make sure that the information provided accurately reflects the firm's condition and performance. Especially in securities regulation, the literature on mandatory disclosure reveals companies' incentives to provide information voluntarily and set up the

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[165] Saijel Kishan, *BlackRock to Push Companies on Racial Diversity in 2021*, BLOOMBERG (*last updated* Dec. 10, 2020), https://www.bloomberg.com/news/articles/2020-12-10/blackrock-plans-to-push-companies-on-racial-diversity-in-2021?sref=TEalMtQ2; Theo Francis, Inti Pacheco & Thomas Gryta, *Big Companies Disclose Details on Gender, Race in Workforces*, Wall St. J. (*last updated* Mar. 1, 2021), https://www.wsj.com/articles/big-companies-disclose-details-on-gender-race-in-workforces-11614594601; BLACKROCK, ENHANCING DIVERSITY DISCLOSURES (2021), https://www.blackrock.com/corporate/literature/continuous-disclosure-and-important-information/blk-eeo1-data-disclosure.pdf.

[166] Holger, *supra* note 163.

[167] *Id* ("You already have the data, you're already tracking it, so now we want to see it so that we can actually assess for ourselves what the company's journey is," said Gwen Le Berre, director of responsible investing at Parametric Portfolio Associates LLC. "The only thing we are asking for is a higher level of transparency.").

[168] *Id* ("Ms. Le Berre of money manager Parametric said some companies are worried that disclosing EEO-1 data would make them look bad. But she said transparency can help win over investors.").

[169] *Id* ("'Disclosing information can be an intimidating process,' said Dawn Jones, the chip maker's diversity chief. 'We open ourselves up to being critiqued.' But Ms. Jones said public disclosure created accountability.").

[170] Francis, Pacheco & Gryta, *supra* note 165 ("'The widening disclosures help add substance to pledges by many executives last year to give priority to diversity,' said Sheri Wyatt, a PwC partner who advises companies on environmental, social and corporate-governance issues and helped compile the company's inaugural diversity report last fall. 'Transparency leads to greater accountability,' Ms. Wyatt said.").

internal mechanisms necessary to collect it.[171] The accuracy of the information released, as well as the regularity of these releases, helps portray the company's condition as clearly as possible stakeholders, thus assisting in their deliberations and earning managers the trust of stakeholders over time.

In addition to improving disclosure accuracy, regulators hope that this internal reorganization will also push executives to clean up their act, put an end to dubious practices, and avoid committing others in the future.[172] According to an oft-repeated mantra in securities law, "sunlight is the best disinfectant."[173] Of course, it is rarely that simple. The conflicts of interest surrounding the release of this information are well established, having given rise to a regulatory framework that sets specific and high-quality audit standards, safeguards the independence of the internal controls department, establishes protection for whistleblowers, and provides access to board committees.[174] A key pillar of this regulatory framework are its external gatekeepers, such as audit firms, lawyers, and investment banks, which conduct due diligence over the information disclosed and confirm its accuracy, thus helping reduce the informational asymmetries with shareholders and regulators.[175] Enforcement authorities have also motivated companies to create compliance departments that streamline internal monitoring and collect evidence that can help establish violations of the law.[176]

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[171] *See* Daniel Bias et al., *The reorganization of knowledge when firms go public* 2 (Draft Working Paper), https://jfs.posch.org/wp-content/uploads/2021/12/Reorganization_IPOs.pdf (discussing how firms in Germany internally reorganize after going public to satisfy securities regulation and compliance requirements); George S. Georgiev, *Too Big to Disclose: Firm Size and Materiality Blindspots in Securities Regulation*, 64 UCLA L. REV. 602. 646-48 (2017)(discussing the benefits to internal corporate governance from securities disclosure).

[172] *See* Lucian Arye Bebchuk & Christine Jolls, *Managerial Value Diversion and Shareholder Wealth*, 15 J.L. ECON. & ORG. 487 (1999); Georgiev, *supra* note 171, at 646-67; Paul G. Mahoney, *Mandatory Disclosure as a Solution to Agency Problems*, 62 U. CHI. L. REV. 1047, 1048 (1995).

[173] The phrase was originally said by future Justice Louis Brandeis shortly before his ascension to the Supreme Court. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914). The term has subsequently been adopted as an organizing mantra in securities regulation. *See, e.g.*, Thomas Lee Hazen, *Identifying the Duty Prohibiting Outsider Trading on Material Nonpublic Information*, 61 HASTINGS L.J. 881, 882 (2010)("[T]he securities laws are based on the premise that sunlight is the best disinfectant."); Adam C. Pritchard, *The SEC at 70: Time for Retirement?*, 80 NOTRE DAME L. REV. 1073, 1087 (2005)("Justice Louis Brandeis's oft-quoted phrase that 'sunlight...is the best disinfectant' provides a succinct summary of the philosophy behind disclosure. [internal citations omitted]).

[174] *See* Leslie Boni & Kent L. Womack, *Wall Street Research: Will New Rules Change Its Usefulness?*, 59 FIN. ANAL. J. 25, 29 (2003)(discussing how securities rules likely reduced conflicts of interest); Usha Rodrigues & Mike Stegemoller, *Placebo Ethics*, 96 VA. L. REV. 1, 44-45 (2010)(discussing conflicts of interest in securities disclosure).

[175] On the role of external gatekeepers in securities regulation, *see* Andrew Tuch, *Multiple Gatekeepers*, 96 VA. L. REV. 101, 110-14 (2010). *See also generally* Stephen Choi, *Market Lessons for Gatekeepers*, 92 NW. U. L. REV. 916 (1998).

[176] *See* Stavros Gadinis & Amelia Miazad, *The Hidden Power of Compliance*, 103 MINN. L. REV. 2135, 2139 (2019)(discussing the explosion of compliance departments in firms over the past decade); Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2077-78 (2016)(discussing internal corporate reorganization resulting from growing

A similar evolution is unfolding within companies that have decided to bolster their internal operations to better support ESG disclosures that are accurate and trustworthy.[177] Companies are building up sustainability and ethics departments designed to consolidate management of stakeholder-oriented initiatives under one roof, gather information, and promote uniform implementation across the whole corporate group.[178] Worried that company departments fail to adopt consistent metrics and that they may engage in parallel initiatives, sustainability offices are seeking to establish company-wide policies that rein-in the do-good instincts and idiosyncratic priorities of isolated executives. Moreover, as investors are inquiring about progress from year to year, accurate information and measurement helps management establish a narrative. Thus, sustainability departments help align company practices with management's priorities and improve the quality of information and deliberation about these priorities with stakeholders, thus advancing its moral legitimacy. By enhancing shareholders' and stakeholders' reliance on the information they provide and the initiatives they undertake, sustainability departments also deepen the company's sociological legitimacy.

These considerations motivated the wide adoption of the framework proposed by the Task Force on Climate-related Financial Disclosures ("TCFD")[179] which was put forward by the Financial Stability Board, a G-20-backed international body of central bank heads, financial regulators, and treasury appointees. The TCFD framework focuses on issues such as governance and board oversight, internal controls for identifying climate-related risks, strategy for assessing the information, and metrics and targets.[180] By underlining the importance of internal corporate functions, the TCFD framework embraces procedural legitimacy, seeking to ensure investors that companies will achieve better outcomes if they follow the right process.[181] To maximize its sociological legitimacy among both firms and investors, the TCFD relied heavily on bureaucratic expertise, and enlisted as heads former regulators with a reputation of unbiased leadership and mastery of industry minutiae, like Mike Carney, former head of the Bank of England, and Mary Shapiro, former SEC Chair.[182] The SEC's recent climate disclosure proposal,

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compliance requirements); Veronica Root Martinez, *Complex Compliance Investigations*, 120 COLUM. L. REV. 249, 257-66 (2020)(discussing the role and function of compliance within corporate governance).

[177] *See* Gadinis & Miazad, *supra* note 82, at 1429-30 (discussing corporate disclosure of stakeholder initiatives in sustainability reports); P.M. Vasudev, *The Stakeholder Principle, Corporate Governance, and Theory: Evidence from the Field and the Path Onward*, 41 HOFSTRA L. REV. 448-50 (2012)(same). *See also* Virginia Harper-Ho, *Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide*, 36 J. CORP. L. 59, 91 (2010).

[178] *See* Gadinis & Miazad, *supra* note 82, at 1422-26 (discussing that firms are rapidly expanding their staffing of sustainability departments).

[179] Colton, Younis & Kaul, *supra* note 161.

[180] *Id*.

[181] *TCFD Recommendations*, TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES OVERVIEW, https://www.fsb-tcfd.org/recommendations/ (last visited Feb. 7, 2022).

