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The Making and Meaning of ESG

Law Working Paper N° 659/2022
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Elizabeth Pollman
University of Pennsylvania and ECGI

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Abstract

ESG is one of the most notable trends in corporate governance, management, and investment of the past two decades. It is at the center of the largest and most contentious debates in contemporary corporate and securities law. Yet few observers know where the term comes from, who coined it, and what it was originally aimed to mean and achieve. As trillions of dollars have flowed into ESG-labeled investment products, and companies and regulators have grappled with ESG policies, a variety of usages of the term have developed that range from seemingly neutral concepts of integrating “environmental, social, and governance” issues into investment analysis to value-laden notions of corporate social responsibility or preferences for what some have characterized as “conscious” or “woke” capitalism. This Article makes three contributions. First, it provides a history of the term ESG that was coined without precise definition in a collaboration between the United Nations and major players in the financial industry to pursue wide-ranging goals. Second, it identifies and examines the main usages of the term ESG that have developed since its origins. Third, it offers an analytical critique of the term ESG and its consequences. It argues that the combination of E, S, and G into one term has provided a highly flexible moniker that can vary widely by context, evolve over time, and collectively appeal to a broad range of investors and stakeholders. These features both help to account for its success, but also its challenges such as the difficulty of empirically showing a causal relationship between ESG and financial performance, a proliferation of ratings that can seem at odds with understood purposes of the term ESG or enable “sustainability arbitrage,” and tradeoffs between issues such as carbon emissions and labor interests that cannot be reconciled on their own terms. These challenges give fodder to critics who assert that ESG engenders confusion, unrealistic expectations, and greenwashing that could inhibit corporate accountability or crowd out other solutions to pressing environmental and social issues. These critiques are not necessarily fatal, but are intertwined with the characteristic flexibility and unfixed definition of ESG that was present from the beginning, and ultimately shed light on obstacles for the future of the ESG movement and regulatory reform.

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THE MAKING AND MEANING OF ESG

ELIZABETH POLLMAN*

ESG is one of the most notable trends in corporate governance, management, and investment of the past two decades. It is at the center of the largest and most contentious debates in contemporary corporate and securities law. Yet few observers know where the term comes from, who coined it, and what it was originally aimed to mean and achieve. As trillions of dollars have flowed into ESG-labeled investment products, and companies and regulators have grappled with ESG policies, a variety of usages of the term have developed that range from seemingly neutral concepts of integrating "environmental, social, and governance" issues into investment analysis to value-laden notions of corporate social responsibility or preferences for what some have characterized as "conscious" or "woke" capitalism.

This Article makes three contributions. First, it provides a history of the term ESG that was coined without precise definition in a collaboration between the United Nations and major players in the financial industry. Understanding this history reveals that key normative choices between promoting shareholder value, limiting corporate externalities, or creating some other social good were not definitively determined in creating the term ESG. Second, the Article identifies and examines the main usages of the term ESG that have developed since its origins. ESG takes on dramatically different meanings varying from factors for integrating in investment analysis or risk management to a synonym for corporate social responsibility, sustainability, or even an ideological preference or political stance provoking backlash. Third, the Article offers an analytical critique of the term ESG and its consequences. It argues that the combination of E, S, and G into one term has provided a highly flexible moniker that can vary widely by context, evolve over time, and collectively appeal to a broad range of investors and stakeholders. These features both help to account for global spread of the term ESG, but also challenges related to the term such as the difficulty of empirically showing a causal relationship between ESG and financial performance, a proliferation of ratings that can seem at odds with understood purposes of ESG, and "sustainability arbitrage." These challenges fuel critics who assert that ESG engenders confusion and fosters unrealistic expectations and greenwashing that could inhibit corporate accountability or crowd out other solutions to pressing environmental and social issues. These critiques are intertwined with the characteristic flexibility and unfixed definition of ESG that were present from the beginning and ultimately shed light on obstacles for the future of the ESG movement and regulatory reform.

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INTRODUCTION

ESG is at the center of global dialogue on corporate governance, management, and investment. Remarkably, it has "risen from an obscure and niche concept to a widely used term around the world."[1] As the creation and uptake of the term ESG took place gradually, then suddenly, its ubiquity has given way to assumptions that "everyone understands what they are referring to."[2]

ESG as an acronym for "environmental, social, governance" is a common denominator of the discourse using the term, but a deeper examination reveals that little beyond that understanding is fixed. The word that follows the famous refrain of "environmental, social, governance" shapeshifts from "criteria" to "factors," "standards," "strategies," "risks," "issues," "activity," or even "goals." Does ESG refer to "three criteria to evaluate a company's

[1] George Serafeim, *ESG: Hyperboles and Reality* 2 (Harv. Bus. Sch., Working Paper No. 22-031, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3966695.

[2] *Id.* at 2. A Google Trends chart shows the ESG term had relatively little worldwide attention from 2004 to 2016 when it began to gradually rise and then explode by 2019. ESG, GOOGLE TRENDS, https://trends.google.com/trends/explore?date=all&q=esg (last visited Aug. 11, 2024).

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sustainability performance"?[3] Is it a "a set of standards for a company's behavior used by socially conscious investors to screen potential investments"?[4] Does it "put. . . money to work with companies that strive to make the world a better place"?[5] Or perhaps more broadly is it a new term or synonym for "corporate social responsibility" (CSR) or its cousin "sustainability"? Could the answer be that ESG simultaneously refers to all of the above?

As usage of the term ESG runs the gamut, trillions of dollars have flowed into ESG-labeled investment products, companies are implementing ESG strategies, and regulators are designing ESG policies.[6] Views about the performance implications from ESG and the usefulness of ESG evaluations grow increasingly polarized—for some, ESG is seen to have "enormous influence on corporate and investor behavior," for others it has none,[7] or worse it is marketing or greenwashing that misleads investors or stakeholders, inhibits corporate accountability, or displaces other concepts and proposed solutions for societal problems.[8] Popular use of the term ESG has even seemed to take on some of these normative views or culture-laden notions that transcend technical ideas of investment screens, financial materiality, reporting, or the like. In common parlance, one regularly hears things such as "startups need ESG,"[9]

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[3] Catherine Brock, *What is ESG Investing & What Are ESG Stocks?*, The Motley Fool (Jan. 12, 2024), https://www.fool.com/investing/stock-market/types-of-stocks/esg-investing/.

[4] The Investopedia Team, *What Is Environmental, Social, and Governance (ESG) Investing?*, Investopedia (Feb. 6, 2024), https://www.investopedia.com/terms/e/environmental-social-and-governance-esg-criteria.asp.

[5] E. Napoletano, *Environmental, Social And Governance: What is ESG Investing?*, Forbes (Feb. 1, 2024, 1:41 AM), https://www.forbes.com/advisor/investing/esg-investing/.

[6] Andrew A. King & Kenneth P. Pucker, *ESG and Alpha: Sales or Substance?*, Institutional Inv. (Feb. 25, 2022), https://www.institutionalinvestor.com/article/b1wxqznltqnyzj/ESG-and-Alpha-Sales-or-Substance (noting ESG represented approximately one third of all professionally managed assets); Alastair Marsh, *Global ESG Market Shrinks After Sizable Decline in US*, Bloomberg (Nov. 29, 2023, 3:35 PM), https://www.bloomberg.com/news/articles/2023-11-29/global-esg-market-shrinks-after-sizable-drop-in-us (noting the "global ESG market" topped thirty trillion dollars).

[7] Serafeim, *supra* note 1, at 2.

[8] *See, e.g.*, King & Pucker, *supra* note 6 (concluding based on empirical research and interviews with industry practitioners that "flows of money into ESG funds represent a marketing-induced trend that will neither benefit the planet nor provide investors with higher returns—but might defer needed government regulation"); Aswath Damodaran, *ESG's Russia Test: Trial by Fire or Crash and Burn?*, Musings on Mkts. (Mar. 28, 2022), https://aswathdamodaran.blogspot.com/2022/03/esgs-russia-test-moment-to-shine-or.html ("ESG is, at its core, a feel-good scam that is enriching consultants, measurement services and fund managers, while doing close to nothing for the businesses and investors it claims to help, and even less for society."); *ESG Should Be Boiled Down to One Measure: Emissions*, The Economist (July 21, 2022), https://www.economist.com/leaders/2022/07/21/esg-should-be-boiled-down-to-one-simple-measure-emissions (arguing that ESG "is often well-meaning" but "risks setting conflicting goals for firms, fleecing savers and distracting from the vital task of tackling climate change" and so "[i]t is an unholy mess that needs to be ruthlessly streamlined").

[9] Edward Robinson, *Do Startups Need ESG?*, Quartz (Jan. 17, 2022), https://qz.com/emails/quartz-forecast/2113257/%E2%9C%A6-do-startups-need-esg/.

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buying a certain asset class is "not very ESG"[10] or that companies can "be" or "not be" ESG.[11] More colorfully, tech billionaire Elon Musk has exclaimed: "I am increasingly convinced that corporate ESG is the Devil Incarnate."[12] Political backlash to ESG in the United States reached such a high fever pitch that it caused Larry Fink, the chief executive of BlackRock, the world's largest asset manager, to declare that he would no longer use the term which had become "weaponized" by both the "far left" and "far right."[13]

As varied language and notions around ESG proliferate, this Article endeavors to provide an in-depth examination of the term itself and its implications. Although commonly used, few know where the term comes from, who coined it, and what it was originally aimed to mean and achieve. The first contribution of the Article is thus to provide a history of the term ESG that has been missing from the debate and scholarly literature.[14] This history illuminates that key normative choices between promoting shareholder value, limiting corporate externalities, or creating some other social good were not definitively determined in creating the term ESG.

Further, as the term spreads from its origins and takes on diverse meanings, the potential arises for confusion, unrealistic expectations, and cooptation. More simply, participants in the debate about ESG might talk past each other as they use the term to refer to different concepts.[15] Indeed, the rise

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[10] *See, e.g.*, Oliver Telling, *ESG's Dirty Secret: Is Do-Good Investing Profitable, or Even Doing Good?*, Inv.'s Chron. (Mar. 18, 2021), https://www.investorschronicle.co.uk/news/2021/03/18/esg-s-dirty-secret/ (quoting commentary that gold is "probably not very ESG").

[11] *See, e.g.*, Alan R. Palmiter, *Capitalism, Heal Thyself* 4 (Wake Forest U. Sch. Law, Working Paper, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3940395 (examining the "effect of being ESG" and the "effect of not being ESG" for companies); David F. Larcker, Brian Tayan & Edward M. Watts, *Seven Myths of ESG* 2, Stan. Closer Look Series (Nov. 4, 2021), https://www.gsb.stanford.edu/faculty-research/publications/seven-myths-esg (observing "we cannot always tell whether an initiative is truly ESG").

[12] Elon Musk (@elonmusk), Twitter (Apr. 3, 2022, 1:14 AM), https://twitter.com/elonmusk/status/1510485792296210434. The tweet came in reply to one by prominent venture capitalist Marc Andreessen, who perhaps sardonically noted in response to a comparison of energy usage by clothes dryers in the U.S. and bitcoin mining that "Dirty clothes are ESG." Marc Andreessen (@pmarca), Twitter (Apr. 2, 2022, 10:09 PM), https://twitter.com/pmarca/status/1510439384746627074?lang=en.

[13] Cheyenne Ligon, *BlackRock CEO Larry Fink Says He No Longer Uses Term 'ESG': 'It's Been Totally Weaponized'*, Pensions & Invs. (June 26, 2023, 3:59 PM), https://www.pionline.com/esg/blackrock-ceo-larry-fink-says-he-no-longer-uses-term-esg.

[14] *See infra* Part I. Scholarly literature to date has not focused on the history of ESG and how it was originally conceived. Recent articles on U.S. and international corporate governance systems have notably included brief descriptions of coinage of the term through United Nations initiatives. *See* Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 Colum. L. Rev. 2563, 2613 (2021) (stating that "[t]he term ESG was coined by the United Nations following its 2005 conference 'Who Cares Wins,' which brought together institutional investors, financial analysts, consultants, and regulators."); Mariana Pargendler, *The Rise of International Corporate Law*, 98 Wash. U. L. Rev. 1765, 1769 (2021) (noting that ESG factors were "a concept first coined and dutifully promoted by various United Nations initiatives.").

[15] *See, e.g.*, King & Pucker, *supra* note 6 ("ESG investing is not precisely defined.").

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of ESG has coincided with a renaissance in thinking about corporate purpose and growing interest in sustainability and stakeholder capitalism, adding to the mix of concepts and terminology in contemporary debates.[16] In a survey of institutional investors, three-quarters of respondents said there is a lack of clarity around ESG terminology.[17] The second contribution of the Article is thus to identify and examine the main usages for the term ESG that have developed over time.

Specifically, the Article finds that ESG was coined to describe a set of issues to be integrated into enhanced financial or investment analysis, and has taken on meanings related to risk management, been treated as a synonym or subset of CSR or sustainability, and been characterized as a preference or activity. It has taken on connotations both positive and negative, as value-laden notions of "conscious" versus "woke" capitalism give way to perceptions of ESG as ideological, political, and subject to backlash. Parsing these varied meanings is important for understanding and shaping fiduciary duties, regulatory debate, and legal reforms around the globe as well as discourse in scholarly, political, and business spheres that impact the direction of one of the most significant trends of the twenty-first century.

Finally, as the term has now been in circulation for nearly two decades, it is time for an accounting of the promise and perils of putting E, S, and G together in one term. The third contribution of the Article is therefore an analytical critique of the term ESG and its consequences. It argues that the combination of E, S, and G into one term has provided a highly flexible moniker that can vary widely by context, evolve over time, and collectively appeal to a broad range of investors and stakeholders. These features both help to account for the global embrace of ESG terminology, but also its challenges such as the ongoing struggle to empirically show a causal relationship between ESG and financial performance, the explosion of ESG ratings that can seem inconsistent with each other or understood purposes of the term, and tradeoffs between important underlying issues that cannot be reconciled without further negotiation or dispute.

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[16] For a sampling of literature on corporate purpose, sustainability, and stakeholder capitalism, see Research Handbook on Corporate Purpose and Personhood (Elizabeth Pollman & Robert B. Thompson eds., 2021); The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability (Beate Sjåfjell & Christopher M. Bruner eds., 2019); Colin Mayer, Prosperity (2018); Alex Edmans, Grow The Pie: How Great Companies Deliver Both Purpose and Profit (2020); Rebecca Henderson, Reimagining Capitalism In a World On Fire (2020); George Serafeim, Purpose + Profit: How Business Can Lift Up the World (2022); Doug Sundheim & Kate Starr, *Making Stakeholder Capitalism a Reality*, Harv. Bus. Rev. (Jan. 22, 2020), https://hbr.org/2020/01/making-stakeholder-capitalism-a-reality; Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *Stakeholder Capitalism in the Time of COVID*, 40 Yale J. on Regul. 60 (2023).

[17] Swasti Gupta-Mukherjee, *Climate Action Is Too Big for ESG Mandates*, Stan. Soc. Innovation Rev. (Sept. 29, 2020), https://ssir.org/articles/entry/climate_action_is_too_big_for_esg_mandates.

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Critics seize on these challenges to assert that ESG engenders confusion, unrealistic expectations, and greenwashing that could mislead investors or stakeholders, or crowd out other problem-solving efforts through public channels and democratically elected representatives. Some additionally argue that ESG politicizes corporate activity or gives corporate boards and executives leeway to pursue their own ideological agendas or increase agency costs.

This Article shows these critiques will continue to plague use of ESG terminology as they are intertwined with the characteristic flexibility and unfixed definition of the term ESG that goes back to its origins. A host of consequences follow from these enduring critiques, ranging from stoking an ESG backlash that imperils corporate and investor initiatives to adding significant obstacles for regulators engaged in ESG-related rulemaking.[18] The history and development of ESG illuminates the fragile alliances and wide-ranging motivations of global players that helped to create a big tent for the term to get mainstream buy-in, as well as its precarious path forward once the ambiguity of normative goals is eventually confronted.

The Article proceeds as follows. Part I tells the story of how ESG was coined and the strategic considerations and goals of doing so. Part II examines how various actors use the term with diverse meanings today. Part III analyzes the consequences—perhaps intended and unintended—of attempting to address such a wide range of issues under one acronym and explores the implications for the future of ESG and related legal reforms.

I. The Creation and Diffusion of ESG

The consideration of corporate governance and corporations' relationships with stakeholders, communities, the environment, and society writ large has a long history. Corporations and their role in society and purpose have been the subject of perpetual debate, going back to early corporations.[19] Over

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[18] *See infra* Part III.B.

[19] For an exploration of the history of corporate purpose through the purpose clause of charters from the Middle Ages to the twenty-first century, see Elizabeth Pollman, *The History and Revival of the Corporate Purpose Clause*, 99 Tex. L. Rev. 1423 (2021). For a sampling of contemporary literature adding to the rich history of "corporate purpose" debate, see, e.g., Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 Cornell L. Rev. 91, 94 (2020) (arguing against "the flaws and dangers" of "stakeholder governance"); Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 Tex. L. Rev. 1310, 1312 (2021) (arguing that corporate purpose serves an "instrumental function" to "facilitate the goals of corporate participants"); Edward Rock, *For Whom Is the Corporation Managed in 2020?: The Debate over Corporate Purpose*, 76 Bus. L. 363, 364–67 (2021) (summarizing the contemporary corporate purpose debate including statements and proposals from academics, business leaders, and politicians); Leo E. Strine, Jr., *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy: A Reply to Professor Rock*, 76 Bus. L. 397, 400 (2021) (arguing that the American corporate governance system "needs an overhaul to fit a 21st century economy"); Colin Mayer, Prosperity: Better Business Makes the Greater Good 6 (2019) (discussing corporate purpose

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the past century, from the famous debate between Professors Adolf Berle and Merrick Dodd,[20] to the coining of the term "corporate social responsibility" in the mid-twentieth century,[21] and the rise of "corporate governance" and its linkage with shareholder primacy,[22] the discourse and engagement with various questions related to the societal role of corporations, the duties of corporate directors, and externalities and impacts on stakeholders have taken many twists and turns.

This Part aims its focus at providing an original account of the specific history of the term ESG and its diffusion in the early twenty-first century. Although the United Nations (UN) does not typically feature in contemporary discussions of ESG, it played a critical role in bringing about the term and mobilizing its spread.[23] The story begins with this international organization and its eventual connection and responsiveness to senior executives of global financial institutions, followed by a host of related initiatives and efforts that helped to spread the term until it reached rapid uptake in mainstream discourse.

A. The Foundation for ESG: The United Nations' Shift toward Collaboration with Business and Launch of the Global Compact

Since its founding in 1945, the UN has catalyzed and sponsored a number of initiatives relating to the world economy, development, the environment,

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in terms of fulfilling business objectives rather than maximizing profits and noting related social and moral values in corporate purpose); THE BRITISH ACAD., THE FUTURE OF THE CORPORATION: PRINCIPLES FOR PURPOSEFUL BUSINESS, 2019), https://www.thebritishacademy.ac.uk/publications/future-of-the-corporation-principles-for-purposeful-business/ (examining the case for reforming business "around its purposes, trustworthiness, values and culture" and solving the problems of "people and planet").

[20] Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); Adolf A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932).

[21] HOWARD R. BOWEN, SOCIAL RESPONSIBILITIES OF THE BUSINESSMAN 6 (1953). For literature tracing the history of corporate social responsibility, see Archie B. Carroll, *A History of Corporate Social Responsibility: Concepts and Practices*, *in* THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 19, 25 (Andrew Crane, Dirk Matten, Abagail McWilliams, Jeremy Moon & Donald S. Siegel eds., 2008); Ming-Dong Paul Lee, *A Review of the Theories of Corporate Social Responsibility: Its Evolutionary Path and the Road Ahead*, 10 INT'L J. MGMT. REVS. 53 (2008); Mauricio Andres Latapí Agudelo, Lara Jóhannsdóttir & Brynhildur Davídsdóttir, *A Literature Review of the History and Evolution of Corporate Social Responsibility,* 4 INT'L J. CORP. SOC. RESP. 1 (2019); Elizabeth Pollman, *Corporate Social Responsibility, ESG, and Compliance*, *in* THE CAMBRIDGE HANDBOOK OF COMPLIANCE 662 (Benjamin van Rooij & D. Daniel Sokol eds., 2021).

[22] *See* Lund & Pollman, *supra* note 14, at 2569–78 (tracing coinage of the term "corporate governance" alongside the widespread adoption of shareholder primacy and the shareholder wealth maximization norm).

[23] *See* Pargendler, *supra* note 14, at 1794 ("UN initiatives not only coined the concept of ESG, but also critically mobilized support for the spread and influence of ESG factors around the globe, in addition to the dissemination of a business and human rights agenda more broadly.").

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human rights, and related issues affecting business and markets. Scholars and experts have recounted the changing tone of engagement between the UN and the business community over the decades. According to John Ruggie, "[h]istorically, UN entities have expressed varying degrees of ambivalence about the market generally and globalization in particular."[24] Earlier in its history, "[t]he UN saw itself as the champion of social justice and distributive policies and viewed the global economic system as more of an impediment than a solution to these ends."[25] Other scholars have explained that "[b]eginning in the 1950s, the UN was prompted to keep its distance from the corporate sector by the Cold War environment and the need to display a relative impartiality toward market economy and planned economy advocates alike."[26] An "antibusiness prejudice,"[27] or even "animosity," pervaded "the UN paradigm until the end of the Cold War."[28]

One notable reflection of this oppositional relationship with the private sector was the New International Economic Order (NIEO), a UN effort launched by a coalition of developing countries known as the G-77 that aimed at "structural reform and global redistribution" to aid the "global south."[29] A controversial aspect of the NIEO's platform in the 1970s and early 1980s involved an attempt to regulate transnational corporations.[30] During this time, the "UN systematically defended the notion that the transnationals, left to themselves, would further enlarge the gap between developed and developing countries."[31] And for many years, a Commission on Transnational Corporations, created after the declaration of the NIEO, pursued the drafting and adoption of a Code of Conduct for transnational corporations[32]—an effort that faced significant opposition as anti-business, especially from the United States, and was eventually phased out in 1992 when negotiations were formally suspended.[33] By around this time, various other initiatives were underway that shifted focus, such as the UN-sponsored Brundtland Report on the environment and development, published in 1987 that coined the term

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[24] John Gerard Ruggie, *The United Nations and Globalization: Patterns and Limits of Institutional Adaptation*, 9 Glob. Governance 301, 303 (2003).

[25] *Id.*

[26] Jean-Phillipe Thérien & Vincent Pouliot, *The Global Compact: Shifting the Politics of International Development?*, 12 Glob. Governance 55, 57 (2006).

[27] Sydney Samuel Dell, The United Nations and International Business ix (1990).

[28] Thérien & Pouliot, *supra* note 26, at 58.

[29] Jennifer Bair, *Corporations at the United Nations: Echoes of the New International Economic Order?*, 6 Human. Int'l J. Hum. Rts. Humanitarianism Dev. 159, 159–63 (2015); *see also* Thérien & Pouliot, *supra* note 26, at 57–58 (discussing how "developing countries entered the organization en masse" in the 1960s and "the rise of the North-South conflict led the UN to make the regulation of the private sector, and of transnational corporations in particular, one of its top development priorities for over a generation").

[30] Bair, *supra* note 29, at 159; Ruggie, *supra* note 24, at 304.

[31] Thérien & Pouliot, *supra* note 26, at 57–58.

[32] Bair, *supra* note 29, at 159.

[33] *Id.* at 160; *see also* Pargendler, *supra* note 14, at 1795.

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"sustainability."[34] The UN Commission (now Council) on Human Rights also increased in prominence and became more active in examining how the UN might influence multinational corporations.[35]

Most notably, however, it was in the 1990s that the UN opened up to the corporate sector, described as "a change of 180 degrees."[36] It was in this phase that Kofi Annan, then-Secretary General of the UN, lay the groundwork for the initiative that created the term ESG.[37] Following a meeting with leaders of the International Chamber of Commerce in 1998, Annan acknowledged: "There is great potential for the goals of the United Nations—promoting peace and development—and the goals of business—creating wealth and prosperity—to be mutually supportive."[38] The UN began to set up a host of public-private partnerships during this new period, reflecting a shift toward understanding business as part of the solution for advancing its goals.[39]

The key moment of this shift on the path to ESG was a speech at the Davos World Economic Forum in 1999 in which Kofi Annan proposed a "Global Compact," directly urging business leaders to join the UN in promoting principles that would provide a foundation for a sustainable global economy. The explosive surge in globalization at the end of the twentieth century was accompanied by gaps in global rule making on labor standards, human rights, and environmental protection—in turn feeding fears that a backlash against globalization might grow.[40] Annan explained:

> Globalization is a fact of life. But I believe we have underestimated its fragility. The problem is this. The spread of markets outpaces the ability of societies and their political systems to adjust to them, let alone to guide the course they take. History teaches us that such

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[34] Report of the World Commission on Environment and Development: Our Common Future (1987), https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf. An earlier event, the 1972 UN Conference on the Human Environment "brought the industrialized and developing nations together to delineate the 'rights' of the human family to a healthy and productive environment." *Id.* For an analysis of eight different conceptual frameworks of the term sustainability that have arisen since it was coined in the 1980s, see Aliette K. Frank, *What is the Story with Sustainability? A Narrative Analysis of Diverse and Contested Understandings*, 7 J. Env't Stud. & Sci. 310 (2017).

[35] Bair, *supra* note 29, at 160.

[36] Thérien & Pouliot, *supra* note 26, at 58–59 (quoting Gerd C. A. Junne, *International Organizations in a Period of Globalization: New (Problems) of Legitimacy*, *in* The Legitimacy of International Organizations (Jean-Marc Couicaud & Veijo Heiskanen eds., 2001)); *see also* Georg Kell, *Relations with the Private Sector*, *in* The Oxford Handbook of International Organizations 738–39 (Jacob Katz Cogan, Ian Hurd & Ian Johnstone eds. 2017) (describing the "fundamental change in relationship between the UN and the private sector" that "started to take shape with the 1997 appointment of Kofi Annan" and the launch of "the Global Compact and subsequent engagements that brought about a historic shift in the relationship").

[37] Kell, *supra* note 36, at 743 n.54.

[38] Press Release, U.N. Secretary-General, Cooperation Between United Nations and Business, U.N. Press Release SG/2043 (Feb. 9, 1998).

[39] Thérien & Pouliot, *supra* note 26, at 59; Ruggie, *supra* note 24, at 304–05.

[40] Ruggie, *supra* note 24, at 309–10.

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> an imbalance between the economic, social and political realms can never be sustained for very long. The industrialized countries learned that lesson in their bitter and costly encounter with the Great Depression. In order to restore social harmony and political stability, they adopted social safety nets and other measures, designed to limit economic volatility and compensate the victims of market failures. Our challenge today is to devise a similar compact on the global scale, to underpin the new global economy.[41]

Furthermore, he noted that until people around the world have confidence that certain minimum standards and security will prevail, "the global economy will be fragile and vulnerable—vulnerable to backlash from all of the 'isms' of our post-cold-war world: protectionism, populism, nationalism, ethnic chauvinism, fanaticism and terrorism."[42] He thus called on firms and business associations "to embrace, support and enact a set of core values in the areas of human rights, labour standards, and environmental practices."[43] In return, he offered assistance from the UN in "incorporating these agreed values and principles into . . . mission statements and corporate practices" and facilitating a dialogue with other social groups.[44] Further, he noted that various interest groups were exerting "enormous pressure" for "restrictions on trade and investment," but he preferred to pursue the UN's "proclaimed standards" through the voluntary Global Compact that was "mutually supportive" of the UN and business.[45]

The Global Compact became operational in 2000, supported by various UN agencies and transnational nongovernmental organizations, with nine (now ten) principles on human rights, labor, environment, and anti-corruption.[46] Although the Compact attracted critique for its nonbinding structure and embrace of corporate trade and investment, participation "increased constantly," and became "more and more diverse in terms of geography and economic sectors."[47] Within just a couple years, approximately 1,000 firms were signatories to the Compact.[48] Building on these efforts, in 2003, the UN increased its focus on environmental matters by convening the first Institutional Investor Summit on Climate Risk, which led to the creation of the Investor Network

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[41] Press Release, U.N. Secretary-General, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to the World Economic Forum in Davos (Feb. 1, 1999), https://www.un.org/press/en/1999/19990201.sgsm6881.html.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] Ruggie, *supra* note 24, at 310–13; *see also* Our Mission, United Nations Glob. Impact, https://www.unglobalcompact.org/what-is-gc/mission (last visited Aug. 11, 2024).

[47] Thérien & Pouliot, *supra* note 26, at 62–69.

[48] *Id.* at 67.

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on Climate Risk—"a politically active group of seventy investors representing seven trillion [dollars] in assets."[49]

Subsequently, senior executives of financial institutions and other companies that were signatories to the Global Compact "repeatedly expressed to the then U.N. Secretary General and to the Global Compact" the need for further efforts.[50] In January 2004, Kofi Annan "wrote to the CEOs of 55 of the world's leading financial institutions inviting them to join in a [new] initiative," under the auspices of the Global Compact, titled "Who Cares Wins."[51] Out of this initiative came a report using the new term "ESG" and recommendations for different actors "on how to better integrate environmental, social and corporate governance issues in asset management, securities brokerage services and associated research functions."[52]

B. The Coining of ESG: The Who Cares Wins Report

Of the fifty-five invited, eighteen financial institutions from nine countries with total assets under management of over six trillion US dollars participated at the outset in the joint initiative with the UN, and with financial sponsorship from the Swiss Government.[53] The endorsing financial institutions included

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[49] Pargendler, *supra* note 14, at 1795–96.