[182] *Id*.

as well as similar rules put in place by policymakers around the world, are leveraging the TCFD framework.[183]

Companies issuing sustainability reports are increasingly recruiting external auditors to provide assurance that they are reporting information accurately.[184] Sometimes, these external providers help companies understand what type of information they need to collect and identify appropriate measures and standards. By enhancing the reporting capacity of their clients, assurance provides help them produce more informative disclosures, thus assisting their moral legitimacy. External auditors also address the information asymmetries between the company and its shareholders and stakeholders, which are stark given the uncertainty enveloping sustainability metrics. Having company disclosures validated by highly specialized outside experts, or by audit firms known for high-quality audits, helps reduce the information gap and reassures investors that company reports reflect actual achievements, rather company public relations. Thus, the involvement of external auditors in developing corporate sustainability reports also builds the disclosures' sociological legitimacy with corporate stakeholders.

E. From Government Technocrats to Private Experts

Building expertise within government has been traditionally evoked as a key driver for creating the administrative state.[185] Rational analysis of policy can help achieve the best solutions to social problems, away from the ebb and flow of popular ideas.[186] Moreover, generalist politicians often have trouble understanding the technicalities of regulatory issues, which requires expert guidance. Certain regulatory fields can become so technical that politicians and judges cannot guide regulatory policy to their preferred directions.[187] Expertise also helps identify areas of concern, construct meaningful measures and thresholds, and propose targeted regulatory solutions. From capital adequacy

[183] https://www.fsb.org/2021/10/2021-status-report-task-force-on-climate-related-financial-disclosures/ , https://www.sec.gov/news/statement/lee-climate-disclosure-20220321.

[184] WBCSD, *Reporting Matters - Six years on: the state of play* 12 (2018)(finding 78% of their 158 member companies have some form of external assurance of their sustainability reports), https://www.wbcsd.org/contentwbc/download/5778/76990/1.

[185] For expertise-based justifications for the administrative state, *see* ELIZABETH FISHER & SIDNEY A. SHAPIRO, ADMINISTRATIVE COMPETENCE: REIMAGINING ADMINISTRATIVE LAW 280 (2020); Landis, *supra* note 114, at 23-24; Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 157-62 (2003).

[186] *See* Landis, *supra* note 114, at 142-43; Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 90 n.34 (1994).

[187] *See generally* Jeffrey S. Banks & Barry R. Weingast, *The Political Control of Bureaucracies under Asymmetric Information*, 36 AM. J. POL. SCI. 509 (1992). *See also* McCubbins, Noll & Weingast, *supra* note 154, at 434-45; Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias In Agency Decisionmaking: Lessons from* Chevron *and* Mistretta, 57 U. CHI. L. REV. 481, 516 (1990)("But when it comes to agency decisionmaking procedures, the need for a generalist's approving oversight is not nearly so clear.").

standards to broadcast and internet regulation, agencies have devised and adopted comprehensive and technical frameworks to further their policy goals.

Just like generalist politicians, many business executives lack the technical background necessary to understand many social issues, risking missteps as they make decisions on these issues.[188] Enlisting experts that can shed light on the problem and potential solutions can help companies climb out of such quagmires. In some social issues, experts can offer perspectives that managers and directors have failed to grasp, as is often the case with workplace issues. In other areas, experts can bring their insights to propose new approaches or solutions, such as suggesting more environmentally friendly production methods and materials.

For these reasons, experts can help companies achieve better decisions on complex social issues, boosting their moral legitimacy. Well-researched and thoughtful policies are more likely to be effective, helping the company improve social welfare. Moreover, data about the company's performance toward its social goals can help with decision-making efficiency. The social legitimacy that expertise can confer is just as important. When taking a stance on social issues, managers risk alienating those that harbor opposing views, and appear driven by their personal agendas. By grounding their choices on expert proposals, managers can alleviate such fears, moving away from personal convictions and toward a debate about technical analysis.

Experts can also help illustrate that companies are making actual progress towards their social goals by tracking specific measures of performance. Fighting climate change or improving workplace relations can sound lofty until a plan comes along that breaks it down into company initiatives with specific goals and sets performance targets. By adopting such plans, tracking their performance, and disclosing their progress, companies can help show their commitment to the policy goal and the results these efforts. Thus, they can gain credit for their contributions and fight back against concerns that their actions do not match their public pronouncements, or that they were quick to make empty promises.

One of the most illustrative utilizations of outside expertise to help companies understand and overcome a legitimacy crisis is the increasing practice of civil rights audits. Civil rights audits are typically conducted by third parties with respected professional credentials who systemically analyze the company to determine whether its structure, decision-making, policies, and products discriminate or have a discriminatory effect on groups historically subject to discrimination. The audit involves multiple forms of analysis, including interviews with senior executives, employees, and external

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[188] *See* Lawrence A. Cunningham, *Rediscovering Board Expertise: Legal Implications of the Empirical Literature*, 77 U. CIN. L. REV. 465, 466 (2008)(discussing how focus on the monitoring board resulted in little attention being paid to the specific expertise of directors); Robert Eli Rosen, *Risk Management and Organizational Governance: The Case of Enron*, 35 CONN. L. REV. 1157, 1175 (2003). ("…[C]orporate problems are 'enhanced when board members in a complex industry are generalists without any connection to the details of particular lines of business.'" [internal citations omitted]).

organizations affected by the corporation in question.[189] Airbnb conducted the first civil rights audit in 2016 and the effort quickly expanded to other corporations after concerted advocacy from stakeholders, including civil rights organizations and members of Congress.[190] Recently, Lauren Murphy, a former director at the ACLU who conducted the Facebook civil rights audit, compiled a widely-endorsed best practices guide, to begin the process of standardizing the civil rights audit process.[191]

For stakeholders, these audits enhance management transparency and accountability by providing the basis for more substantive dialogues with management on how to improve the company. According to Trillium Asset Management, a proponent of civil rights audits, if "management is truly committed to make racial justice a critical element of its operations then in practice it can and should treat it like any other operations issue and audit it as such."[192] Glass Lewis, the proxy advisory firm, generally favors civil rights audits in its recommendations, recognizing that they help customer-facing companies grapple with issues of racial equity and avoid high-profile controversies.[193] These stakeholders want to ensure their management's public statements of support are not illusory claims of solidarity, thus safeguarding the company's sociological legitimacy.[194] The audits allow stakeholders to engage in ongoing and iterative deliberation with corporate managers to improve corporate decisions around racial justice issues so as to increase the legitimacy of their decisions.[195]

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[189] Naomi Nix, *CEOs, Boards Are Urged to Embrace Civil Rights Audits (Correct)*, BLOOMBERG L. (Oct. 21, 2021), https://news.bloomberglaw.com/esg/ceos-boards-are-urged-to-embrace-corporate-civil-rights-audits.

[190] LAURA W. MURPHY ET. AL., *FACEBOOK'S CIVIL RIGHTS AUDIT—FINAL REPORT (July 8, 2020)*https://about.fb.com/wp-content/uploads/2020/07/Civil-Rights-Audit-Final-Report.pdf.

[191] LAURA W. MURPHY, *CIVIL RIGHTS AUDIT* (2021), http://www.civilrightsdocs.info/pdf/reports/Civil-Rights-Audit-Report-2021.pdf.

[192] Susan Baker, Director of Shareholder Advocacy, Trillium Asset Management, *Racial Equity Audits: A Critical Tool for Shareholders, SOC. INV. GROUP* (April 13, 2021), https://www.socinvestmentgroup.com/critical-tool-for-shareholders.

[193] Saijel Kishan, *Shareholder-Advisory Firms Take Opposing Views on Racial Audits*, BLOOMBERG L. (Apr. 17, 2021), https://news.bloomberglaw.com/esg/shareholder-advisory-firms-take-opposing-views-on-racial-audits?context=search&index=5.

[194] *Thomas P. DiNapoli*, *Remarks by New York State Comptroller Thomas P. DiNapoli at SEIU Capital Stewardship Program and CtW Investment Group Webinar Entitled "Racial Equity Audits: A Critical Tool for Shareholders," N.Y. ST. COMPTROLLER (Apr. 13, 2021),* https://nyscomptroller.medium.com/remarks-by-new-york-state-comptroller-thomas-p-397b006d1d5c.

[195] Cyrus Mehri, Founding Partner of Mehri & Skalet, PLLC, *Racial Equity Audits: A Critical Tool for Shareholders, SOC. INV. GROUP* (April 13, 2021),https://www.socinvestmentgroup.com/critical-tool-for-shareholders

F. From Ad hoc Determinations to Standardization

The choice between adjudication and rulemaking is of critical importance for administrative agencies.[196] Rulemakings enunciate principles of policy that embrace the agency's goals and apply uniformly against all regulated entities, while adjudications seek to impose discipline and resolve policy questions arising from the specific facts. From industry's perspective, rulemakings provide certainty and predictability, which allows companies to adjust their practices accordingly. Moreover, rulemakings tend to level the playing field among competitors, since every company is subject to the same set of rules.[197] On the other hand, adjudications offer the opportunity to examine cases closely and tailoring solutions to facts.[198] Either policymaking form may suffer from many substantive misjudgments, biases, and other failings.[199] Rather than revisiting the literature on the choice between rulemaking and adjudication, our goal here is to underline a simple reality: rulemakings bring clarity to regulatory choices *at a general policy level* and assuage concerns about competition, while adjudications require parties to invest resources in resolving the issue *ad hoc*.