[50] The Global Compact, Who Cares Wins: Connecting Financial Markets to a Changing World vii (2004), https://www.unepfi.org/fileadmin/events/2004/stocks/who_cares_wins_global_compact_2004.pdf [hereinafter Who Cares Wins]. A list of then-recent initiatives by institutional investors on ESG issues in the report included "climate change, corporate governance, issues relating to the pharmaceutical industry, the disclosure of payments to governments and the management of corruption and bribery cases." *Id.* at 21; *see also id.* (Exhibits 14–17).

[51] *Id.* at vii.

[52] *Id*. at i. Around this time, the United Nations Environment Programme Finance Initiative (UNEP FI) Asset Management Working Group, a group of asset managers and pension funds led by Paul Clements-Hunt, Ken Maguire, and Yuki Yasui, had also been exploring "Social, Environmental and Governance issues in the context of capital market analysis." Paul Clements-Hunt, *The Evolution of ESG*, Medium (Feb. 3, 2020), https://medium.com/artificial-heart/the-evolution-of-esg-4bd984657eb0; *see also* Elliot Wilson, *The United Nations Free-Thinkers Who Coined the Term 'ESG' and Changed the World*, EuroMoney (Oct. 1, 2021), https://www.euromoney.com/article/294dqz2h1pqywgbyh3zls/esg/the-united-nations-free-thinkers-who-coined-the-term-esg-and-changed-the-world. In 2004, the Asset Management Working Group commissioned studies by brokerage house analysts on the materiality of ESG issues to equity pricing. *See* U.N. Env't Programme Fin. Initiative, The Materiality of Social, Environmental and Corporate Governance Issues to Equity Pricing: 11 Sector Studies (2004), https://www.unepfi.org/fileadmin/documents/amwg_materiality_equity_pricing_report_2004.pdf/. It found "agreement that environmental, social and corporate governance issues affect long-term shareholder value" and "[i]n some cases those effects may be profound." *Id.* at 4. A number of UNEP FI members also participated in the *Who Cares Wins* initiative and, as discussed below, UNEP FI played an important role in helping to catalyze the spread of ESG at a critical early juncture.

[53] Who Cares Wins, *supra* note 50, at i. Two additional organizations, Mitsui Sumitomo Insurance and China Minsheng Bank, later joined as endorsing institutions of the *Who Cares Wins* initiative. Conference Report, Investing for Long-Term Value: Integrating Environmental, Social and Governance Value Drivers in Asset Management and

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some of the world's largest banks including Goldman Sachs, Morgan Stanley, UBS, Credit Suisse Group, Deutsche Bank, HSBC, Banco do Brasil, BNP Paribas, as well as insurance companies such as Aviva, and investment advisors such as Innovest.[54]

For the goals of "stronger and more resilient financial markets," "sustainable development," "improved trust in financial institutions," and "awareness and mutual understanding of involved stakeholders," the report from the first convening of the joint initiative argued, above all, for a "better inclusion of environmental, social and corporate governance (ESG) factors in investment decisions."[55] In the view of the initiative participants, such ESG integration will "ultimately support the implementation of the Global Compact principles throughout the business world"[56]—reflecting the collaboration by the financial industry and the UN that were at the heart of the initiative.

On the financial industry side of this equation, the report further noted that "investment markets have a clear self-interest in contributing to better management of environmental and social impacts in a way that contributes to the sustainable development of global society."[57] A section of the report labeled "[i]nvestment rationale" noted that studies confirmed "the business case" for "good management of ESG issues contribut[ing] to shareholder value creation."[58] It explained that "[c]ompanies with better ESG performance can increase shareholder value by better managing risks related to emerging ESG issues, by anticipating regulatory changes or consumer trends, and by accessing new markets or reducing costs" and "hav[ing] a strong impact on reputation and brands."[59] Companies should not focus on single issues, but instead the "entire range of ESG issues relevant to their business."[60]

Alongside these articulated goals and rationales, three points about the report's strategic choice of terminology stand out. First, the use of ESG, in contrast to other existing terms, was deliberate and emphasized throughout the report. It explained:

> Throughout this report we have refrained from using terms such as sustainability, corporate citizenship, etc., in order to avoid misunderstandings deriving from different interpretations of these terms.

Financial Research 1, n.1 (2005), https://www.ifc.org/content/dam/ifc/doc/mgrt/whocareswins-2005conferencereport.pdf.

[54] Who Cares Wins, *supra* note 50 (Endorsing Institutions page). Ivo Knoepfel has been credited as the author of the report. *See* Georg Kell, *The Remarkable Rise of ESG*, Forbes (July 11, 2018), https://www.forbes.com/sites/georgkell/2018/07/11/the-remarkable-rise-of-esg/?sh=1019d6f51695.

[55] Who Cares Wins, *supra* note 50, at 3.

[56] *Id.* at vii.

[57] *Id.* at 3.

[58] *Id.* at 9.

[59] *Id.*

[60] *Id.*

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> We have preferred to spell out the environmental, social and governance issues which are the topic of this report.[61]

Correspondingly, the report includes a list of examples for each E, S, and G, such as "climate change and related risks," "human rights," and "management of corruption and bribery issues." It also notes that "ESG issues relevant to investment decisions differ across regions and sectors."[62] With the benefit of hindsight, contemporary readers might indeed note that certain issues are missing on the list of examples that have become a prominent focus of ESG efforts in some regions such as human capital management and board diversity.[63]

Second, the report explained why the initiative participants included the G in their framing of ESG:

> Sound corporate governance and risk management systems are crucial pre-requisites to successfully implementing policies and measures to address environmental and social challenges. This is why we have chosen to use the term "environmental, social and governance issues" throughout this report, as a way of highlighting the fact that these three areas are closely interlinked.[64]

By way of example, the report noted that "better transparency and disclosure" and "linking executive compensation to longer-term drivers of shareholder value and improving accountability" can play a key role in implementing many recommendations.[65] It cited then-recent findings and recommendations released by the Conference Board Commission on Public Trust and Private Enterprise, laying out "best practice suggestions" on executive compensation, corporate governance, and audit and accounting issues, in the wake of 2001-2002 corporate scandals such as at Enron, WorldCom, and other companies.[66] With this framing, in the view of the initiative participants, G was not an anachronistic appendage or dissimilar concept, but rather a vital and connected set of issues and means of execution for relevant E and S issues.

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[61] *Id.* at 1–2.

[62] *Id.* at 6.

[63] The report lists example issues such as "[w]orkplace health and safety," "[h]uman rights," and "[b]oard structure and accountability," but not human capital management and disclosure or board and workforce diversity. *See id.* at 6. For a discussion of human capital management, the wide range of issues it encompasses beyond workplace health and safety, and its context in the ESG movement, see George S. Georgiev, *The Human Capital Management Movement in U.S. Corporate Law*, 95 Tul. L. Rev. 639 (2021). For a discussion of various rules and initiatives on board diversity and the ESG movement's inclusion of diversity, equity, and inclusiveness, see Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 Vand. L. Rev. 1 (2022).

[64] Who Cares Wins, *supra* note 50, at 2.

[65] *Id.*

[66] *Id.* at 2 (citing The Conference Board, Commission on Public Trust and Private Enterprise: Findings and Recommendations 2–3 (2004)).

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Similarly, the report emphasized the possibility of mainstreaming the integration of ESG issues into "normal research and fund management functions."[67] It even provided a graphic illustrating "[o]ne (of many) possible organisational paths leading from mainstream, to first generation screening; to partial ESG integration in different asset classes; to full ESG integration in research and portfolio management processes."[68] Notably, this language suggested an evolutionary process for investing practices toward more holistic analysis and presented a contrast to the Socially Responsible Investment (SRI) movement,[69] which had been around for decades and was based on ethical and moral criteria, using mostly negative screens.[70] Sprinkled throughout the report were quotes from executives of large companies, financial institutions, and asset managers emphasizing the theme of alignment of ESG issues with risk-adjusted financial performance and shareholder value,[71] and how consideration of these issues "should be part of every financial analyst's normal work."[72]

Third, the report also suggested that in framing ESG issues and the need to integrate them into mainstream investment analysis, it would take a broad approach and use longer time horizons in construing issues that could be material:

> This report focuses on issues which have or could have a material impact on investment value. It uses a broader definition of materiality than commonly used—one that includes longer time horizons (10 years and beyond) and intangible aspects impacting company value. Using this broader definition of materiality, aspects relating to generally accepted principles and ethical guidelines (e.g. the universal principles underlying the Global Compact) can have a material impact on investment value.

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[67] *Id.* at 38.

[68] *Id.* at 39 fig.7.

[69] *See generally* Marina Welker & David Wood, *Shareholder Activism and Alienation*, 52 Current Anthropology (Supplement to Apr. 2011) S57 (2011), https://www.journals.uchicago.edu/doi/full/10.1086/ (tracing history of SRI movement).

[70] *See, e.g.*, John H. Langbein & Richard A. Posner, *Social Investing and the Law of Trusts*, 79 Mich. L. Rev. 72 (1980); Maria O'Brien Hylton, *Socially Responsible Investing: Doing Good Versus Doing Well In An Inefficient Market*, 42 Am. U. L. Rev. 1 (1992); George Djurasovic, *The Regulation of Socially Responsible Mutual Funds*, 22 J. Corp. L. 257, 261–62 (1997); Benjamin J. Richardson, *Fiduciary Relationships for Socially Responsible Investing: A Multinational Perspective*, 48 Am. Bus. L.J. 597 (2011). For an exploration of the contrasts of SRI and ESG, see Blaine Townsend, *From SRI to ESG: The Origins of Socially Responsible and Sustainable Investing*, 1 J. Impact & ESG Investing 1 (2020); Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 Stan. L. Rev. 381 (2020).

[71] *See* Who Cares Wins, *supra* note 50, at 1, 3–4, 9, 21.

[72] *See id.* at 21, 27.

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This language conceptually tied the report's framing of the term ESG to issues relevant to investment value, as articulated in "the investment rationale," but made clear that it was not constricting itself to traditional or narrow notions of materiality.[73] At the same time, the report did not confront key normative choices between ESG as a means of pursuing long-term shareholder value, reducing corporate externalities, or producing some other social good. Investment value was a key focus, but language concerning social values was also included.

The report concluded by stating the initiative participants' intentions for outreach to start a process "to further deepen, specify and implement the recommendations outlined in th[e] report."[74] This included plans to approach accounting standard-setting bodies (FASB, IASB, etc.), professional and self-regulatory organizations (AIMR, EFFAS, NYSE, NASDAQ, FAS, etc.), and investor relations associations (NIRI, DIRK, etc.).[75] Further, the participants planned to approach their own clients to assess their interest and needs for ESG-related research and investment services, and to engage platforms like the UNEP Finance Initiative, The Conference Board, and the World Economic Forum to start dialogue with investors, companies, regulators, stock exchanges, accountants, consultants, and NGOs.[76]

C. The Diffusion of ESG: The Flywheel of UN Initiatives, Financial Institutions, Institutional Investors, and Their Networks

An acronym that might have been viewed as nothing more than a defined term in a technocratic report has instead seen a "meteoric rise."[77] The strategic framing of putting E, S, and G together was not inherently sticky; it was amplified through a number of UN initiatives and institutional support that helped to spread the term through the global investment community to investors and stakeholders around the world. While the term ESG was mentioned in fewer than 1% of earnings call in the years immediately following the *Who Cares Wins* report, by 2021 it was mentioned in nearly one-fifth of earnings

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[73] Subsequent discussions, particularly in Europe, have focused on the concept of "double materiality" to describe "how corporate information can be important both for its implications about a firm's financial value, and about a firm's impact on the world at large." Henry Engler, *"Double Materiality": New Legal Concept Likely to Play in Debate Over SEC's Climate Plan*, Thomson Reuters (Apr. 12, 2022), https://www.thomsonreuters.com/en-us/posts/investigation-fraud-and-risk/sec-double-materiality-climate/.

[74] *See* Who Cares Wins, *supra* note 50, at 40.

[75] *Id.*

[76] *Id.*

[77] *See* Witold Henisz et al., *Five Ways that ESG Creates Value*, McKinsey Q. (Nov. 14, 2019), https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/five-ways-that-esg-creates-value.

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calls and a survey found that 72% of institutional investors implemented ESG factors.[78]

One of the early boosts to using the ESG frame came immediately on the heels of the *Who Cares Wins* report. The United Nations Environment Programme Finance Initiative (UNEP FI) Asset Management Working Group, composed of thirteen asset managers and pension funds, commissioned the international law firm Freshfields Bruckhaus Deringer to produce a study analyzing whether integration of ESG issues into investment policy was voluntarily permitted, legally required, or hampered by law and regulation.[79] The issue of fiduciary duty was a particularly thorny potential obstacle to spreading ESG. For years, many observers interpreted the law in jurisdictions around the world, including the United States, as requiring portfolio managers and other trustees to solely pursue profit maximization in investment practice and decision-making.[80] Under the "sole interest rule" of trust fiduciary law, a trustee must consider only the interest of the beneficiary, and consideration of the trustee's own sense of ethics or an attempt to obtain collateral benefits for third parties could be seen as a violation of the duty of loyalty.[81] The integration of ESG issues into investments by portfolio managers and other trustees was thus "vastly ambiguous and often resisted based on a belief that taking account of such issues was legally prevented."[82]

The Freshfields report concluded that "the links between ESG factors and financial performance are increasingly being recognised" and so "integrating ESG considerations in an investment analysis. . . is clearly permissible and is arguably *required* in all jurisdictions."[83] The report came to be regarded as "[t]he single most effective document for promoting the integration of environmental, social, governance (ESG) issues into institutional investment."[84]

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[78] Debbie Carlson, *Mentions of 'ESG' and Sustainability are Being Made on Thousands of Corporate Earnings Calls*, MarketWatch (July 19, 2021), https://www.marketwatch.com/story/mentions-of-esg-and-sustainability-are-being-made-on-thousands-of-corporate-earnings-calls-11626712848.

[79] U.N. Env't Programme Fin. Initiative, Foreword to A Legal Framework for the Integration of Environmental, Social and Governance Issues Into Institutional Investment (2005), https://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf.

[80] U.N. Env't Programme Fin. Initiative & Principles for Responsible Inv., Fiduciary Duty In the 21st Century (2019), https://www.unepfi.org/fileadmin/documents/fiduciary_duty_21st_century.pdf; Schanzenbach & Sitkoff, *supra* note 70, at 381.

[81] Schanzenbach & Sitkoff, *supra* note 70, at 381.

[82] U.N. Env't Programme Fin. Initiative & Principles for Responsible Inv., *supra* note 80.