Similar dynamics have dogged corporate adoption of ESG in the last decade. Many market actors, from activist NGOs to large investors such as Blackrock and State Street, urged companies to think harder about their social mission and develop ESG initiatives. Initially, these pressures did not coalesce around a single set of specific principles, but were expressed in vague terms that left lots of leeway to management.[200] Since every company has a different set of stakeholders, a distinct operating structure, and its own needs, most market players were reluctant to advocate for one-size-fits-all approaches and asked

[196] The optimal balance between agency use of rulemaking and adjudications for policymaking is a perennial topic in administrative law scholarship. *See generally, e.g.*, Richard K. Berg, *Re-Examining Policy Procedures: The Choice Between Rulemaking and Adjudications*, 38 ADMIN. L. REV. 149 (1986); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004); Jeffrey J. Rachlinski, *Rulemaking versus Adjudication: A Psychological Perspective*, 32 FLA. ST. U. L. REV. 529 (2005); David L. Shapiro, *The Choice of Rulemaking or Adjudication in The Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

[197] For discussions of the benefits of rulemaking, *see* Warren E. Baker, *Policy by Rule or Ad Hoc Approach - Which Should It Be?*, 22 L. & CONTEMP. PROBS. 658,671 (1957); Shapiro, *supra* note 196, at 972.

[198] For discussions of the benefits of adjudications, *see* Peter L. Strauss, *Rules, Adjudication, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law*, 74 COLUM. L. REV. 1231, 1253-54 (1974); Robert G. Vaughn, *The Opinions of the Merit Systems Protection Board: A Study in Administrative Adjudication*, 34 ADMIN. L. REV. 25, 53 (1982)

[199] *See* Rachlinski, *supra* note 196, at 543-50 (discussing the various potential cognitive shortcomings that can manifest in rulemakings and adjudications).

[200] For example, the UN's Principles for Responsible Investment focuses on six vague and aspirational principles for signatories to incorporate into their decision-making. Principles for Responsible Investing, *What are the Principles for Responsible Investing?*, https://www.unpri.org/about-us/what-are-the-principles-for-responsible-investment.

management to take leadership.[201] Large institutional investors showed preference for *ad hoc* determinations of ESG initiatives and opted to use non-public engagements with management to promote their ESG agenda.[202]

For all its flexibility, the initial ad hoc approach to ESG left many gaps. Managers were often unclear about the deliverables, uncertain about metrics, and concerned that their efforts would be deemed inadequate or biased.[203] Amidst confusion about ESG features and growing demand for ESG investment products, many companies labeled their products and processes as ESG-friendly based on assessments that worked best for their purposes.[204] Soon, policymakers and market players were concerned that companies were attaching the ESG moniker indiscriminately.

Gradually, investors started switching their support in favor of more standardization. For example, Blackrock and State Street have publicly endorsed the SASB standards, which help companies assess whether the environmental and social risks in their production and operation are

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201 *See* Marisa Fernandez, *By the numbers: The rise of "belief-driven" buyers*, AXIOS (Oct. 28, 2018), https://www.axios.com/belief-driven-activist-brands-nike-kaepernick-edelman-e4680a8e-7aa5-43e1-84de-2874929c868e.html (finding 64% of the public want CEOs to lead on climate change); Jennifer Thompson, *Fears mount over mis-selling of ESG-labelled products*, FIN. TIMES (Jan. 20, 2019), https://www.ft.com/content/2d3f7683-65a6-3171-8cbb-66ff5ab34405; U.S. Sec. & Exch. Comm'n Inv. Advisory Comm., *Recommendation of the Investor Advisory Committee Human Capital Management Disclosure* 3 (March 28, 2019)(recommending against "one-size-fits-all" mandatory disclosure requirements and encouraging standards that allow manager reporting flexibility).

202 *See* Jonathan Bailey, Bryce Klempner & Josh Zoffer, *Sustaining Sustainability: What institutional investors should do next in ESG*, MCKINSEY & CO. (June 22, 2016), https://www.mckinsey.com/industries/private-equity-and-principal-investors/our-insights/sustaining-sustainability-what-institutional-investors-should-do-next-on-esg ("Investors have a real opportunity to move beyond ad-hoc collaboration…");MATT ORSAGH ET AL., ESG INTEGRATION IN THE AMERICAS: MARKETS, PRACTICES, AND DATA 66 (2018), https://www.cfainstitute.org/-/media/documents/survey/esg-integration-in-the-americas.ashx ("It seems that for the most part the use of ESG research in analysis is done on an ad hoc basis in the United States…").

203 *See* Sara Bernow et al., *More than values: The value-based sustainability reporting that investors want*, MCKINSEY & CO. (Aug. 7, 2019), https://www.mckinsey.com/business-functions/sustainability/our-insights/more-than-values-the-value-based-sustainability-reporting-that-investors-want (discussing investor frustration with the sustainability reports produced by companies); Simon MacMahon, *The Challenge of Rating ESG Performance*, HARV. BUS. REV. (2020), https://hbr.org/2020/09/the-challenge-of-rating-esg-performance (discussing the difficulty of rating corporate sustainability due, in part, to differing information and engagement from corporate management); Michael O'Leary & Warren Valdmanis, *How the 137 million Americans who own stock can force climate action*, VOX (*last updated* Oct. 15, 2020), https://www.vox.com/21509913/climate-change-bp-microsoft-investors-shareholders-accountability (discussing how the lack of sustainability standards makes it difficult for investors to monitor sustainability efforts across companies)

204 *See* Meredith Jones, *For ESG investors, the newest challenge is separating fact from 'greenwashing'*, MARKETWATCH (Oct. 15, 2019), https://www.marketwatch.com/story/for-esg-investors-the-newest-challenge-is-separating-fact-from-greenwashing-2019-10-15; Shivaram Rajgopal, *What's Behind the Label: Quality, ESG, Value, Growth…?*, FORBES (June 10, 2020), https://www.forbes.com/sites/shivaramrajgopal/2020/06/10/whats-behind-the-label-quality-esg-value-growth/?sh=378942ef6922.

material.[205] For example, the standards direct an apparel company to report what percentage of its supplier facilities comply with wastewater discharge permits or have been audited in compliance with a labor code of conduct. SASB is a non-profit comprised of industry experts modeled on the International Accounting Standards Board ("IASB"), an industry body that issues accounting standards followed by countries around the world.[206] Like IASB, SASB emphasizes its governance principles, including separation between its administrative management (who oversee funding) and its standard-setting staff, to establish its legitimacy and defend against claims of industry bias, unbridled progressivism, or utopianism.[207] Its industry-based approach relies heavily on technical expertise and scientific evidence, further buttressed by an extensive public notice-and-comment process.[208]

Like rulemaking, the move toward standardization in ESG strengthens the legitimacy of companies' efforts. The resources devoted into producing, negotiating, testing, and implementing the standards offer greater comfort that chosen policy targets reflect the underlying social values given the needs of the companies implementing them. As the standards gain followings in companies around the globe, concerns about international competition grow less stark.[209] The effort to strike the right balance speaks to the moral legitimacy of the policymaking effort. Moreover, the public articulation of the standards, which makes them open to debate and improvement, sets the foundation for procedural legitimacy through ongoing deliberation. For policymakers and reformers alike, information about the standard's success or failure becomes easier to evaluate. At the same time, openness and transparency of compliance help boost the sociological legitimacy of companies' efforts. When market coalesces on a single standard, gaining external stakeholders' trust becomes more straightforward. Consumers can be assuaged more readily by benchmarking a company's performance as following standard industry practice. Regulators and governments can assess an industry-wide principle more quickly and effectively, compared to trying to second-guess divergent choices firm-by-firm.

Besides the legitimacy buildup typically arising from standardization, there are specific advantages emanating from the fact that investors generated many current ESG standards. In the past, industry self-regulation has attracted criticism for prioritizing the industry's interests over aggregate social welfare by entrenching established practices and stifling competition.[210] Yet, current ESG

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[205] *SASB Standards, Value Reporting Foundation,* https://www.sasb.org/standards/.

[206] *Id.*

[207] *Id.*

[208] *Id.*

[209] This radius excludes companies in jurisdictions that investors cannot easily reach, such as China or Russia. While this leaves important gaps, particularly with regard to climate change, it is still true that the vast majority of the largest corporations in the world can be brought under the standards' ambit.