[83] *Id.*

[84] Asset Mgmt. Working Grp. U.N. Env't Programme Fin. Initiative, Fiduciary Responsibility: Legal and Practical Aspects of Integrating Environmental, Social and Governance Issues Into Institutional Investment 14 (2009); *see also* Joakim Sandberg, *Socially Responsible Investment and Fiduciary Duty: Putting the Freshfields Report into Perspective*, 101 J. Bus. Ethics 143, 144 (2011) (describing influence of the Freshfields report).

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It did not end all debate about fiduciary duties,[85] but, crucially, it provided institutional investors with a go-to resource to cite for legal analysis from a highly-respected global firm that supported taking action on ESG integration consistent with their fiduciary duties.

The following year, the UNEP FI and the UN Global Compact launched the Principles for Responsible Investment (PRI)—again, a group of leading institutions jointly engaged with the UN to push forward the larger project of understanding the investment implications of ESG.[86] Under the PRI, institutional investor signatories can voluntarily commit to supporting and implementing six core principles that channel their power toward promoting the disclosure of ESG issues by portfolio companies and the integration of ESG issues in investment analysis, ownership policies, and within the investment industry itself.[87]

By this time, efforts at standard setting for "impact" or "sustainability" reporting started to evolve as well. The Global Reporting Initiative (GRI), which had launched its guidelines in 2000, the same year as the UN Global Compact, had initially focused on environmental conduct principles following public outcry over the Exxon Valdez oil spill.[88] By the mid-2000s, "demand for GRI reporting and uptake from organizations steadily grew," and the guidelines were expanded and GRI opened up offices around the world.[89] Most critically, it broadened its focus from environmental conduct principles to ESG issues, and eventually transitioned from providing guidelines to global standards for reporting.[90]

The *Who Cares Wins* initiative, which originally coined the term ESG, also continued its efforts through 2008 in "a series of closed-door/invitation-only events for investment professionals, providing a platform for asset managers

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[85] Schanzenbach & Sitkoff, *supra* note 70, at 385–92 (distinguishing between ESG pursued for a direct benefit of risk-adjusted return versus for collateral benefits to third parties or for moral and ethical reasons, and discussing continued "confusion" and disagreement about fiduciary duties and ESG investing).

[86] In 2005, Kofi Annan invited a group of the world's largest institutional investors to develop the PRI. It is a "20-person investor group drawn from institutions in 12 countries [a]nd supported by a 70-person group of experts from the investment industry, intergovernmental organisations and civil society." *About the PRI*, Principles for Responsible Inv., https://www.unpri.org/about-us/about-the-pri.

[87] *What Are the Principles for Responsible Investment?*, Principles for Responsible Inv., https://www.unpri.org/about-us/what-are-the-principles-for-responsible-investment; *see also* Virginia E. Harper Ho, *'Enlightened Shareholder Value': Corporate Governance Beyond the Shareholder-Stakeholder Divide*, 36 J. Corp. L. 59, 81–82 (2010) (discussing the primary goals of the PRI and the six principles). These efforts expanded in subsequent years. For example, the PRI and UNEP FI launched a joint initiative that led to a 2019 report declaring that fiduciary duties require investors to incorporate ESG issues into investment analysis and decisions, and a Global Statement on Investor Obligations and Duties with over one hundred signatories from fifty countries. U.N. Env't Programme Fin. Initiative & Principles for Responsible Inv., *supra* note 80, at 8, 52.

[88] *Our Mission and History*, GRI, https://www.globalreporting.org/about-gri/mission-history/.

[89] *Id.*

[90] *Id.*

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and investment researchers to engage with institutional asset owners, companies and other private and public actors on ESG issues."[91] Each event in the series looked in-depth at "a particular element of ESG mainstreaming," from the interface between investors and companies to the role of ESG in emerging markets investment.[92] A much larger universe of institutions had participated in initiative events by this time—from new bank participants such as Citigroup to companies like Nestlé and Royal Dutch Shell, and a wide array of non-profit organizations.[93]

The initiative culminated in a final report that identified impediments to wider uptake of ESG by the financial industry and offered a set of recommendations for each of the key market actors in the system.[94] It noted that "progress has not been uniform": "corporate governance is the concept that most easily captures mainstream minds" and the understanding and integration of financially-material environmental issues had also "advanced greatly."[95] The quality and amount of coverage of social/stakeholder issues, employee relations and human capital, and business ethics had lagged.[96] It was "understandable that change has sometimes been slow" because ESG "is about doing traditional investments better" and so it is "necessarily long term and adds value at the margin."[97] With "the learning phase . . . drawing to a close" and "a springboard for scaling up ESG integration" in place, however, it ultimately observed that the majority of industry professionals that had participated in the initiative "believe that the investment system is well on track for ESG issues becoming mainstream."[98] Indeed, in less than a decade the groundwork had been set for the term ESG to reach ubiquity in subsequent years.

Notably, to arrive at this point, a fragile alliance had to come together under a big tent to create and focus attention on the new term of ESG. Although not explicitly spelled out in reports, the history reflects a wide array of interests being negotiated through this time, starting with the vision of some true believers in environmental and social progress who catalyzed the

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[91] Int'l Fin. Corp., Who Cares Wins, 2004–08: Issue Brief at 2 [hereinafter IFC Issue Brief].

[92] The Global Compact, Outcomes of the Who Cares Wins Initiative 2004-2008: Future Proof? Embedding Environmental, Social and Governance Issues in Investment Markets 14 (2008) [hereinafter WCW Future Proof?], https://documents1.worldbank.org/curated/en/476811468158704493/pdf/476600WP0Futur10Box338858B01PUBLIC1.pdf.

[93] *Id.* at 43–44. The global financial crisis was underway in 2008, at the conclusion of the Who Cares Wins initiative, and participants viewed it as having "reinforced the necessity for the financial industry to more diligently manage their risks, including those related to [ESG] issues." *Id.* at 3.

[94] IFC Issue Brief, *supra* note 91, at 2.

[95] WCW Future Proof?, *supra* note 92, at 16.

[96] *See id.* at 24 (charting significantly different amounts and quality of coverage of ESG issues, with GHG emissions and other environmental issues and risks far ahead of social/stakeholder issues, employee relations and human capital, and business ethics).

[97] WCW Future Proof?, *supra* note 92, at 17.

[98] *Id.* at 16.

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international investment community and financial industry to become a driving force for uptake.[99] The E in ESG held out promise for making progress on environmental issues for financial institutions and institutional investors, particularly in Europe, that had been working on climate initiatives and engagement on "sustainability" dating back to the 1980s and the UN-commissioned Brundtland Report. Incorporating S into ESG was particularly important for labor-affiliated pension funds and reflected various principles that the UN had championed through its work on the Global Compact and earlier efforts focused on developing economies. The G was already widely embraced by mainstream players and conventional notions of law and finance,[100] and thereby provided legitimacy or cover for attempts at making progress on environmental and social issues.[101]

Coining ESG and framing it as a new concept for mainstream investing practices gave it the potential for uptake beyond that achieved by earlier efforts under the guise of "ethical investing" or SRI, which had largely used negative screening of "bad" firms and could be "depicted as rabidly ideological,"[102] or CSR that had often taken the limited form of corporate philanthropy. However, navigating these varied interests and packaging ESG for the mainstream also involved a compromise or shift in approach for the previous generation of advocates—ESG was crafted in the language of conventional finance as aligning with long-term risk adjusted value, envisioning that at some point values and value would converge, but without fully working out the details at the time.

Later accounts from key participants described a purposeful attempt to "shift the conversation away from personal ethics and toward material issues" that could engage asset and pension fund managers, and capital market players generally, in language that the investment and financial industry understood.[103] The very ordering of the letters E, S, and G reflects this strategic positioning and fragile alliance—one account noted: "S was the real problem, the outlier the investment chain felt most uncomfortable with and, possibly, with a whiff

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[99] *See, e.g.*, Wilson, *supra* note 52 (describing how key thinkers at the United Nations who believed in the importance of sustainability and environmental and social issues strategized on how to engage asset and pension fund managers and "build a bridge between . . . freewheeling capital markets, and . . . the corset-tight area of multilaterals, with its love of hierarchy and procedure").

[100] *See, e.g.*, Lund & Pollman, *supra* note 14, at 2575–78 (describing "the reign of shareholder primacy and good governance"); Mariana Pargendler, *The Corporate Governance Obsession*, 42 J. Corp. L. 359, 359 (2016) (arguing that corporate governance is "politically palatable" as "a midway solution between markets and government" that "appeals to progressives as a path for social and economic change in the face of political resistance to state intervention, while pleasing conservative forces as an acceptable concession to deflect greater governmental intrusion in private affairs").

[101] *See* Clements-Hunt, *supra* note 52 (noting that governance "dominate[d] the business world" and was "familiar" to the business and investment community).

[102] Wilson, *supra* note 52.

[103] *Id.*

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of socialism about it [that] could open the Pandora's box of labour rights and even human rights issues."[104] The solution was to "stick S in the middle" to "protect it" from "lobbyists uncomfortable with anything which challenged the Milton Friedman doctrine" and then "weld environment upfront and live with G at the end."[105] Even with this solution, in the early years after the term ESG was coined, cultural clashes between "more capitalist Anglo-Saxon investors" and European fund managers emerged and had to be navigated to launch initiatives such as the Principles for Responsible Investment.[106]

These varied efforts and strategies eventually paid off in terms of mainstreaming ESG. After significant groundwork laid by a wide array of actors, the "Big Three" asset managers—BlackRock, Vanguard, and State Street—started to speak in the language of ESG and offer ESG funds. By 2017, Larry Fink, the chairperson and CEO of BlackRock, the world's largest asset manager, said in his annual letter to CEOs that BlackRock looks to ESG factors for "essential insights into management effectiveness and thus a company's long-term prospects."[107] In subsequent years, he emphasized the importance of ESG and tied the term to other buzzwords such as "sustainability," "purpose," and "stakeholders," while conveying the notion that "purposeful companies, with better environmental, social, and governance (ESG) profiles, have outperformed their peers," and "broad-market ESG indexes are outperforming their counterparts."[108]

Furthermore, the Big Three have not only spoken the language of ESG in their public outreach, but also in their direct engagement with portfolio companies and crafting of voting policies on topics spanning ESG disclosure, carbon emissions, and board diversity.[109] Scholars and commentators have expressed concern over the rising power held in the hands of these large asset managers, and have explained their advocacy on ESG issues with

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[104] Clements-Hunt, *supra* note 52.

[105] Wilson, *supra* note 52; *see also* Michael Baxter, *Can Judges Save the World? The Troubled History of ESG and the Fiduciary Duty*, GRC World Forums (Apr. 19, 2022), https://www.grcworldforums.com/can-judges-save-the-world-the-troubled-history-of-esg-and-the-fiduciary-duty/4930.article (quoting Paul Clements-Hunt that "'S' was put in the middle to 'stop it from falling off the side'").

[106] Wilson, *supra* note 52.

[107] Larry Fink, *Larry Fink's 2017 Letter to CEOs*, BlackRock, https://www.blackrock.com/corporate/investor-relations/2017-larry-fink-ceo-letter.

[108] Larry Fink, *Larry Fink's 2021 Letter to CEOs*, BlackRock, https://www.blackrock.com/corporate/investor-relations/2021-larry-fink-ceo-letter.

[109] *See* Dorothy S. Lund, *Asset Managers as Regulators*, 171 U. Pa. L. Rev 77 (2022); *see also* Tim Bowley & Jennifer G. Hill, *The Global ESG Stewardship Ecosystem* (Eur. Corp. Governance Inst. Fin, Working Paper No. 660/2022, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4240129 (describing "ESG stewardship" across the "transnational network of different non-state actors, including globally-active institutional investors, international institutions and agencies, non-governmental organizations, investor networks and representative bodies, as well as the various service providers that support the governance activities of institutional investors").

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theories ranging from client demand to marketing to millennials.[110] ESG notably exploded in popular usage as the world's largest asset managers tied significant portions of their own business models to the label and adopted voting policies related to ESG disclosures and issues.[111] Corporate governance battles such as shareholder proposals on environmental and social policy, and ESG-related shareholder activism, also sharply rose in recent years.[112] As ESG-related investing has soared into the trillions of dollars, the emergence of niche investment funds touting contrarian "anti-ESG" strategies reflects a sign of the new times and just how mainstream the term has become over the past two decades.[113]

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[110] *See, e.g.*, John C. Coates, *The Future of Corporate Governance Part I: The Problem of Twelve* 1, 5–6 (Harv. L. Sch., Harv. Pub. L. Working Paper No. 19-07, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3247337 (raising concern about the concentration of power in the hands of a small number of large asset managers that lack democratic legitimacy and electoral accountability); Zohar Goshen & Doron Levit, *Ages of Inequality: Common Ownership and the Decline of the American Worker*, 72 DUKE L.J. 1, 1 (2021) (arguing that the concentration of ownership in large institutional investors exacerbates income inequality by shifting wealth from labor to capital); Lund, *supra* note 109 (arguing that large asset managers have acted as "private regulators" by establishing standards and mandates on various ESG issues in response to client demand); Jeff Schwartz, '*Public' Mutual Funds*, *in* CAMBRIDGE HANDBOOK ON INVESTOR PROTECTION, (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3821388 (arguing that large asset managers engage in stewardship "just enough to ward off public opprobrium and potential regulation"); Michal Barzuza, Quinn Curtis & David Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243, 1244 (2020) (describing ESG activism by the Big Three and arguing that "index funds are locked in a fierce contest to win the … assets of the millennial generation, who place a significant premium on social issues in their economic lives").

[111] As one indication, one of the most popular websites on corporate law and governance featured the term ESG for the first time in 2008, reached approximately 100 incidents of the term in 2017, the year that BlackRock's Larry Fink first mentioned it in his annual letter to CEOs, and 2022 is on track to reach over 500 incidents of the term ESG. *See* HARV. L. SCH. F. ON CORP. GOVERNANCE, https://corpgov.law.harvard.edu.

[112] *See, e.g.*, THE CONFERENCE BOARD, 2022 PROXY SEASON PREVIEW AND SHAREHOLDER VOTING TRENDS: ENVIRONMENTAL & SOCIAL PROPOSALS IN GENERAL, https://www.conference-board.org/publications/pdf/index.cfm?brandingURL=environmental-and-social-proposals-in-general-brief-1; Kai H.E. Liekefett et al., *Shareholder Activism and ESG: What Comes Next, and How to Prepare*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE (May 29, 2021), https://corpgov.law.harvard.edu/2021/05/29/shareholder-activism-and-esg-what-comes-next-and-how-to-prepare/.