[210] For discussions of the problems with self-regulation, *see, e.g.*, CHRISTINE PARKER, THE OPEN CORPORATION: EFFECTIVE SELF-REGULATION AND DEMOCRACY 135-167 (2002); Harper W. Boyd Jr. & Henry Claycamp, *Industrial Self-Regulation and the Public Interest*, 64 MICH. L. REV.

standards are often the handiwork of investor coalitions, like Climate 100+, or investor-backed NGOs, such as SASB, which are not tied to the interests of a specific industry and are generated by independent experts rather than company executives.[211] Companies therefore cannot influence the content of these rules as directly as in conventional self-regulatory initiatives, while the investors can use their shareholder voting power to monitor management's compliance with them, further enhancing the credibility of companies' efforts. Due to these credentials, investor-backed standards are likely to attract greater acceptance among stakeholders than ad hoc company practices. For these reasons, investor support for standardization is an uplift for the legitimacy of the standards.

G. From Enforcement to Board Accountability

The power to pursue violations of their rulemakings and have sanctions ordered against transgressing corporations affords administrative agencies with a weighty lever against industry.[212] At present, no single agency has the mandate to oversee companies' sustainability efforts, but given the broad set of issues that involve environmental and social concerns, multiple agencies may have jurisdiction over different aspects of sustainability initiatives, ranging from the EPA to the Department of Labor.[213] Importantly for public companies, the SEC has proposed mandating climate-related disclosures, which signals their intention to monitor compliance and potentially bring enforcement actions.[214] Companies voluntarily issuing sustainability reports are already subject to litigation risks from shareholders, either for stock price changes due to faulty disclosure under securities law, or for violation of fiduciary duties if their

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1239, 1248-52 (1966); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 323 (2005); Ian Maitland, *The Limits of Business Self-regulation*, 27 CAL. MGMT. REV. 132 (1985).

[211] One prime example is SASB, which does not have any representatives from industry on their Standards Board. *See* SASB, *SASB Standards Board*, https://www.sasb.org/about/governance/standards-board/.

[212] On administrative enforcement powers, *see* JOEL MINTZ, ENFORCEMENT AT THE EPA 9-20 (2012)(describing the EPA's enforcement powers); Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1042-46 (2013)(describing general agency enforcement powers); David Weil, *Crafting a Progressive Workplace Regulatory Policy: Why Enforcement Matters*, 28 Comp. LAB. L. & POL'Y J. 125, 145 (2007)(describing the Department of Labor's enforcement powers).

[213] *See* Susan Ariel Anderson, *"Minding Our Business": What the United States Government has done and can do to Ensure that U.S. Multinationals Act Responsibly in Foreign Markets*, 59 J. BUS. ETHICS 175, 178-187 (2005)(discussing the various US agencies with regulatory jurisdiction regarding corporate sustainability); Fisch, *supra* note 157, at 934-41 (same); Virginia Harper Ho, *Nonfinancial Risk Disclosure and the Costs of Private Ordering*, 55 AM. BUS. L.J. 407, 414-30 (2012)(same).

[214] U.S. Securities and Exchange Commission, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors (March 21, 2022), https://www.sec.gov/news/press-release/2022-46.

conduct fails the good faith standard.[215] However, shareholders' lawsuits based on ESG disclosures and statements have so far failed to elicit support from federal and state courts, in part because of the high threshold required to hold boards accountable.[216] Overall, public enforcement tools related to environmental and social issues are currently limited.

To counter this lack of public might, investors and stakeholders have turned to substitute mechanisms of pressure. Activist shareholders have brought scores of ESG related proposals at general meetings with considerable success.[217] Influential shareholder advisory firms are increasingly supporting ESG proposals deemed worthwhile.[218] When this pressure fails to yield results, and investors are convinced that changes cannot happen without management changes, they have launched campaigns against directors and placed their candidates on the board.[219] Ultimately, investors are seeking to hold boards accountable on ESG matters by whatever means are available to them.

Investor-driven initiatives against corporate management and directors was particularly strong after #MeToo, as various investor groups linked a lack of board diversity to creating corporate cultures where sexual harassment and discrimination was tolerated.[220] State Street, for example, first launched their

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[215] Marc S. Gerber, Caroline S. Kim & Jeongu Gim, *Voluntary Environmental and Social Disclosure*, HARV. L. F. CORP. GOV. (July 21, 2021), https://corpgov.law.harvard.edu/2021/07/27/voluntary-environmental-and-social-disclosures/ ("As companies face growing demands for increased voluntary and mandatory E&S disclosures, companies also face increasing risks of litigation, as well as scrutiny from regulators, investors, and other third parties, over the accuracy and reliability of those E&S disclosures."). *Cf.* Karen K. Nelson & A.C. Pritchard, *Carrot or Stick? The Shift from Voluntary to Mandatory Disclosure of Risk Factors*, 13 J. EMPIRICAL LEGAL STUD. 266, 287–95 (2016)(finding firms with high litigation risk increase voluntary disclosures to attempt to mitigate their risk).

[216] *See generally* Sara K. Orr & Bart J. Kempf, *Voluntary Sustainability Disclosure and Emerging Litigation*, 19 CLIMATE CHANGE, SUSTAINABLE DEV., AND ECOSYSTEMS COMMITTEE NEWSL. (2015)(discussing recent shareholder cases brought based on corporate voluntary sustainability disclosures); Jason Meltzer et al., *Corporate Social Responsibility Statements—Recent Litigation and Avoiding Pitfalls*, GIBSON DUNN (Mar. 9, 2017), https://www.gibsondunn.com/corporate-social-responsibility-statements-recent-litigation-and-avoiding-pitfalls/ (same); Caitlin M. Ajax & Diane Strauss, *Corporate Sustainability Disclosures in American Case Law: Purposeful or Mere "Puffery"?*, 45 ECOLOGY L.J. 703 (2019).

[217] In 2021, shareholders brought 287 Governance proposals, 239 Social proposals, and 112 Environmental proposals. Elizabeth Ising et al., *Shareholder Proposal Developments During the 2021 Proxy Season*, GIBSON DUNN (Aug. 19, 2021), https://www.gibsondunn.com/wp-content/uploads/2021/08/shareholder-proposal-developments-during-the-2021-proxy-season.pdf.

[218] Christopher S. Auguste et al., *ESG Voting Policy Updates for the 2022 Proxy Season*, KRAMER LEVIN (Jan. 28, 2022), https://www.kramerlevin.com/en/perspectives-search/esg-voting-policy-updates-for-the-2022-proxy-season.html (discussing ISS's and Glass Lewis's recent changes to their recommendation frameworks to increase their support of ESG proposals).

[219] Shirley Westcott, *2021 Proxy Season Review*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 5, 2021), https://corpgov.law.harvard.edu/2021/08/05/2021-proxy-season-review/ (discussing the Exxon Mobile and Engine 1 proxy fight in 2021 resulting from management failure to implement ESG measures).

[220] For in-depth discussion, *see generally* Amelia Miazad, *Sex, Power, and Corporate Governance*, 54 U.C. DAVIS L. REV. 1913 (2021).

"Fearless Girl" campaign in 2017 by stating they would start to target all-male boards under the belief that a lack of board diversity resulted in unethical behavior that hurt long-term firm value.[221] When this move failed to yield the desired results, State Street doubled down and announced in 2018 that they would soon vote against all members of all-male boards.[222] Other asset managers, such as BlackRock and Vanguard, joined the push for board diversity and leading proxy advisors, including ISS and Glass Lewis, began to use board gender diversity in their vote recommendations.[223] Meanwhile, other investors, such as California pension funds, came together to specifically target directors as responsible for the billions of dollars lost by investors as a result of the various #MeToo scandals at firms.[224] When #MeToo scandals at specific firms caused large-scale stock price declines, some investors instead chose to file derivative suits and alleged the directors breached their fiduciary duties by not properly monitoring sexual harassment at the firm.[225]

Board accountability is a touchstone for moral and social legitimacy within the hierarchical edifice of corporate law. As the company's decisionmaker, the board sits at the epicenter of the effort to introduce stakeholder considerations into the corporate calculus. By involving managers and directors in environmental and social issues, stakeholder governance ensures that these considerations are part of the board's deliberations to improve their decisions on issues that affect the stakeholders. A board active in environmental and social issues, undertaking or supporting initiatives that make a clear mark in stakeholders' minds, can also better convince stakeholders that their interests are appropriately represented in its decision-making. Thus, board accountability can also widen the company's sociological legitimacy.