[113] *See, e.g.*, Saijel Kishan & Bloomberg, *'It's a Whirligig': ESG Pioneer Expects Shakeout for Funds Hyped by 'Fairy Dust'*, FORTUNE (Mar. 20, 2022, 2:19 PM), https://fortune.com/2022/03/20/whirligig-esg-pioneer-expects-shakeout-for-funds-hyped-by-fairy-dust-russia-paul-clements-hunt-hairobi-blended-capital-group/ (noting "ESG has ballooned into an industry embraced by the giants of Wall Street and Europe's financial hubs" and as a "global market adds up to about $40 trillion of assets"); Jeff Benjamin, *Anti-woke Strategies Emerge as Flip Side of ESG*, INVESTMENTNEWS (Dec. 22, 2021), https://www.investmentnews.com/anti-woke-strategies-emerge-as-flipside-of-esg-215345 (discussing the launch of the "BAD ETF" offering exposure to the gambling, alcohol and pharmaceutical industries in response to the "proliferation of ESG funds flooding the market, despite a general lack of clarity"); Liam Denning, *The Tricky Politics of Anti-ESG Investing*, BLOOMBERG (May 19, 2022, 6:00 AM), https://www.bloomberg.com/opinion/articles/2022-05-19/the-tricky-politics-of-a-new-asset-firm-backed-by-peter-thiel (discussing the launch of Strive Asset Management with an "anti-ESG thesis").

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II. The Evolving and Varied Usages of ESG

As the ESG term was pushed out of closed-door meetings of financial institutions convened by the United Nations and into reports, further dialogue with a large network of market actors, and frameworks such as the PRI, it spread quickly and in ensuing discourse it became used in a variety of ways. Different usages of ESG are not necessarily mutually exclusive, but in some instances overlapping or in tension with each other. These varied usages and understandings of ESG reflect a diversity of views about justifications for the concept, its utility, and the like, as well as an untethering or lack of connection to the original framing from the *Who Cares Wins* report.

This Part examines several common ways in which the term ESG has been given meaning to date, starting from the primary sense in which the term ESG was used, as factors for integrating in investment analysis, and exploring evolving usage such as ESG as a means of risk management, as a synonym for CSR or sustainability, or as a preference or activity. Additional variations and usages are undoubtedly possible and consensus on the meaning of ESG does not currently exist.[114] Scholars have previously observed that ESG lacks a "common theorization"—an agreement or shared beliefs establishing a common discourse on a term or concept.[115] Without such a common theorization, convergence on things such as ESG ratings is less likely,[116] and regulatory approaches may vary.[117] A host of other implications arise from the strategic choice to combine E, S, and G in one term, and from the varying usages that have developed, which this Article takes up in subsequent discussion.

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[114] *See* Elad L. Roisman, Comm'r, Sec. & Exch. Comm'n, Keynote Speech at the Society for Corporate Governance National Conference (July 7, 2020), https://www.sec.gov/news/speech/roisman-keynote-society-corporate-governance-national-conference-2020 ("[T]here is not consensus on what, exactly, 'ESG' means."); *see also* Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 Vand. L. Rev. 1401, 1414 (2020) ("Despite trillions of dollars poured into ESG investments, a decade of corporate soul searching, and a bevy of standard setters, one would be hard-pressed to come up with a consistent definition for this phenomenon."); Larcker et al., *supra* note 11, at 1 (noting that "considerable uncertainty exists over what ESG is" and "[d]espite the near universal push for ESG, consensus does not exist about the problem ESG is expected to solve").

[115] *See* Aaron K. Chatterji, Rodolphe Durand, David I. Levine & Samuel Touboul, *Do Ratings of Firms Converge? Implications for Managers, Investors and Strategy Researchers*, 37 Strat. Mgmt. J. 1597, 1599 (2016).

[116] *See, e.g.*, Robert G. Eccles & Judith C. Stroehle, *Exploring Social Origins in the Construction of ESG Measures* (July 12, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3212685 (noting whether different raters measure the same construct in a similar way would also contribute to a greater likelihood of convergence on ratings).

[117] *See, e.g.*, Jane McAdam, Climate Change, Forced Migration, and International Law 15 (2012) (exploring how the conceptualization of climate change can "dramatically change the way it is perceived and regulated").

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A. ESG as Factors for Investment Analysis

The *Who Cares Wins* report did not provide a singular definition of ESG beyond the acronym—but it repeatedly referred to being "a joint effort of financial institutions" to "develop guidelines and recommendations on how to better integrate environmental, social and governance issues in asset management, securities brokerage services and associated research functions."[118] Indeed, this language featured as a subtitle on the cover of the report.[119] As noted above, the report also listed example issues that fall under each E, S, and G, and focused on "issues which have or could have a material impact on investment value," while noting that it took a broad view of materiality and saw the G as interlinked with the E and S.[120] Although the report sometimes referred to broader goals such as "contribut[ing] to the sustainable development of global society," invoking language in the spirit of the UN Global Compact, it heavily emphasized the "business case" justification and alignment with long-term value for shareholders.[121] On the whole, the picture that emerges from the report is that ESG refers to "information," "issues," "factors," or "criteria" that should be integrated into "normal" and "mainstream" investment analysis.[122] The report did not explain in any detail how such integration should be done.

The term ESG has been and is often still used in this vein as a way of referring to a set of issues that should be integrated into investment analysis.[123] As a tool, ESG is often broken into component parts of E, S, and G, and explained by reference to underlying content that would be relevant to investor decision-making. In this framing, ESG is not synonymous with ethical investing, but rather viewed as integral to mainstream investment strategy.[124]

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[118] WHO CARES WINS, *supra* note 50, at vii.
[119] *Id.* at i.
[120] *Id.* at 2.
[121] *See id.* at 3, 9–10.
[122] *See id.*, *passim*.
[123] *See, e.g.*, Ron Lieber, *The Rush to E.S.G., With or Without Elon Musk*, N.Y. TIMES (June 18, 2022), https://www.nytimes.com/2022/06/18/your-money/esg-investing-stocks-elon-musk.html (quoting Domini Impact Investments' founder defining ESG as "a more robust set of material data points from which an investment adviser can make a decision"); *cf.* Alex Edmans, *The End of ESG* 5 (Eur. Corp. Governance Inst., Working Paper No. 847, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4221990 (describing ESG as "a set of long-term value factors").
[124] *See* Kishan & Bloomberg, *supra* note 113 (describing view that "ESG is often wrongly conflated with ethical investing" and instead "the strategy involves measuring investment risks tied to issues such as climate change, human-rights violations in supply chains and poor corporate governance" and "by addressing those challenges, there are opportunities to make money"); *see, e.g.*, Stuart Kirk, *ESG Must Be Split In Two*, FIN. TIMES (Sept. 2, 2022), https://www.ft.com/content/4d5ab95e-177e-42d6-a52f-572cdbc2eff2 (explaining that "portfolio managers, analysts and data companies have understood ESG investing for years" as "taking [ESG] issues into account when trying to assess the potential for risk-adjusted returns of an asset" and this is "very different" from "'ethical' or 'green' or 'sustainable' assets").

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To take S as an example, as one scholar explained, "[i]n the context of responsible investment, the S is meant to better evaluate how well positioned a company is for the long term, the reputational value it or its products gain from goodwill, the stability and long-term efficiency of its workforce, potential costs of labour conflicts, the political risk of conflicts with communities, the legal and reputational risks that it runs from potential problems with its supply chain employment practices or community protests, and so on."[125] Notably, there are a variety of ways in which the idea of stakeholders, social issues, and society may enter into ESG investment practice. Social information, for instance, might be integrated into valuation, into investment mandates such as exclusionary screens, or into standards of practice or principles that corporations are meant to adopt or against which their behavior will be measured.[126] A variety of frameworks for evaluating and engaging corporations on social issues have developed, closely linked to ESG as a tool for investment or vehicle for investor-corporate dialogue.[127]

B. ESG as Risk Management

The broad scope of potential issues that could come under the words "environmental, social and governance," the wide-ranging and potentially diverging incentives of the UN and the financial industry, and the lack of specificity in definition by the *Who Cares Wins* initiative opened up the possibility of the term ESG taking on a variety of meanings. By 2008, the year in which the initiative concluded, a survey of over 300 fund managers, of whom only 23% self-identified as "socially responsible investors," found that over 70% viewed ESG as a tool to identify investment opportunities as well as to manage risk.[128]

For many mainstream investors and asset managers, the key justification for incorporating ESG factors into investment analysis relates to their potential impact on portfolio-level risk-adjusted returns or the relationship between ESG factors and risk management at the company level.[129] Further,

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[125] David Wood, *What Do We Mean by the S in ESG? Society as a Stakeholder in Responsible Investment*, *in* The Routledge Handbook of Responsible Investment 553 (Tessa Hebb, James P. Hawley, Andreas G. F. Hoepner, Agnes L. Neher, David Wood eds., 2015).

[126] *Id.* at 556–59.

[127] *Id.* at 560.

[128] Harper Ho, *Enlightened Shareholder Value*, *supra* note 87, at 88 (citing Danyelle Guyett, *ESG Ratings of Fund Managers—a Step Closer Towards the Mainstreaming of ESG Integration*, Mercer (July 4, 2008)).

[129] Virginia Harper Ho, *Sustainable Investment & Asset Management: From Resistance to Retooling* (Mar. 23, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4064317; *see also* Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk*, 41 J. Corp. L. 647, 647 (2016) (discussing "the exercise of shareholder power to promote firm management, mitigation, and disclosure of risk, including nonfinancial environmental, social, and governance (ESG) risks"). On ESG and systematic risk, see John C. Coffee, *The Future of Disclosure: ESG, Common Ownership, and Systematic Risk* (Eur. Corp. Governance Inst.,

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based on interviews and roundtable discussions with over three hundred participants, including large asset managers, investment banks, pension funds, proxy advisors, hedge funds, leading investors and sustainability advocates, Stavros Gadinis and Amelia Miazad found that "companies are using ESG on the ground" to help "identify and manage social risks to their business."[130] According to their findings, "ESG has evolved into a separate corporate function, whose mission is to monitor and manage the risks facing the company due to environmental and social impact."[131]

Unlike internal controls and accounting, which operate under an externally-driven, rules-based framework, "ESG represents an attempt by companies to self-regulate their conduct."[132] Thus, in this understanding of ESG, "[t]he values that ESG promotes do not originate from an abstract moralistic philosophy of 'doing the right thing,' nor are they dictated by a central standard setter . . . [r]ather, they arise following a wide-ranging consultation with stakeholders, who are better positioned to take notice of potentially catastrophic company operations."[133] In an era in which bad public relations or corporate scandals could have devastating effects on a company's operations and brand value, engaging stakeholders such as consumers and employees through "ESG practices" can provide useful information to manage key relationships and mitigate risk.[134] Instead of simply being a tool for evaluating a broader set of investment factors, ESG has taken on meaning as a set of practices for proactive risk management, whether at the firm or portfolio level.

Working Paper No. 541, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3678197; *see* Jeffrey N. Gordon, *Systematic Stewardship* (Eur. Corp. Governance Inst., Working Paper No. 640, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782814.

[130] Gadinis & Miazad, *supra* note 114, at 1410.

[131] *Id.* at 1415.

[132] *Id.*

[133] *Id.* at 1426; *see also* Wood, *supra* note 125, at 562 (explaining that ESG, and particularly S, plays a role as "a lens with which to view corporate value, by identifying places where corporations or investments improve their financial performance through more effective management of human relations with employees, communities, or other stakeholders").

[134] *See* Gadinis & Miazad, *supra* note 114, at 1432–35; *see also* Gillian Tett, *ESG Exposed in a World of Changing Priorities*, Fin. Times (June 2, 2022), https://www.ft.com/content/6356cc05-93a5-4f56-9d18-85218bc8bb0c ("[T]he concept of ESG has moved from being a narrow area of activism—driven by people who want to change the world—to a sphere of risk management for corporate boards—where it is shaped by the knowledge that companies that ignore ESG issues can face reputational damage and the loss of customers, investors and employees."); *see also* Allison Herren Lee, *Keynote Address by Commissioner Lee on Climate, ESG, and the Board of Directors*, Harv. L. Sch. F. on Corp. Governance (June 30, 2021), https://corpgov.law.harvard.edu/2021/06/30/keynote-address-by-commissioner-lee-on-climate-esg-and-the-board-of-directors/ (discussing the role of corporate boards to mitigate ESG risks). For an argument against director oversight liability extending to ESG, see Stephen M. Bainbridge, *Don't Compound the Caremark Mistake by Extending it to ESG Oversight*, 77 Bus. Law. 651 (2022).

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C. ESG as Corporate Social Responsibility or Sustainability

A different interpretation or meaning ascribed to ESG in contemporary parlance is a belief that it represents "a step towards a better world" that is tied to beneficial long-term social outcomes.[135] In short, ESG gets equated, or conceptually combined, with CSR. A variation of this equates ESG with a different term—sustainability.

For some, this usage may stem from a belief that broad social benefits may flow from using ESG as a tool for enhanced investment analysis. The preamble to the Principles for Responsible Investment itself draws this link, declaring, "We also recognize that applying these Principles may better align investors with broader objectives of society."[136] The original *Who Cares Wins* report also included language about broader social benefits—reflecting the UN's goals in the initiative and the values it aimed to serve through the Global Compact.[137] Thus, some usage of ESG reflects the notion that using it as a tool for enhanced investment analysis might create social benefits that non-ESG-related investing might not provide.[138]

Although the use of ESG information in investment decision-making is not the same as pursuing broad social benefits, some view the two as inextricably linked and so language around ESG takes on the flavor of CSR discourse. For example, Lynn LoPucki suggested the following connection: "CSR is the abstract idea that corporations have a moral responsibility to voluntarily integrate environmental, social, and governance ('ESG') improvements into their business operations for the benefit of shareholders, other stakeholders, society as a whole, and the environment."[139] Stated differently, "CSR is adherence to the actual values of corporate stakeholders, and ESG is a set of measurements from which conclusions about CSR can be drawn."[140]

For others, they may simply think that ESG is a new synonym for CSR.[141] Some may have inferred this understanding from notions that the types of environmental and social issues that are often discussed under the term ESG are the same or similar as those of previous eras that were labeled

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[135] Wood, *supra* note 125, at 553.

[136] *What Are the Principles for Responsible Investment?*, Principles for Responsible Inv., https://www.unpri.org/about-us/what-are-the-principles-for-responsible-investment#:~:text=Signatories'%20commitment&text=We%20also%20recognise%20that%20applying,with%20broader%20objectives%20of%20society (last visited Aug. 11, 2024).

[137] *See* Who Cares Wins, *supra* note 50, at vii.

[138] *See* Wood, *supra* note 125, at 553.

[139] Lynn M. LoPucki, *Repurposing the Corporation Through Stakeholder Markets*, 55 U.C. Davis L. Rev. 1445, 1448 (2022).

[140] *Id.* A common variation is to combine ESG and CSR, perhaps to straddle the various meanings and connotations. *See generally* Mark J. Roe, *Corporate Purpose and Corporate Competition*, 99 Wash. U. L. Rev. 223 (2021) (referring throughout to "CSR/ESG" and "ESG/CSR").

[141] *See* Larcker et al., *supra* note 11, at 2 (noting that a viewpoint "held by many investors and members of the public, is that ESG is synonymous with corporate responsibility").