IV. A NEW CORPORATE GOVERNANCE BLUEPRINT: THE PROMISES OF LEGITIMACY-ENHANCING TOOLS

Here, we argue that corporate governance should utilize the lessons from administrative law outlined the previous Part and adjust them into a new blueprint tailored to business needs. As discussed above, some companies have already begun taking steps in this direction, showing that this is a realistic

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[221] *See Fearless Girl*, STATE ST. GLOBAL ADVISORS (last visited July 26, 2022), https://www.ssga.com/us/en/intermediary/ic/capabilities/esg/asset-stewardship/fearless-girl

[222] Andrea Vittorio & Jeff Green, *State Street to Vote Against More Directors at Male-Only Boards*, BLOOMBERG (Sept. 27, 2018), https://www.bloomberg.com/news/articles/2018-09-27/state-street-to-vote-againstmore-directors-at-male-only-boards

[223] *See* Bradley Keoun, *All-Male Boards Could Face New Pressure From Shareholder Adviser ISS*, THE STREET (Sept. 19, 2018), https://www.thestreet.com/investing/allmale-boards-could-face-new-pressure-from-shareholder-adviser-iss-14716455; *2018 Proxy Season Preview – United States*, GLASS LEWIS (2018), https://www.glasslewis.com/wp-content/uploads/2018/03/2018-Proxy-Season-Preview-US.pdf

[224] Bloomberg, *California pension trustees call for disclosures of #MeToo costs*, L.A. TIMES (Jan. 14, 2019), https://www.latimes.com/business/la-fi-calpers-calstrsmetoo-20190114-story.html

[225] *See* Hemel & Lund, *supra* note 144.

proposal that management can implement in a cost-effective manner without alarming markets. In contrast, when companies fail to buttress their legitimacy ahead of their business choices on controversial social issues, the ensuing legitimacy crisis is harder to overcome, as management's moral standing and on-the-ground determinations are already in doubt. By adopting our suggestions in a systematic and ongoing manner, companies will be better placed to ground their decisions and anticipate emerging concerns by stakeholders that otherwise appear unpredictable to uninformed management. The tools we propose are mutually reinforcing, as they address different aspects of moral and sociological legitimacy, both from a substantive and from a procedural perspective. Thus, they can bolster management's legitimacy, credibility, and trustworthiness and prevent crises from exploding.

A. Corporate Managers Are Already Embracing Legitimacy-Enhancing Mechanisms

Corporations are increasingly faced with the impact of their business choices on different stakeholder groups inside and outside the firm. When addressing social issues enmeshed in business decisions, corporate managers find themselves in uncharted waters. In the short term,[226] the wrong decisions on social issues can end up being costly for businesses in the form of employee walkouts, consumer boycotts, reduced access to investor funds, and shareholder suits. More broadly, repeatedly legitimacy challenges may result in the company's business model coming under question.

The previous Part demonstrated that corporate managers are already adopting some legitimacy-enhancing tools into their decision-making. This descriptive fact is important in two respects. First, even if corporate law scholarship has not yet embraced the logic of legitimacy,[227] corporate managers are acutely aware of creating potential stakeholder-driven legitimacy challenges and are developing ad hoc mechanisms to mitigate them. It is time for corporate law theory to catch up to these changes on the ground. Second, the fact that corporate managers are already utilizing some of our legitimacy-enhancing tools demonstrates that our suggestions are not fanciful ideas by legal theorists, but real-world solutions that companies can implement without scaring away shareholders. Indeed, in many situations, it is investors themselves who are clamoring for managers to implement some mechanisms from our proposed toolkit.[228] Further, other firms have chosen to adopt some legitimacy-enhancing tools proactively in order to build credibility with stakeholders.[229] Thus, our

[226] *See supra* Part III.
[227] *See supra* notes 60, 62 for some limited exceptions of corporate law articles that discuss the concept of legitimacy.
[228] This situation was evident in the 2021 shareholder proxy season, where investors clamored for firms to release EEO-1 reports and conduct civil rights audits at record levels to hold managers accountable on corporate diversity and civil rights issues.
[229] For example, *see* Intel's discussion of why they adopted voluntary EEO-1 disclosures in Section III.C.

proposals fall in line with shareholder expectations and stakeholder predispositions, allowing managers to gain welcome feedback they would have otherwise had difficulty obtaining from stakeholder groups.

B. Regaining Legitimacy After a Challenge is an Uphill Battle

Unfortunately, many firms are adopting legitimacy-enhancing tools reluctantly and only after suffering a legitimacy challenge. By then, however, doubts about management's standing have solidified among stakeholders and managers appear disingenuous to them. This situation can create stakeholder backlash that inflames, rather than quells, the existing storm. Stakeholder concerns of management hypocrisy have propelled many legitimacy challenges.[230] For example, when Pinterest management sought to address minority employees' serious complaints of mistreatment by creating a diversity council, it rather emboldened stakeholders to take employee complaints seriously and doubt the sincerity of the managerial response. The employee reaction soon ballooned to a consumer boycott and a shareholder lawsuit against management. Similarly, after the New York Times revealed that Google's management, aware of credible sexual harassment allegations against Andy Rubin, the creator of Android, offered him a $90 million severance package, many employees felt angered.[231] Efforts to address the moral fallout through town hall meetings and email apologies failed to calm the waters, as employees saw the executives' stance as "flimsy" and "not so accountable."[232] Soon after, 20,000 employees protested with a walkout.

In both situations, management tried to address a legitimacy crisis by adopting approaches like those we advocate: establishing direct communication with stakeholders, touting the company's credentials in public announcements, recognizing the fallout and committing to ensure it does not get repeated in the future. While welcome, these attempts often fall on deaf ears because by this point, stakeholders do not fully trust management's sincerity. For many, management's efforts look like "too little, too late." To regain trust, management must expend significant effort, time, and resources, such as by inviting outside experts for consultations, holding civil rights audits, and instituting broad-ranging reforms within the corporate hierarchy.

Even after expending these efforts, it is unclear whether a company will be able to regain its legitimacy with stakeholders after a crisis. When Uber faced an intense legitimacy crisis in 2017, with mishandled sexual harassment allegations, toxic workplace claims, and a lawsuit over stolen intellectual property for self-driving cars, shareholders demanded a management change

[230] *See supra* Part III. On the more general role of shaming in corporate law, *see generally* David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811 (2001).

[231] Daisuke Wakabayashi & Katie Benner, *How Google Protected Any Rubin the "Father of Android*", N.Y. TIMES (Oct. 25, 2018), https://www.nytimes.com/2018/10/25/technology/google-sexual-harassment-andy-rubin.html.

[232] Id.

and CEO Travis Kalanick resigned. [233] Facebook, hit by a litany of blunders and scandals of far-reaching social ramifications, is still trying unsuccessfully to regain its legitimacy with stakeholders. It struggled with how to deal with controversial politicians' posts, including some by President Trump.[234] It faced concerns about toxic Instagram photo-sharing for teenage girls and spreading misinformation about Covid vaccines.[235] Escaping from a harrowing portrait of a social network sacrificing its members' wellbeing for profitable clicks is not an easy task. Facebook took the unprecedented step of creating an Oversight Board, an internal court-like body for assessing what kind of speech would be acceptable on Facebook posts.[236] Despite its independent composition and funding, and the expertise and public nomination process for its members, opinion on the board's success remains divided. Overall, then, this is a cautionary tale: companies may have to go to extraordinary lengths to regain their lost legitimacy, and even then, results are far from assured.

C. Systematic Adoption of Legitimacy-Enhancing Tools Can Help Companies Run Better

1. *Managers should embrace these tools in a systematic way*

The examples above illustrate the complicated stakeholder ecosystem that managers must increasingly navigate. Sitting at the C-suite, it is not easy to predict how stakeholder groups will react to managerial choices, or which specific social issue will incinerate management's trustworthiness. Managers may adopt a wait-and-see approach, but they then risk fighting a losing battle if a crisis emerges. Ex post responses focus on the challenges of the past, doing precious little to address the emerging issues of the future. To avoid operating consistently with poor information regarding stakeholder concerns, management should adopt legitimacy-enhancing tools systematically, following the administrative law toolkit as a whole ex ante, rather than on an ex post piecemeal approach.

By systematically adopting a legitimacy-enhancing framework, managers broaden the range of issues that come to their attention, embrace

[233] Elizabeth Dwoskin, *Uber founder Travis Kalanick resigns as CEO amid a shareholder revolt*, WASH. POST (June 21, 2017), https://www.washingtonpost.com/business/technology/2017/06/21/cecb34bc-564e-11e7-ba90-f5875b7d1876_story.html.

[234] *See* Alex Hern, *Facebook moderators join criticism of Zuckerberg over Trump stance*, THE GUARDIAN (June 8, 2020), https://www.theguardian.com/technology/2020/jun/08/facebook-moderators-criticism-mark-zuckerberg-donald-trump.

[235] *See* Jeff Horwitz, *Facebook Says Its Rules Apply to All. Company Documents Reveal a Secret Elite That's Exempt.*, WALL. ST. J. (Sept. 13, 2021), https://www.wsj.com/articles/facebook-files-xcheck-zuckerberg-elite-rules-11631541353?mod=article_inline.

[236] Kate Klonick, *Inside The Making Of Facebook's Supreme Court*, THE NEW YORKER (Feb. 12, 2021), https://www.newyorker.com/tech/annals-of-technology/inside-the-making-of-facebooks-supreme-court.

stakeholder participation and feedback on these issues, and set in motion processes for implementing and monitoring initiatives across these areas. A systematic approach brings a variety of different concerns in the company to management attention, compared to the monopolistic focus on one problem after a crisis occurs. Moreover, through stakeholder participation mechanisms, affected parties can transmit their concern to management earlier in the decision-making process. Thus, managers can obtain better information about emerging stakeholder concerns and maintain open lines of communication with them.

Besides identifying issues that matter to stakeholders, a systematic framework helps managers convince stakeholders about their commitment to implement solutions. Through the consultation process, management can formulate governance oversight for implementing reforms, and stakeholders can more effectively monitor these reforms when the company is transparent with its plans. Thus, management and stakeholders can work together to reach a satisfactory outcome that can help prevent a future legitimacy challenge from arising in the first place. But even if a legitimacy challenge does arise, then systematically ex ante adopting these tools provides ways for management to nip the challenge in the bud. Because of their ongoing communication with management on other issues through our proposed legitimacy-enhancing framework, stakeholders have less reason to question whether management is sincere in their engagement.

Additionally, systematically adopting legitimacy-enhancing mechanisms can better prepare the company for government regulatory intervention on social issues that affect corporate stakeholders. To start, the case for regulation is often based on the fact that corporations have been unable to solve new social issues that raise legitimacy-related questions themselves.[237] This problem has prominently occurred on climate change issues, as the SEC has already proposed mandatory climate risk disclosures in response to industry being slow to resolve stakeholder challenges by voluntarily adopting climate risk disclosures.[238] The better companies can address controversial social issues by themselves, the lower the need for government intervention. Of course, companies cannot be expected to solve all social issues. But they can help illuminate the stumbling blocks, so that government intervention can build and adjust on private sector initiatives and capabilities.

[237] On when the failure of corporate private ordering justifies public regulation in corporate and securities law, *see* Donald C. Langevoort & Robert B. Thompson, *"Publicness" in Contemporary Securities Regulation After the JOBS Act*, 101 GEO. L.J. 337, 383 (2013); Hillary A. Sale & Robert B. Thompson, *Market Intermediation, Publicness, and Securities Class Actions*, 93 WASH. U. L. REV. 487, 493-94 (2015); Hillary A. Sale, *Public Governance*, 81 GEO. WASH. L. REV. 1012, 1013-14 (2013).

[238] U.S. Securities and Exchange Commission, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors (March 21, 2022), https://www.sec.gov/news/press-release/2022-46.

2. *Legitimacy-Enhancing Tools are Mutually Reinforcing*

Administrative law teaches us that our proposed tools work in a mutually reinforcing manner.[239] For example, when an agency is transparent about its decision-making process, interested parties can participate more meaningfully during rulemaking by evaluating the agency's arguments and tailoring their responses to the agency's goals and methods. Meanwhile, relying on expertise can help agencies not only with making more informed choices, but also with justifying their choices to stakeholders. Legitimacy concerns span the whole timeline of agency policymaking, from its initial proposal and passage, to monitoring and enforcement. Corporate choices face similar milestones from conception to implementation, and a systematic approach can better maintain management focus throughout.

In contrast, when managers only implement one of the tools we propose and fail to follow through with the others, they may be ineffective. For example, increased disclosure without opportunity for consultation may not allow any feedback to reach the board or for changes to be negotiated, as the literatures in both administrative and securities law have argued.[240] For that reason, disclosure of gender pay gaps has not led to a much-hoped overhaul, as firms have merely disclosed gender pay gaps without embracing additional tools for reform.[241] As a result, stakeholders are left with limited formal means to address gender pay gaps, even if they are made aware of the problem by management.[242] Faced with a lack of follow-up after disclosure, certain state governments, such as California, felt compelled to intervene with controversial gender parity statutes to address the problem.[243]

On the other hand, not all the legitimacy-enhancing tools identified above can be deployed in every possible issue. Not all issues are equally complicated or controversial, and some corporate choices may be easier to implement or monitor than others. In this respect, these tools allow for a degree of private ordering as managers can choose which combination of tools to

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[239] *See supra* note 113. *See also* Havasy, *supra* note 48, at 27-32 (arguing that procedural, relational, and substantive values must all be present in agency policymaking to ensure the legitimacy of agency decision-making).

[240] *See, e.g.*, Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 ADMIN. L. REV. 813, 830 (2000); Kevin S. Haeberle & Todd M. Henderson, *A New Market-Based Approach to Securities Law*, 85 U. CHI. L. REV. 1313, 1327-41) (2018); Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PENN. L. REV. 1, 26-30 (1991).

[241] *See generally* Morten Bennedsen et al., *Do Firms Respond to Gender Pay Gap Transparency?*, 77 J. FIN. 2051 (2022); Jack Blundell, *Wage Responses to the Gender Pay Gap Reporting Requirements* (Draft), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3584259.

[242] On the necessity of formal mechanisms of accountability to remedy gender pay gaps, *see generally* Emilio J. Castilla, *Accounting for the Gap*, 26 ORG. SCI. 311 (2015)(showing transparency must be combined with accountability measures to reduce the gender pay gap).

[243] Women on Boards, S.B. 826 (2018). Abigail Johnson Hess, California just became the first state to require women on corporate boards, CNBC (Oct. 1, 2018), https://www.cnbc.com/2018/10/01/california-law-will-require-women-on-corporate-boards.html.

adopt given their firm- and industry-specific stakeholder environment.[244] We both accept and welcome the likelihood that the systematic adoption of our mechanisms will differ on both firm-to-firm and industry-to-industry bases. Each legitimacy-enhancing tool targets a different concern, and not all concerns will be equally prominent across issues.

3. *Guidance for Managers and Stakeholders*

Our legitimacy-enhancing tools provide guidance for both corporate managers and corporate stakeholders as they negotiate making decisions regarding controversial social issues. For managers, these tools give them concrete ways to identify affected parties and seek feedback, organize their decision-making in a transparent and accountable manner, and cast as wide a net as possible to gain acceptance for their choices. These tools are helpful regardless of whether managers are in the throes of a heated legitimacy challenge, or whether they are operating proactively. Because these tools are mutually reinforcing, managers are better off following our suggested approach ex ante in a systematic manner, rather than reaching out haphazardly for some of these tools in the face of a current legitimacy challenge by stakeholders.

Stakeholders also have a lot to gain from heeding to the suggestions in this Article, as we illustrate which potential proposals might work best in discussions and negotiations with management. As we have shown, stakeholders have already pressured management to embrace some of these legitimacy-enhancing tools to resolve their legitimacy challenges and improve managerial decision-making. Our discussion can help stakeholders to assess the result of already adopted tools, as well as identify potential improvements through complementary approaches not yet adopted by stakeholders or management. Moreover, our Article brings together approaches utilized in various companies and builds the foundation for a set of best practices that, together, can move the needle on important social issues. In the long run, this information diffusion will allow for a degree of standardization to occur across firms, as stakeholders and management settle on their preferred legitimacy-enhancing tools to adopt during managerial decision-making.

C. Our Legitimacy-Enhancing Tools Should Be Attractive to Proponents of Both Shareholder Primacy and Stakeholderism

Corporate governance scholars and practitioners are at a theoretical impasse between stakeholderism and shareholder primacy. On one hand, stakeholderism proponents have long complained that current corporate law structures are inadequate to address the corporate governance challenges

[244] On the benefits of private ordering-grounded arguments in corporate governance and its criticism, *see supra* note 78.

surrounding social issues that affect diverse sets of stakeholders.[245] However, even scholars positively inclined towards stakeholderism are pessimistic about it actually informing corporate law given the corporate governance machine's focus on shareholder primacy.[246]

Meanwhile, shareholder primacy advocates are critical of contemporary stakeholderism efforts, even if they are themselves concerned with improving social welfare.[247] Many shareholder primacy advocates question whether operationalizing stakeholder perspectives in managerial decision-making is feasible.[248] These advocates also warn that allowing managers to have a roving ability to be concerned with stakeholders will increase managerial insulation and decrease managerial accountability to investors.[249]

Our proposal for corporate managers to systematically integrate legitimacy-enhancing tools into their decision-making should appeal to both stakeholderism and shareholder primacy advocates. For stakeholderists, this Article proposes concrete reforms to corporate law and governance that provides managers the tools to consider stakeholders during managerial decision-making on social issues. These tools provide mechanisms for stakeholders to have ex ante input in managerial decision-making and ex post accountability over managers. For those worried about how to reconcile stakeholderism with corporate governance institutions built to promote profit maximization,[250] our proposed toolkit provides a blueprint for a dependable negotiation framework to begin to develop concrete governance reforms. In our proposed setting, managers obtain information and make discretionary but

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[245] *See generally* Christopher M. Bruner, *Corporate Governance Reform and the Sustainability Initiative*, 131 YALE L.J. 1062 (2022); Kent Greenfield, *Defending Stakeholder Governance,* 58 CASE W. RES. L. REV. 1043 (2008).

[246] Lund & Pollman, supra note 15, at 2629-31 (2021)(describing why they believe that the "corporate governance machine" is unlikely to a form of stakeholderism that usurps shareholder primacy).