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CSR. For example, one scholar described ESG "as a subcategory of CSR and uses a metrics-driven format to measure a company's commitment to social responsibilities."[142] Others have observed, "the ESG movement sounds like older corporate social responsibility (CSR) movement—but with a new name."[143]

In this understanding of ESG as a synonym for CSR, it encompasses notions of moralistic or ethical value. It is a "normative (values-based) argument" to "inject social consciousness into both corporate and individual investment decisions."[144] Participants in the system that had been focused on values-driven activity imbued the term ESG with their views and in turn helped shape others' understanding of the values being promoted by ESG-related activity. For example, researchers have traced how the different "origins, philosophies, and 'purposes' of ESG" shaped the methods and data characteristics of two important ESG data vendors.[145] Whereas Innovest developed a financial value-oriented methodology, KLD by contrast took a values-driven approach.[146]

The *Who Cares Wins* initiative did not resolve the potential tensions between these approaches to understanding ESG—it emphasized the "business case" from the financial industry perspective but also promoted notions that the UN's goals would be served, which arose out of Kofi Annan's concern for building a social safety net around the globe and addressing gaps in human rights, labor standards, and environmental practices. This potential ambiguity left open the interpretation that ESG was a new term for what used to be called CSR and many market participants, non-profit organizations, and the like maintained such orientation and refocused their efforts into the new ESG movement.

D. ESG as Ideological Preference

Finally, another characterization of ESG is that it represents "a preference or taste among some companies or investors."[147] In this common and controversial conceptualization, ESG is a means of "expressing a preference"[148]—like "voting" with one's money as a consumer or investor.[149]

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[142] Thomas Lee Hazen, *Social Issues in the Spotlight: The Increasing Need to Improve Publicly-Held Companies' CSR and ESG Disclosures*, 23 U. PA. J. BUS. L. 740, 745 (2021).

[143] Nives Dolšak, Jennifer J. Griffin & Aseem Prakash, *Is ESG Simply the Old CSR Wine in a New Bottle?*, REGUL. REV. (Mar. 28, 2022), https://www.theregreview.org/2022/03/28/dolsak-griffin-prakash-is-esg-old-csr-wine-in-new-bottle/.

[144] Larcker et al., *supra* note 11, at 2.

[145] Robert G. Eccles, Linda-Eling Lee & Judith C. Stroehle, *The Social Origins of ESG: An Analysis of Innovest and KLD*, 33 ORG. & ENV'T 575 (2020).

[146] *Id.*

[147] Serafeim, *supra* note 1, at 14.

[148] *Id.*

[149] *See* Kell, *supra* note 54; *see also* Quinn Curtis, Jill Fisch & Adriana Z. Robertson, *Do ESG Mutual Funds Deliver on Their Promises?*, 120 MICH. L. REV. 393, 402 (2021) ("For some

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As Georg Kell explained, "The rise of ESG investing can also be understood as a proxy for how markets and societies are changing and how concepts of valuation are adapting to these changes."[150] Corporations are challenged to adapt to changing consumer and investor preferences that "favor[] smarter, cleaner and healthier products and services," and "to leave behind the dogmas of the industrial era when pollution was free, labor was just a cost factor and scale and scope was the dominant strategy."[151]

In this spirit, investors and a wide range of stakeholders seek to align their activities with an expression of their values, whether political, ethical, or social, and ESG is a label vaguely signifying some level of attention to issues beyond the purely financial.[152] It is in this sense that one might hear that a company "is" or "is not" "very ESG" or that is possible to "do ESG."[153] And this usage contributes to some seeing ESG as "a virtue signal,"[154] a marketing tool for companies, asset managers, and service providers that lends itself to greenwashing,[155] or even equating ESG with an ideological preference for "woke capitalism."[156]

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years, investing on the basis of ESG considerations was thought to be a preference predicated on ethical, political, religious, or other objectives rather than an investment strategy grounded in financial risk and return."); Schanzenbach & Sitkoff, *supra* note 70 (differentiating between ESG investing for moral or ethical reasons, which they call "collateral benefits ESG," and ESG investing for risk and return benefits, which they call "risk-return ESG").

[150] Kell, *supra* note 54.

[151] *Id.* For an argument that "index funds have engaged in a pattern of competitive escalation in their policies on [ESG] issues" in response to preferences of millennials as investors, customers, and employees, see Barzuza et al., *supra* note 110, at 1243.

[152] This view is illustrated by a 2021 survey by Broadridge finding that retail investors, particularly millennials aged between 25 to 40, seek to express their environmental and social preferences. Broadridge, *From the Retail Trading Frenzy to Growing ESG Trends, What Will Be in Proxy Season 2021?*, PR Newswire (May 3, 2021), https://www.prnewswire.com/news-releases/from-the-retail-trading-frenzy-to-growing-esg-trends-what-will-be-in-proxy-season-2021-301281582.html. On whether investors are willing to sacrifice returns for social interests, see Scott Hirst, Kobi Kastiel & Tamar Kricheli-Katz, *How Much Do Investors Care About Social Responsibility?*, 2023 Wis. L. Rev. 977, 977 (2023).

[153] *See supra* notes 9–11; *see also* Matt Levine, *Everyone Wants to Do ESG Now*, Bloomberg (Mar. 21, 2022), https://www.bloomberg.com/opinion/articles/2022-03-21/everyone-wants-to-do-esg-now.

[154] *See* Dolšak et al., *supra* note 143; *see also* Gadinis & Miazad, *supra* note 114, at 1415 (observing the "definitional ambiguousness [of ESG] has given rise to a common misperception of ESG as a random and ever-sprawling assortment of objectives, influenced by fads and trends rather than hard business logic.").

[155] *See, e.g.*, Aswath Damodaran, *The ESG Movement: The "Goodness" Gravy Train Rolls On!*, Musings on Mkts. (Sept. 14, 2021), https://aswathdamodaran.blogspot.com/2021/09/the-esg-movement-goodness-gravy-train.html.

[156] Paul Polman, *Critics of 'Woke' Capitalism Are Wrong*, Fin. Times (Jan. 24, 2022), https://www.ft.com/content/34cf61c7-345d-4277-bf18-c1dbdd8a91fc (discussing "woke capitalism"); *see* Andrew Ross Sorkin et al., *Larry Fink Defends Stakeholder Capitalism*, N.Y. Times (Jan. 18, 2022), https://www.nytimes.com/2022/01/18/business/dealbook/fink-blackrock-woke.html (discussing BlackRock CEO Larry Fink's rebuttal to claims that ESG is "bowing to anti-business interests" and that "stakeholder capitalism" is "woke"); *see* Kenneth Rapoza, *How The 'Woke' Capitalists Can Save America*, Forbes (Apr. 5, 2020, 9:00 AM), https://www.forbes.com/sites/kenrapoza/2020/04/05/how-the-woke-capitalists-can-save-america/?sh=3ee8507271ed (noting

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In turn, this understanding of ESG as a preference has catalyzed a "backlash" as it is not seen as a neutral concept or activity but rather one that is value-laden and ideologically or politically tilted.[157] Former Vice President Mike Pence, for example, penned a scathing op-ed vehemently opposing ESG as "a pernicious strategy" that is "inherently political" and "allows the left to accomplish what it could never hope to achieve at the ballot box or through competition in the free market."[158] He championed the view that "the next Republican president and GOP Congress should work to end the use of ESG principles nationwide," and suggested that "government intervention" to stop "the ESG craze" is necessary for "the free market" to "be truly free."[159]

The irony of this latter statement is not lost on those with an understanding of the history of the term. As we have seen, it was in fact coined by an initiative including market actors such as the world's largest banks and participants in the financial industry who subsequently spread it through market activity and private initiatives, with investors choosing ESG-related investment vehicles and an industry growing up to serve client demands. ESG was pitched from its beginning as aligning with financial materiality and the pursuit of long-term value maximization in capital markets. Furthermore, corporations have long been sites of contestation for social and political issues and values, centuries before the term ESG was ever uttered.[160]

Nonetheless, ESG has notably entered a new phase of possible meanings as politicians tout it as a hot button issue or proxy for other values and beliefs.

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that international investment fund managers and the World Economic Forum have made ESG "a talking point for a good 10 years now, largely in response to the old lefty, anti-neoliberal World Social Forum" and "[t]hey all talk about diversity, equality, justice").

[157] *See* Trillions, *The ESG Backlash*, Bloomberg (May 11, 2022), https://www.bloomberg.com/news/audio/2022-05-11/the-esg-backlash-podcast (observing critical views that large asset managers have supported ESG and become too "woke" and formed an "ideological cartel"); Richard Morrison, *The ESG Backlash*, Nat'l Rev. (Mar. 9, 2022, 6:30 AM), https://www.nationalreview.com/2022/03/the-esg-backlash/ (discussing how "[c]onservatives have come to see this collection of business trends" towards ESG as "yet another 'woke' assault on mainstream society" and have "growing opposition to ESG" that will cause it "to hit a wall of resistance"); Aron Cramer, *After a Backlash Summer, ESG Needs to Get Back in the Game*, Fortune (Sept. 20, 2021, 6:00 AM), https://fortune.com/2021/09/20/esg-backlash-summer/ (observing "the backlash against the momentum driving widespread adoption of [ESG] policies became a thing").

[158] Mike Pence, *Republicans Can Stop ESG Political Bias*, Wall St. J. (May 26, 2022, 1:50 PM), https://www.wsj.com/articles/only-republicans-can-stop-the-esg-madness-woke-musk-consumer-demand-free-speech-corporate-america-11653574189 (arguing for "[s]tates, cities and Congress" to take action "by adopting measures to discourage the use of ESG principles").

[159] *Id.*

[160] *See, e.g.*, Corporations and American Democracy (Naomi R. Lamoreaux & William J. Novak eds., 2017) (exploring U.S. law and history from the founding to the present on the topic of corporations and their role in American democracy); Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 Wm. & Mary L. Rev. 1673 (2015) (examining the two-hundred-year history of corporate constitutional rights including the extension of First Amendment rights to corporations); Adam Winkler, We the Corporations (2018) (chronicling the "civil rights movement" of corporations for rights under the U.S. Constitution).

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Battlelines appear sharply drawn by politics, from the rise of "[c]onservative or anti-ESG shareholder proposals"[161] to "anti-ESG" funds.[162] News headlines are filled with proposals to oust ESG or its proponents from the mainstream, such as by claiming the "ESG investing giants" are breaching their fiduciary duties or should be broken up.[163] State politicians and officials from so-called "red states" have attracted attention to the anti-ESG cause by banding together to oppose ESG disclosures,[164] banning state pension funds from screening for ESG risks,[165] probing ESG scores,[166] and limiting contracts with state entities to companies that do not "boycott" energy companies.[167] In 2023, lawmakers

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[161] Clara Hudson, *Conservative Shareholder Proposals Rise Amid Anti-ESG Rumbles*, Bloomberg L. (Aug. 31, 2022, 5:00 AM), https://news.bloomberglaw.com/esg/conservative-shareholder-proposals-rise-amid-anti-esg-rumbles; Ruth Saldanha, *Anti-ESG Proxy 'Explosion' Ends with a Whimper, Not a Bang*, Morningstar (Aug. 15, 2022, 5:00 AM), https://www.morningstar.ca/ca/news/225811/anti-esg-proxy-explosion-ends-with-a-whimper-not-a-bang.aspx.

[162] Silla Brush & Saijel Kishan, *The Anti-ESG Crusader Who Wants to Pick a Fight with BlackRock*, Bloomberg (Sept. 1, 2022, 5:00 AM), https://www.bloomberg.com/news/articles/2022-09-01/woke-inc-author-s-firm-targets-blackrock-esg-investing#xj4y7vzkg; David Isenberg, *'Anti-Woke' and Sin ETFs Could Get Caught Up in SEC Rules Scrutiny*, Fin. Times (Aug. 31, 2022), https://www.ft.com/content/26ce80e6-fcfb-4dff-a565-bd7e23ee364b; *see also* Emma Boyde, *Biblical ETF Provider Renounces ESG Labels in War with 'Liberal Activists'*, Fin. Times (Aug. 31, 2022), https://www.ft.com/content/b6f92b25-8a64-4b04-be70-af65f8d491d2.

[163] Dan Morenoff, *Break Up the ESG Investing Giants*, Wall St. J. (Aug. 31, 2022, 3:10 PM), https://www.wsj.com/articles/break-up-the-esg-investing-giants-state-street-blackrock-vanguard-voting-ownership-big-three-competitor-antitrust-11661961693?st=nuajzp9fq8rkvha; Jed Rubenfeld & William P. Barr, *ESG Can't Square With Fiduciary Duty*, Wall St. J. (Sept. 6, 2023, 6:31 PM), https://www.wsj.com/articles/esg-cant-square-with-fiduciary-duty-blackrock-vanguard-state-stree-the-big-three-violations-china-conflict-of-interest-investors-11662496552.

[164] Patrick Morrisey, Comment Letter on Proposed Rule Titled "Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices" (Aug. 16, 2022), https://ago.wv.gov/Documents/2022.08.16%20ESG%20Funds%20Comment.pdf; Lesley Clark, *Red States Decry "Woke Left" SEC Proposal for ESG Investing*, E&E News (Aug. 18, 2022, 6:38 AM), https://www.eenews.net/articles/red-states-decry-woke-left-sec-proposal-for-esg-investing/.

[165] Frances Schwartzkopff, *GOP Fury Over ESG Triggers Backlash With US Pensions at Risk*, Bloomberg (Aug. 25, 2022, 6:00 AM), https://www.bloomberg.com/news/articles/2022-08-25/esg-pros-say-republican-anti-woke-bashing-hurts-regular-savers; *see also* Ropes & Gray, *State Regulation of ESG Investment Decision-making by Public Retirement Plans: An Updated Survey* (Aug. 9, 2022), https://www.ropesgray.com/en/newsroom/alerts/2022/August/Navigating-State-Regulation-of-ESG-Investments-by-Investment-Managers.

[166] Zach C. Cohen, *Republicans Are Focusing on a New Economic Threat: ESG Scores*, Bloomberg (Aug. 11, 2022, 5:00 AM), https://www.bloomberg.com/news/articles/2022-08-11/esg-as-economic-threat-catches-on-as-theme-in-key-senate-race#xj4y7vzkg; *Eighteen U.S. States Join Missouri Probe Into Morningstar ESG*, ValueEdge Advisors (Aug. 19, 2022), https://valueedgeadvisors.com/2022/08/19/eighteen-u-s-states-join-missouri-probe-into-morningstar-esg-reuters/.