[247] *See* William W. Bratton & Michael L. Wachter, *Shareholders and Social Welfare*, 36 SEATTLE L. REV. 489, 502 (2013)("[C]an shareholder wealth maximization appropriately be deemed a proxy for social welfare maximization? The two are often thus connected in the legal literature…"). Many prominent shareholder primacy advocates insist that they hold this position because of their concern for improving social welfare. *See* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 440 (2001)("[T]here is convergence on a consensus that the best means to this end [that is, the pursuit of aggregate social welfare] is to make corporate managers strongly accountable to shareholder interests and, at least in direct terms, only to those interests"); REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW, A COMPARATIVE AND FUNCTIONAL APPROACH 17-19 (2004).

[248] *See* Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain?*, 93 S. CAL. L. REV. 101, 102 (2021)(finding managers and directors in states with constituency statutes do not negotiate to materially benefit other stakeholders during the sale of companies).

[249] *See* Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 100-01 (2020)(arguing that corporate managers will use stakeholderism to insulate managerial decision-making from shareholder and judicial oversight).

[250] *See* Lund & Pollman, *supra* note 15, at 2629-31.

credible commitments, while stakeholders gain access to the decision-making process and monitor outcomes.

For shareholder primacy advocates, our proposals provide both shareholder value and accountability-based reasons to embrace legitimacy-enhancing tools. Willingly or not, corporate managers find themselves enmeshed in controversial social issues,[251] which are largely uncharted terrain for business leaders. Perhaps unsurprisingly, managers have frequently found themselves in legitimacy challenges. Employee walkouts, consumer boycotts, and shareholder proxy battles hurt firm value through decreased employee productivity, reduced sales, and diverted management attention. The systematic ex ante adoption of legitimacy-enhancing tools will likely reduce the number of legitimacy challenges and mitigate their severity when they occur, thereby maintaining or improving firm value.

Our proposals also provide accountability-based reasons for shareholder primacy advocates to embrace legitimacy-enhancing tools. These tools will improve managerial accountability to investors and other stakeholders, as stakeholders can both ex ante improve the outcome of managerial decision-making and can use such disclosures and engagement as evidence during subsequent proxy challenges or shareholder litigation if management remains recalcitrant. For example, investors and other stakeholders concerned with a company's climate risk will have the firm's internal metrics and policies to substantively engage with managers when they are deciding such climate measures, rather than after managers have already decided and implemented their choice. Thus, management is more likely to heed to investor input, and investors are better placed to hold managers accountable.

D. Addressing Potential Criticisms

Even if convinced about the value of adopting a legitimacy framework for corporate decision-making ex ante and in a systematic manner, some might still be concerned about the costs of reorienting corporate governance toward legitimacy, or the advisability of managers' openly recognizing the social implications of their choices. In this final Section, we address these two potential overarching worries about our proposal.

1. *The Costs and Benefits of Legitimacy*

Building the institutional structures and processes for increasing legitimacy beyond the extent required by state and federal law is likely to have upfront costs. Ethics and sustainability departments will require significant staffing and management attention, stakeholder consultation processes can be lengthy, and even disclosures require a higher level of internal discipline. On

[251] For potential reasons why, *see generally* Michal Barzuza, Quinn Curtis & David Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CALIF. L. REV. 1243 (2020).

the other hand, the benefits of adopting any governance framework, including this one, are notoriously hard to quantify. Still, our proposal calls on managers to suffer the costs of establishing a framework whose potential payoff has a potentially longer time horizon. Below, we offer some thoughts on both sides of these equation, even though addressing these questions fully requires methodologies beyond the scope of this Article that are topics for further research.

The costs of building a systematic legitimacy-enhancing framework from scratch are significant, but many companies already have its key components in place. Most large publicly traded companies already issue sustainability reports, for example, accepting that the costs for doing so are manageable and likely to be outweighed by the benefits. For companies that are laggards in environmental and social governance, the learning curve and price tag are going to be admittedly steeper. In addition, the investment required by companies will vary depending on industry, size, or emerging controversial issues. Climate change poses a greater challenge for a natural resources company than for a technology company, while the opposite goes for privacy. Similarly, larger companies may face greater difficulty in collecting data throughout their various operations and supply chains, while smaller companies are less nimble with staff time.

Importantly, while some costs will be ongoing, others can be expected to decline over time, once management and staff streamline the framework and company responses become more standardized.[252] As the examples discussed in Part III illustrate, many companies are already experimenting with institutional mechanisms for enhancing legitimacy, either voluntarily or in response to a legitimacy challenge. Industry groups are coalescing around best practices and knowledge-sharing. International bodies are forming to help standardize criteria and processes, adding much clarity to demands. Growing expertise and standardization help simplify choices for corporate managers.

Finally, many legitimacy-enhancing tools mobilize better communication channels to inform stakeholders about company policies already in place. Through measures such as enhanced disclosure, stakeholder consultations, and verification of disclosures by experts, companies are better placed to convince stakeholders about the efficacy of actions they are already taking. In these cases, the additional costs of communicating with stakeholders are a small price to pay to help the company get the appropriate credit from stakeholders for its efforts.

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[252] On the decreased costs due to the standardization of practices across a wide variety of domains, *see* Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting*, 83 VA. L. REV. 713, 713 (1997)(discussing how the standardization of corporate contracting can reduce firm costs); Michal S. Gal & Daniel L. Rubinfeld, *Data Standardization*, 94 N.Y.U. L. REV. 737, 752 (2019)(discussing how standardizing data compatibility between firms will reduce data costs); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clauses *Principle*, 110 YALE L.J. 1, 8 (2000)(discussing how the standardization of property rights reduces measurement costs).

On the other hand, calculating the benefits of avoiding a legitimacy crisis is far from straightforward. Counterfactuals are hard to construct, as many companies have unique features, and predicting the timing and intensity of legitimacy challenges is not easy. Moreover, while some legitimacy crises explode in immediate bursts, others are protracted, culminating in years of expensive proxy contests, shareholder litigation, or consumer boycotts that hurt firm value. Besides the direct benefits of a legitimacy-enhancing approach, which relate to avoidance of crises and more widely accepted outcomes in individual issues, there are also indirect benefits. For example, the discipline imposed by legitimacy-enhancing measures provides managers and directors with additional information regarding the company's businesses and operational performance, helping them to make better choices on other matters too. After earning stakeholders' trust, managers can capitalize this advantage in future challenges to dissuade stakeholders from adopting costly and adversarial tactics, such as running proxy contests, filing shareholder litigation, or consumer boycotts, that can harm both short and long-term firm value.

2. *Firms Can Avoid Legitimacy Challenges by Steering Clear of Socially Controversial Issues*

Just ten years ago, it would be highly unusual for corporate managers to publicly take a stance on controversial social issues. This abrupt reversal of managerial attitudes has left many wondering whether managers have brought legitimacy challenges upon themselves. Either because they are succumbing to stakeholder criticism or because they are eager to promote their own ideological agendas, managers now seem more likely to take the initiative in declaring their positions. If only they kept quiet and stuck to business issues, one might think, then stakeholder-driven legitimacy problems would quiet down.[253]

There are several reasons why managers are unable to keep quiet on social issues that may potentially generate legitimacy challenges. Some issues are impossible to avoid for certain companies and industries, as they permeate many key business choices. Most obviously, transportation, energy, agriculture, and other industries have greatly contributed to climate change by their normal business activities.[254] To make matters worse, corporate managers in some firms actively chose to engage in climate change disinformation as a business practice, thus contributing to political inaction on the issue and making climate change worse.[255] In a similar vein, privacy and customer

[253] We want to thank Ed Rock for bringing this line of criticism to our attention, as well as his engagement on the issue.
[254] Environmental Protection Agency, Sources of Greenhouse Gas Emissions (last updated April 14, 2022), epa.gov/ghgemissions/sources-greenhouse-gas-emissions (breaking down United States green house gas emissions by industry and activity – 27% transportation, 25% energy, 24% industry, and 11% agricultural among other sources).
[255] On industry lobbying and advocacy of climate disinformation campaigns during the late 20th and early 21st Centuries, *see generally* MICHAEL MANN & TOM TOLES, THE MADHOUSE EFFECT: HOW CLIMATE CHANGE DENIAL IS THREATENING OUR PLANET, DESTROYING OUR POLITICS, AND DRIVING US CRAZY (2016); NAOMI ORESKES & ERIK M. CONWAY,

confidentiality issues have gained prominence because of the rise of digital tracking and targeted advertising. When companies base their success on disrupting existing production models, they unavoidably create new stakeholder concerns.

But even for longstanding issues, such as race and gender relations in the workplace, the tools for monitoring managers and countering corporate narratives have become more sophisticated in recent years with the rise of social media.[256] As evident when corporations stated they supported racial equality after the murder of George Floyd, stakeholders with different experiences now have the means to speak up when corporate management appears hypocritical. Once Aerica Shimizu Banks and Ifeoma Ozoma spoke up on social media about Pinterest's mistreatment and their stories gained an audience, Pinterest was powerless to quell the oncoming legitimacy challenge without adopting legitimacy-enhancing tools.[257] But corporate managers need not be bad actors to confront legitimacy challenges. For example, technology companies face widely known and persistent problems related to diversity recruitment, training, and promotion.[258] These problems persist even in tech companies where managers have proactively invested in diversity measures.[259]

Finally, it is far from certain that keeping silent would help managers navigate the tricky social environment in which they find themselves. There is no denying the increased appetite from various stakeholders for firms to take positions on social issues. There are many potential reasons for this shift in stakeholder behavior, including the increased polarization of our social

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MERCHANTS OF DOUBT (2010); JAMES LAWRENCE POWELL, THE INQUISITION OF CLIMATE SCIENCE (2012).

[256] *See supra* Section III.C (discussing how stakeholders used social media to monitor firms and hold them accountable for managerial decisions); Tina McCorkindale & Maria W. DiStaso, "The Power of Social Media and Its Influence on Corporate Reputation," *in* THE HANDBOOK OF COMMUNICATION AND CORPORATE REPUTATION 497-512 (Craig E. Carroll, ed., 2013); Kari Alldredge, Jeff Jacobs, & Warren Teichner, *Great Expectations: Navigating challenging stakeholder expectations of brands*, MCKINSEY & CO. (Dec. 9, 2021), https://mckinsey.com/industries/consumer-packaged-goods/our-insights/great-expectations-navigating-challenging-stakeholder-expectations-of-brands; Sprout Social, *The Sprout Social Index, Edition XII: Call-out Culture*, https://sproutsocial.com/insights/data/q3-2017/ (finding 46% of consumers have used social media to call out brands to complain about their business).

[257] *See supra* Section III.B (discussing the Pinterest example).

[258] *See, e.g.*, Sarah Harrison, *Five Years of Tech Diversity Reports–and Little Progress*, WIRED (Oct. 1, 2019), https://www.wired.com/story/five-years-tech-diversity-reports-little-progress/; Kate Rooney & Yasmin Khorram, *Tech companies say they value diversity, but reports show little change in last six years*, CNBC (June 12, 2020), https://www.cnbc.com/2020/06/12/six-years-into-diversity-reports-big-tech-has-made-little-progress.html.

[259] *See* Harrison, *supra* note 258 ("Google invested $25 million to give more black and Latinx students exposure to computer science, and created a one-year residency at Google for juniors at historically black colleges. Facebook, similarly, has invested in training programs, internships, and projects like TechPrep, meant to introduce the tech field to people from nontraditional backgrounds.").

lives,[260] the creation of epistemic bubbles and echo chambers that reinforce ideological narratives,[261] and the increased pro-social behavior of younger citizens.[262] Regardless of stakeholder motivation, managers staying mum is likely to be seen as a statement as much as speaking up. Often, stakeholders will equivocate managerial silence as indifference or even as a vote in favor of the status quo, which can itself cause backlash.[263] Against the rising tide of stakeholder complaints, managers can perhaps wash their hands and hope for the best. But managers are better off, we have argued, by following a systematic approach that brings together warring factions and respects diverse interests and considerations of the different corporate stakeholder groups.

V. CONCLUSION

Now more than ever, corporate stakeholders are questioning, criticizing, and opposing corporate decisions that affect them. This questioning has become especially pronounced as corporations wade into contentious social matters. Employees, consumers, politicians, and other stakeholders are criticizing, boycotting, and otherwise taking actions that could harm corporate profits to such a degree that shareholders have been compelled to take note. As a result, shareholders are increasingly joining other stakeholders to push managers to change their decision-making processes across ESG matters. Whether they like it or not, corporate managers can no longer stay on the sidelines as they are forced to take a stand by stakeholder groups.

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[260] On how political polarization has increasingly seeped into social and economic realms of civil society, *see* ROBERT M. BARKER, CORPORATE GOVERNANCE, COMPETITION, AND POLITICAL PARTIES 2 (2010); EITAN HERSH, POLITICS IS FOR POWER: HOW TO MOVE BEYOND POLITICAL HOBBYISM, TAKE ACTION, AND MAKE REAL CHANGE 87 (2020); Abinhav Gupta & Forrest Briscoe, *Organizational Political Ideology and Corporate Openness to Social Activism*, 65 ADMIN. SCI. Q. 524, 525-27 (2020). On how increased political polarization in corporate management might be value reducing for shareholders, *see generally*, Vyacheslav Fos, Elisabeth Kempf, & Margarita Tsoutsoura, *The Political Polarization of U.S. Firms* (NBER Working Paper 30183), https://www.nber.org/papers/w30183.

[261] On the philosophical phenomena of echo chambers and epistemic bubbles, *see generally* C. Thi Nguyen, *Echo Chambers and Epistemic Bubbles*, 17 EPISTEME 141 (2020). On empirical study of media and social echo chambers, *see generally* KATHLEEN HALL JAMIESON & JOSEPH N. CAPPELLA, ECHO CHAMBER: RUSH LIMBAUGH AND THE CONSERVATIVE MEDIA ESTABLISHMENT (2008); Matteo Cinelli et al., *The echo chamber effect on social media*, 118 PROC. NAT'L ACAD. SCI. 1 (2021).

[262] *See generally* Barzuza, Curtis & Webber, *supra* note 251.

[263] *See* Abinhav Gupta, *CEOs Ignore Social Issues at Their Own Peril*, WALL ST. J. (June 26, 2021), https://www.wsj.com/articles/ceo-social-political-issues-11624307505; Martin Reeves, et. al., *How Business Leaders Can Reduce Polarization*, HARV. BUS. REV. (Oct. 8, 2021), https://hbr.org/2021/10/how-business-leaders-can-reduce-polarization ("Even so, inaction is not necessarily the better strategy. Polarization can also affect businesses that *do not* speak out….Silence can also be perceived as tacit support for one side of an issue."). In 2017, Uber confronted widespread consumer boycott and lost significant market share due to their silence regarding the U.S. travel ban on majority Muslim countries. Mike Isaac, *What You Need to Know About #DeleteUber*, N.Y. TIMES (Jan. 31, 2017), https://www.nytimes.com/2017/01/31/business/delete-uber.html.

As corporations are increasingly becoming involved in controversial social issues, corporate managers must be sensitive to the beliefs, ideology, and values of stakeholders to a previously unrecognized degree. This Article explains how the concept of legitimacy is a useful frame to view the interaction between corporate managers and stakeholders. It also provides an analytical framework for how legitimacy functions within corporate governance to improve our understanding of how corporations should operate when they engage in contentious social issues. While corporate governance currently focuses on the legal legitimacy of corporate decision-making, the deference to corporate managerial decision-making provided by current corporate law means that legal legitimacy underspecifies corporate legitimacy. As a result, corporate managers should consider the sociological and moral legitimacy during their decision-making, especially when becoming involved in controversial social matters likely to generate stakeholder-driven challenges.

Drawing on public law discussions on the legitimacy of administrative agencies, this Article proposes concrete and realistic steps that can be made to corporate decision-making deliberation, procedure, and outcomes to improve the legitimacy of corporate decisions. These steps include: increasing participation with stakeholders, improving corporate managerial transparency and disclosure, embracing the use of external experts during deliberation, and standardizing the metrics and methods of corporate decision-making, among other proposed methods. These proposals are by no means meant to be considered exhaustive, as further research is needed to identify additional steps managers can take to improve the legitimacy of their decisions.

As we show through our discussion, no company will be perfect when it comes to ensuring the legitimacy of managerial decisions. By their nature, many social issues will involve stakeholders who hold different ideological positions on the issue in question. Sometimes some stakeholders will advocate for the company not to get involved at all, as various stakeholders will have different views on which ESG issues are central or peripheral to the purpose of the company. This is why we have remained both theoretically and practically realistic when it comes to the legitimacy of corporate decisions. This Article has advocated for specific governance steps that corporate managers can practically integrate into their decision-making processes and outcomes to provide stepwise improvements in the legitimacy of their decisions. As corporate managers improve the legitimacy of their decisions, stakeholders will increasingly find the decisions of managers worthy of respect and compliance such that they will not launch full-scale legitimacy challenges, even if they disagree with ultimate decision.

There is much future work to be done to study the legitimacy of corporate decision-making. This Article argues that corporate managers should be cognizant of the legitimacy of their decision-making processes and outcomes to improve their standing with corporate stakeholders and thereby improve the functioning of their company. In practice, companies working in different industries may choose to adopt different proposed governance changes to improve the legitimacy of their decisions based upon their own business ecosystem and stakeholders. Therefore, improving the legitimacy of corporate managerial decision-making will be an iterative and ongoing process as corporate managers decide which governance changes to integrate into their specific company and as their particular stakeholders advocate for and react to the chosen changes suggested in this article. However, without an understanding of the concept of legitimacy and how it operates in the corporate governance context, corporate managers will continue to gravely misstep when they deal with contentious social issues.