[167] Kate Aronoff, *The Deranged Demands of the "Anti-ESG" Movement*, New Republic (Aug. 29, 2022), https://newrepublic.com/article/167550/desantis-anti-esg-movement; Brooke Masters & Patrick Temple-West, *Companies Attack Texas Over 'Politicized' ESG Blacklist*, Fin. Times (Aug. 29, 2022), https://www.ft.com/content/8031aaad-efc6-4829-ac02-bd9c151974f4; *see also* Adele Peters, *The Secret Money Fueling The Conservative Anti-ESG Push*, Fast Company (Dec. 19, 2022), https://www.fastcompany.com/90824901/secret-money-fueling-conservative-anti-esg-push (describing the coordinated efforts of various donors and groups to oppose ESG and push for anti-ESG legislation).

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in 37 states have introduced over a hundred pieces of "anti-ESG" legislation.[168] Such anti-ESG activities might come at a cost.[169] And in turn, these attacks on ESG are countered and parried, often by asserting value alignment reminiscent of the original *Who Cares Wins* report,[170] or the reality of externalities,[171] reflecting that whether ESG is ideological or political is itself up for debate.

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The variety of usages of ESG that have developed over time reflect a diverse set of justifications, purposes, and views. Understanding the origins of the term helps shed light on how the possibility of these wide-ranging usages was left open at the outset by the lack of a more specific definition and conceptual grounding. Although ESG was coined to describe the types of issues to be integrated into investment analysis by the financial industry, it was connected to notions of more active engagement to manage environmental and social issues that could mitigate risks and create long-term value, and to UN goals and the principles of the Global Compact that more broadly aimed at producing social benefits, security, and sustainable development. As the term spread, it took on varied associations and meanings that reflect these underlying themes but also in some instances are quite far from where it began.

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[168] *2023 Statehouse Report: Anti-ESG State Legislation Tracker & Analysis*, Pleiades Strategy (2023), https://www.pleiadesstrategy.com/state-house-report-bill-tracker-republican-anti-esg-attacks-on-freedom-to-invest-responsibly-earns-business-labor-and-environmental-opposition.

[169] *See, e.g.*, Daniel G. Garrett & Ivan T. Ivanov, *Gas, Guns, and Governments: Financial Costs of Anti-ESG Policies* (Brookings Inst. Hutchins Ctr. Working Paper, 2023), https://www.brookings.edu/wp-content/uploads/2023/03/WP85-Ivanov-Garrett_formatted.pdf (finding that state laws prohibiting municipalities from contracting with counterparties with certain ESG policies imposes significant financial cost); *see also* Leslie Norton, *While Criticizing ESG Investing, Florida, Texas Public Pensions Have Overwhelmingly Supported ESG Resolutions*, Morningstar (Sept. 7, 2022), https://www.morningstar.com/articles/1113157 (noting that public pension funds from Texas and Florida voted in favor of ESG shareholder proposals in 2021 between 85% and 99% of the time before uptick in politicization).

[170] *See, e.g.*, Dan Primack, *BlackRock Response to Attorneys General of the States Listed as Signatories of the August 4, 2022 Letter*, Axios (Sept. 8, 2022), https://www.axios.com/2022/09/08/blackrock-strikes-back-at-esg-critics ("We believe investors and companies that take a forward-looking position with respect to climate risk and its implications for the energy transition will generate better long-term financial outcomes."); *see also* Serafeim, *supra* note 16, at 135 (asserting that those who are not yet on board with ESG "will be left behind" as they have not kept up with "their peers and understanding why industry behavior has changed"); Edmans, *supra* note 123, at 5 ("It makes no sense to politicize ESG issues, when we'd never politicize other drivers of both shareholder and stakeholder value, such as innovation and resilience. . .").

[171] *See, e.g.*, McKinsey, *Does ESG Really Matter—And Why?*, McKinsey Q. (Aug. 10, 2022), https://www.mckinsey.com/business-functions/sustainability/our-insights/does-esg-really-matter-and-why?cid=soc-web (noting a key response to ESG critics is "the acute reality of externalities" and how regulators, stakeholders, employees put pressure on companies to change as part of social license to operate).

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III. The Promise and Perils of the ESG Moniker

While ESG has become "pervasive,"[172] and taken on various meanings, the strategic choice to coin the term, putting together a wide variety of issues into one acronym, has received little focused examination. It is admittedly difficult to disentangle aspects of the conceptual and rhetorical construction of the term from underlying substantive debate of the merits of ESG that has ensued, and the notion of consequences flowing from such construction must necessarily be caveated in terms of causation that cannot be definitively ascribed. Nonetheless, as the term has now been in circulation for nearly two decades, it is possible to look back to gain insights into impacts of the choice to put E, S, and G into one term and better understand current regulatory challenges and potential paths for the future of ESG.

A. The Flexible, Big Tent Approach of ESG and its Alignment Story

The combination of E, S, and G into one acronym has provided a highly flexible term that can vary widely by context, evolve over time, and collectively appeal to a broad range of investors and stakeholders. To explore the advantages of constructing ESG as an umbrella term, each one of these aspects should be considered in turn.

First, ESG was specifically designed to be globally applicable and customizable by context. As the *Who Cares Wins* report explained: "ESG issues relevant to investment decisions differ across regions and sections."[173] Instead of specifying what issues were intended to be integrated into investment analysis, this was left open beyond the words "environmental, social, and governance" and a short list of examples. One of the key examples of an ESG issue provided was the management of corruption and bribery—a topic that is particularly significant in some developing economies around the world and one of the pillars of the Global Compact, but is not front of mind in other geographic areas such as the United States, where board diversity is instead a top issue that has gained traction under the ESG acronym but did not appear on the original list.

Second, ESG was pitched at a highly generic level of phrasing and deliberately avoided words that were already loaded with connotations such as "responsibility," "citizenship," or "sustainability." Instead, the phrase simply combined categories of broad topics, which allows not only for variance by region or context, as discussed above, but also an evolution over time in meaning. Specific sub-issues can change in importance or conceptualization and still fit under the umbrella of the term ESG. For instance, "climate change

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[172] Larcker et al., *supra* note 11, at 1.
[173] *See* Who Cares Wins, *supra* note 50, at 6.

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and related risks" was listed as an example under E, and it has been a primary focus in the ESG movement, and as other issues such as water risks and biodiversity come to be appreciated they can be integrated without change to the existing term.[174] Similarly, "workplace health and safety" was listed as an example under S, and as a broader array of issues related to workers came into focus and took on the label of "human capital management," this too could easily be fit within the existing umbrella of ESG.[175] Further, as ESG was not originally coined by regulators as a legal term of art, investors themselves could be the drivers of the evolution over time in their areas of focus.[176]

Third, and perhaps most importantly, ESG has served as a "big tent"[177] that collectively appeals to a broad range of investors and stakeholders, contributing to the ability of the concept to gain momentum in mainstream audiences. Whereas efforts under the label of CSR faced headwinds and were marginalized with the rise in shareholder primacy and wealth maximization in the late twentieth century, as researchers began to explore links to financial performance and build a "business case" it opened up a pathway for integration in the existing "corporate governance machine" of law, markets, and culture oriented towards shareholders.[178] The *Who Cares Wins* initiative explicitly framed ESG in terms of the business case for integrating issues into mainstream investment analysis, chose a term that was facially more neutral than other existing terms, interjected "governance" which had widespread buy-in from mainstream market actors, and emphasized the theme of aligning goals between those of the financial industry and the UN.[179] This allowed for

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[174] *See, e.g.*, *We Need to Rethink ESG to Ensure Access to Water and Sanitation for All*, World Econ. F. (Aug. 20, 2021), https://www.weforum.org/agenda/2021/08/rethink-esg-to-ensure-access-to-water-and-sanitation-for-all/; Thomas Helm, *Biodiversity Concerns Set To Be The Next Frontier After Climate Change*, IFLR (Feb. 21, 2022), https://www.iflr.com/article/2a647jipe3beilnnbt0qo/biodiversity-concerns-set-to-be-the-next-frontier-after-climate-change.

[175] *See, e.g.*, Georgiev, *supra* note 63, at 639 (noting that human capital management has quickly rose in "prominence and uptake" and is "broadly fitting within the rubric of environmental, social, and governance (ESG) factors").

[176] *See* Wolf-Georg Ringe, *Investor-Led Sustainability in Corporate Governance* (Eur. Corp. Governance Inst., Working Paper No. 615, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3958960 (arguing that "ESG engagement has the potential to become a very powerful driver towards a more sustainability-oriented future" because "investor-led priorities would follow a more flexible and dynamic pattern rather than complying with inflexible predefined criteria"); *see also* Ann Lipton, *ESG Investing, or, If You Can't Beat 'Em, Join 'Em*, *in* Research Handbook on Corporate Purpose and Personhood (Elizabeth Pollman & Robert Thompson eds., 2021) (describing ESG as an "intervention" that "leans into, rather than resisting, shareholder power" and exploring "whether the investor class is the right constituency to craft social policy").

[177] *See* Amanda M. Rose, *A Response to Calls for SEC-Mandated ESG Disclosure*, 98 Wash. U. L. Rev. 1821, 1825 (2021) ("The breadth of topics embraced by ESG, and the breadth of motivations spurring the ESG movement, has created a big tent that has undoubtedly served a purpose in terms of helping the various causes of those involved to gain momentum."); *see also* Curtis et al., *supra* note 149, at 401 ("ESG is a rough label for an amalgamation of voices, interest groups, and substantive concerns.").

[178] Lund & Pollman, *supra* note 14, at 2613.

[179] Who Cares Wins, *supra* note 50, at 1, 3–4, 9, 21.

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understanding ESG as value enhancing, and thus threading the needle of legal debates and creating a "business opportunity" for a wide range of institutional players such as asset managers, ratings agencies, accounting firms and the like.[180]

At the same time, "values-based investors who care about whether, and how, corporations address (at least certain) ESG topics due to religious or sociopolitical commitments"[181] also found the ESG term and concept attractive. As the discussion above examines, for many observers ESG indeed became associated with CSR in various ways ranging from a view of alignment of value and values to a more direct equating of ESG as CSR in a new bottle. Creating a term that could present itself as neutral or value-enhancing, while at the same time welcoming proponents of previous "social"-related concepts, enabled a diverse group of investors and stakeholders to embrace activity under such a term.

B. The Combination Giving Rise to Challenges and Critiques

Although coining the term ESG helped to create a flexible, big tent that could gain support from a diverse group of investors and stakeholders, it did not resolve tensions between different views of the purpose of ESG or the lack of consensus about the fundamental problem it is addressing. The combination of E, S, and G into one term has given rise to several challenges that are increasingly becoming apparent.

The characteristic flexibility that the term embodies by allowing for a variety of understandings of meaning, and a broad array of issues across space and time, has come with several potential downsides. An important challenge that has proven enduring in this regard is the difficulty of pinpointing empirically the relationship between ESG and economic performance. An enormous amount of research has focused on the question and come up short in providing a definitive conclusion. Although significant evidence exists of such a link,[182]

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[180] *See* Lund & Pollman, *supra* note 14, at 2614–15; *see also* Rose, *supra* note 177, at 1823 ("ESG proponents also include members of an emerging corps of people and institutions who profit from the movement, including corporate sustainability officers, providers of ESG ratings and indices, accounting firms that offer ESG-related services, and managers of specialized ESG-investment vehicles."); Dana Brakman Reiser & Anne Tucker, *Buyer Beware: Variation and Opacity in ESG and ESG Index Funds*, 41 CARDOZO L. REV. 1921, 1992 (2020) (observing that "[r]ising interest in ESG investing has generated a huge market opportunity for the providers of ESG indices and metrics, who are capitalizing on this key moment").

[181] *See* Rose, *supra* note 177, at 1822–23.

[182] *See* SERAFEIM, *supra* note 16, at 50–51 (describing study of 2,300 companies that were improving performance on material ESG issues and finding they outperformed their competitors by more than 3% annually); Ulrich Atz, Zongyuan (Zoe) Liu, Christopher C. Bruno & Tracy Van Holt, *Does Sustainability Generate Better Financial Performance? Review, Meta-analysis, and Propositions*, 13 J. SUSTAINABLE FIN. & INV. 802, 809–10, 821–23 (2022) (surveying 1,141 primary peer-reviewed papers and 27 meta-reviews published between 2015 and 2020 and finding

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the studies often bundle ESG issues together or rely on ESG performance ratings that do so, and often leave unanswered which, if any, corporate policies or activities are actually related to financial performance and whether the relationship is causal.[183] We can understand this challenge, at least in part, as a function of the lack of clear definition of ESG and the fact that it is combining sometimes disparate and changing issues.[184] The mixed empirical evidence gives both proponents and critics of ESG something to point to in debates that continue to rage on.

Similarly, the flexibility and wide-ranging understandings of the term ESG contribute to a multitude of issues and approaches, with an ever-growing list of sub-topics to the three components and more than six hundred ESG ratings organizations and rankings worldwide, and substantial variation among ratings.[185] For some, this diversity is not problematic or it is viewed as a temporary situation as regulators around the world move to require disclosure of additional ESG-related information and companies provide more information on a voluntary basis.[186] And, although proponents acknowledge there is room for improvement in ESG ratings, they counter that does not mean that they are useless.[187] But for others, the constant expansion of sub-topics fitting under the big tent of ESG contributes to a sense that the term is too nebulous or so capacious that it is ultimately meaningless or will collapse under its

evidence of a positive association between sustainability and financial performance at the firm level and risk-mitigating effects at the portfolio level); Gunnar Friede et al., *ESG and Financial Performance: Aggregated Evidence From More Than 2,000 Empirical Studies*, 5 J. Sustainable Fin. & Inv. 210, 220–21, 225–26 (2015) (aggregating nearly 2,200 studies and concluding that the majority found positive correlations between corporate financial and ESG performance but portfolio-level studies had more mixed results); *cf.* Luca Berchicci & Andrew A. King, *Corporate Sustainability: A Model Uncertainty Analysis of Materiality* 7 J. Fin. Reporting 43 (2022) (noting that the "accuracy of sustainability measures . . . has been called into question" and "promising associations between sustainability scales and stock returns" have "eventually proven to be fragile or spurious"); Jan-Carl Plagge & Douglas M. Grim, *Have Investors Paid a Performance Price? Examining the Behavior of ESG Equity Funds*, 46 J. Portfolio Mgmt. 123 (2020) (finding that "return and risk differences of ESG funds can be significant but appear to be mainly driven by fund-specific criteria rather than by a homogeneous ESG factor"); Schanzenbach & Sitkoff, *supra* note 70, at 454 (noting "there is theory and evidence in support of risk-return ESG" but "this support is far from uniform, is often contextual, and in all events is subject to change, especially as markets adjust to the growing use of ESG factors").

[183] *See* Rose, *supra* note 177, 1825–27; *see also* Atz et al., *supra* note 182.

[184] *See, e.g.*, Curtis et al., *supra* note 149, at 402 ("One challenge to analyzing the relationship between ESG and economic performance is the absence of a clear definition of ESG."). Meta analyses of ESG studies have likewise reported a range of results, and the approach has been criticized on the basis that "the different measures and methods used by scholars make it impossible to form a meaningful synthesis." King & Pucker, *supra* note 6.

[185] *See* Curtis et al., *supra* note 149, at 403.

[186] *See* Edmans, *supra* note 123, at 14–15 (suggesting that diversity is to be expected if ESG ratings are viewed as opinion based on intangible assets).

[187] *See* Serafeim, *supra* note 1, at 18. For example, a study found ESG ratings helpful in predicting future ESG related news. *See id.* (citing George Serafeim & Aaron Yoon, *Stock Price Reactions to ESG News: The Role of ESG Ratings and Disagreement*, 28 Rev. Acct. Stud. 1500 (2023)).

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own weight.[188] Likewise, the multitude of ESG ratings is evidence to some observers that they are "inconsistent" or "subjective."[189] Moves to consolidate disparate ESG ratings systems could also prove problematic as it could lock in inadequate standards in areas such as S that have lagged in development and been more difficult to find alignment among investors in assessing and quantifying.[190] These concerns about ESG issues and ratings, together with other challenges, in turn feed a range of critiques.

One such related challenge is that because ESG was coined in a way that combines wide-ranging issues, companies with diverging performance on E, S, or G can receive ratings that seem at odds with understood purposes of the term ESG.[191] For example, electric vehicle manufacturer Tesla has been included in many ESG-labeled mutual funds and exchange-traded funds, but observers have pointed to potentially problematic S issues for the company, ranging from a string of racial and sexual discrimination lawsuits and employee reports of a "culture of racism," to supply chain concerns about the production of cobalt which may involve child labor and safety hazards.[192] Ironically, Elon Musk, the CEO of Tesla, has himself called out that "Exxon is rated top ten best in world for environment, social & governance (ESG) by S&P 500, while Tesla didn't make the list!"[193] He followed that "ESG is a scam. It has been weaponized by phony social justice warriors."[194] Although less hyperbolic, investors have similarly registered surprise when they realize

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[188] *See, e.g.*, Swasti Gupta-Mukherjee, *Clarity, Climate and Principles: Aligning Social and Economy Value Through Finance*, Aspen Inst. (July 6, 2022) (noting concern that "making ESG issues a laundry-list of social and environmental factors . . . could be counterproductive").

[189] *See* Rose, *supra* note 177, at 1827; *see also* Hester M. Peirce, Comm'r, Sec. & Exch. Comm'n, Scarlet Letters: Remarks Before the American Enterprise Institute (June 18, 2019), https://www.sec.gov/news/speech/speech-peirce-061819 (observing substantial variation in ESG ratings and questioning the viability of accurate evaluation).

[190] *See, e.g.*, Michael Posner, *Does Tesla Deserve to Be Treated as an ESG Champion?*, Ethical Sys. (Feb. 8, 2022), https://www.ethicalsystems.org/does-tesla-deserve-to-be-treated-as-an-esg-champion/. Although S is frequently pointed to as lagging, the first "ESG"-related disclosure requirement that the SEC implemented as such was notably for human capital management. *See* Georgiev, *supra* note 63.

[191] A variation of this critique concerns the proliferation of approaches to ESG reporting. *See, e.g.*, Leo E. Strine, Jr., Kirby M. Smith & Reilly Steel, Caremark *and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective* Caremark *and EESG Strategy*, 106 Iowa L. Rev. 1885, 1911–12 (2021) (noting the challenge that the proliferation of ESG reporting is "inefficient, encourages greenwashing and gamesmanship of the kind that has characterized corporate governance ratings, and threatens to engage companies more in the rhetoric of EESG than the reality of managing a corporation with the goal of being other-regarding toward company stakeholders and society").

[192] *See id.*; Margot Roosevelt & Russ Mitchell, *Black Tesla Employees Describe a Culture of Racism*, L.A. Times (Mar. 25, 2022), https://www.latimes.com/business/story/2022-03-25/black-tesla-employees-fremont-plant-racism-california-lawsuit; Dana Hull & Bloomberg, *Tesla Sued By More Women Alleging Sexual Harassment at Plant*, Fortune (Dec. 14, 2021), https://fortune.com/2021/12/14/tesla-sued-sexual-harassment-fremont-plant/.

[193] Elon Musk (@elonmusk), Twitter (May 18, 2022, 9:09 AM), https://twitter.com/elonmusk/status/1526958110023245829.

[194] *Id.*

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that ESG funds they are invested in have large holdings in bank stocks instead of the wind and solar companies they are expecting.[195] Reporting by the *Wall Street Journal* "revealed that eight of the 10 biggest ESG funds in 2019 were invested in oil and gas companies."[196] After Russia invaded Ukraine, the U.S. media brought to light that a number of ESG funds hold stakes in Russian assets ranging from state-backed energy companies to government bonds.[197] Indeed, ESG has been criticized by those who think it does not do enough "good for the world" and instead is "just capitalism at its slickest: ingenious marketing in the service of profits."[198]

Not only do the ratings reflect a combination of wide-ranging issues that can create a mismatch with expectations for the ESG label, the ratings themselves may be unreliable and are not subject to standardized approaches, which also stems at least in part from the lack of a fixed definition of ESG and its components. The ratings reflect structural measurement and reporting problems arising from data that is incomplete, largely unaudited, and voluntarily disclosed.[199] One study of six top ESG ratings firms concluded that "ratings from different providers disagree substantially" and "the information that decision-makers receive from ESG rating agencies is relatively noisy."[200] Furthermore, as companies can choose to use different metrics and standards for reporting, as well as change their methodology from year to year, it is "nearly impossible" to compare companies on the basis of ESG performance.[201]

In addition, ratings firms might compute ESG ratings by measuring the degree to which a company's economic value is at risk due to ESG factors or

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[195] Laurence Fletcher & Joshua Oliver, *Green Investing: The Risk of a New Mis-Selling Scandal*, Fin. Times (Feb. 19, 2022, https://www.ft.com/content/ae78c05a-0481-4774-8f9b-d3f02e4f2c6f.

[196] Kenneth P. Pucker, *Overselling Sustainability Reporting*, Harv. Bus. Rev. (May–June 2021), https://hbr.org/2021/05/overselling-sustainability-reporting.

[197] Kishan & Bloomberg, *supra* note 113.

[198] Hans Taparia, *One of the Hottest Trends in the World of Investing Is a Sham*, N.Y. Times (Sept. 29, 2022), https://www.nytimes.com/2022/09/29/opinion/esg-investing-responsibility.html; *see also* Andrew Winston, *What's Lost When We Talk 'ESG' and Not 'Sustainability*', MIT Sloan Mgmt. Rev. (May 5, 2022), https://sloanreview.mit.edu/article/whats-lost-when-we-talk-esg-and-not-sustainability/ (expressing concern with "investor-led language" like ESG because "the quest for shareholder maximization is largely how we got into this mess in the first place" and "it seems unwise to let finance lead the journey to a humane, more just, less greed-filled form of capitalism").

[199] Pucker, *supra* note 196; *see also* David F. Larcker, Lukasz Pomorski, Brian Tayan & Edward M. Watts, *ESG Ratings: A Compass Without Direction*, (Aug. 2, 2022) (Rock Ctr. for Corp. Governance Stan. U., Working Paper, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4179647 (providing description of ESG ratings industry and discussing challenges with completeness of data, standardization, and consistency as well as conflicts of interest).

[200] Florian Berg, Julian F. Kölbel & Roberto Rigobon, *Aggregate Confusion: The Divergence of ESG Ratings*, 26 Rev. Fin. 1315 (2022); *see also* Rajna Gibson, Philipp Krueger & Peter Steffen Schmidt, ESG Rating Disagreement and Stock Returns, (Eur. Corp. Governance Inst. Fin, Working Paper No. 651/2020, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3433728 (studying the relationship between ESG rating disagreement and stock returns).

[201] *Id.*; *see also* Andrea Cardoni, Evgeniia Kiseleva & Simone Terzani, *Evaluating the Intra-Industry Comparability of Sustainability Reports: The Case of the Oil and Gas Industry*, 11 Sustainability 1093 (2019).

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based on its management of issues such as pollutive behavior or regulatory risk, rather than its positive environmental and social impacts.[202] Conflicts of interest or other concerns might also be at play. One study showed that one of the leading vendors of ESG ratings gave higher scores to firms connected to it through institutional ownership than to other firms.[203] Another research paper has documented "widespread and repeated changes to the historical ESG scores" of one of the key ratings providers—suggesting there might be "data rewriting" that "plausibly originates from the rating vendor's incentive to retroactively strengthen the link between ESG scores and returns."[204] Unsurprisingly given this state of affairs, 26% of investment professionals surveyed by Amir Amel-Zadeh and George Serafeim indicate concerns with the reliability of ESG ratings, though 82% use ESG data in the investment process.[205] As Virginia Harper Ho has observed, "[t]he limitations of ESG ratings and data have led many asset managers to expend their own resources to analyze ESG information at added cost, which also has fiduciary implications."[206]

Furthermore, the challenge is not simply that there may be misimpressions of what ESG means or widely varying performances between the components of E, S, and G that can give rise to questionable ratings. Without an integrated approach to ESG factors, "sustainability arbitrage" is possible for both companies and investors.[207] Good performance on one issue, such as low-carbon product development, could be strategically used to mask another, such as poor labor practices.[208]

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[202] Hans Taparia, *The World May Be Better Off Without ESG Investing*, Stan. Soc. Innov. Rev. (July 14, 2021), https://ssir.org/articles/entry/the_world_may_be_better_off_without_esg_investing (providing the example of Pepsi and Coca Cola which get high ESG scores from the biggest ratings firms because they rank highly on corporate governance and greenhouse gas emissions, "[h]owever, their core businesses involve the manufacturing and marketing of addictive products that are a major cause of diabetes, obesity, and early mortality").

[203] Dragon Yongjun Tang, Jiali Yan & Chelsea Yaqiong Yao, *The Determinants of ESG Ratings: Rater Ownership Matters*, Proceedings of Paris Dec. 2021 Finance Meeting EUROFIDAI – ESSEC (June 6, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3889395.

[204] Florian Berg, Kornelia Fabisik & Zacharias Sautner, *Is History Repeating Itself?: The (Un)predictable Past of ESG Ratings*, (Eur. Corp. Governance Inst. Fin, Working Paper No. 708/2020, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3722087.

[205] Amir Amel-Zadeh & George Serafeim, *Why and How Investors Use ESG Information: Evidence from a Global Survey*, 74 Fin. Analysts J. 87, 88 (2018).

[206] Harper Ho, *Sustainable Investment & Asset Management*, *supra* note 129. Relying on private initiatives to standardize ESG investment practices and report "has also created costly fragmentation and slowed the development of a level playing field for all investors." *Id.*

[207] Alperen A. Gözlügöl, *The Clash of 'E' and 'S' of ESG: Just Transition on the Path to Net Zero and the Implications for Sustainable Corporate Governance and Finance*, (SAFE, Working Paper No. 325, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3962238.

[208] Nick Robins, Vanda Brunstig & David Wood, Climate Change and the Just Transition: A Guide for Investor Action 18 (2018), https://www.unpri.org/download?ac=9452; *see also* Hester M. Peirce, Comm'r, Sec. & Exch. Comm'n, Remarks Before the Brookings Institution: Chocolate-Covered Cicadas (July 20, 2021), https://www.sec.gov/news/speech/peirce-chocolate-covered-cicadas-072021?utm_medium=email&utm_source=govdelivery (arguing that ESG encompasses a "great and growing number of unrelated (and incommensurable) items" that lead to a lack of "clear boundaries and internal cohesion").

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In some instances, the challenge is not even a problematic rating or sustainability arbitrage, but instead inherent tensions between E and S that can arise due to business model or industry.[209] For example, "[a]dverse employment impacts are to be expected in companies in certain sectors such as energy and some regions that will have to execute an extensive transformation to reduce their GHG emissions and to ultimately stay on a path consistent with the net zero ambitions."[210] Environmental concerns and labor interests "are not always reconcilable" and divesting or decommissioning brown assets or transforming a business to new technology can lead to workers losing relevant skills, having lower wages, or getting laid off.[211] If labor has countervailing power it might be able to get concessions, but "it is also possible that balancing of different interests is too difficult and the process of net transition comes often to the deadlock" or the company will not give due consideration to social impacts, which could deepen inequality.[212] The potential for stakeholder conflicts arising from this clash between E and S has led to arguments for a "just transition" that promotes swift climate action at the same time as mitigating adverse effects for workers such as with Coasean bargaining or reorganization and re-training programs.[213] To the extent that ESG investors fail to take up the just transition issue, it can add to doubts about whether these investors "walk the talk."[214]

Discourse on the just transition issue connects to an even deeper point—use of ESG factors for investment analysis and decision-making purposes alone may only achieve value alignment for investors with their portfolios, not social value creation. As scholars have highlighted, "[i]t is virtually impossible for a socially-motivated investor to affect the outputs or behavior of companies whose securities trade in public markets through buying and selling their shares in the secondary market."[215] By contrast, "impact investing" is a subset of socially-motivated investing that aims to influence a company's performance or activity.[216] Such outcome might be achieved by lowering the cost of capital to the company, thereby allowing it to engage in more socially valuable practices, or engaging in stewardship or activism of a sort that goes beyond simply considering ESG factors for investment purposes such as

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[209] Gözlügöl, *supra* note 207.
[210] *Id.* at 4.
[211] *Id.* at 4, 9.
[212] *Id.* at 17, 19–20.
[213] *Id.* at 1; Robins et al., *supra* note 208.
[214] Gözlügöl, *supra* note 207, at 27. Sometimes employees are vocal advocates for companies to reduce their environmental impact. *See* Karen Weise, *Over 4,200 Amazon Workers Push for Climate Change Action, Including Cutting Some Ties to Big Oil*, N.Y. Times (Apr. 10, 2019), https://www.nytimes.com/2019/04/10/technology/amazon-climate-change-letter.html.
[215] Paul Brest, Ronald J. Gilson & Mark A. Wolfson, *How Investors Can (And Can't) Create Social Value*, 44 J. Corp. L. 205, 227 (2019).
[216] *Id.* at 228.

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socially-screened ESG mutual funds.[217] At some point, tradeoffs with financial returns may come into play.[218]

Existing usage of the term ESG investing includes a wide variety of strategies—some of which aim at impact whereas others are more likely to only attain values alignment at best. Commentators have observed, for example, that analysts typically group ESG investment strategies into five categories: "impact (seeking environmental or social outcomes and most often undertaken by private investors), thematic (focusing on a theme such as water scarcity or energy transition), engagement (direct communications between investors and companies), negative screen (excluding certain industries), or integration (considering ESG-related risks and opportunities)."[219]

Further, scholars and other legal observers have highlighted potential tensions between focusing on ESG issues at the firm level versus at the portfolio or market-level. Institutional investors that hold a broadly diversified portfolio across the market may be motivated to reduce systematic risk and internalize intra-portfolio negative externalities.[220] Considering ESG factors or risk management for one company may point in a different direction than for the overall portfolio. Moreover, the label "ESG" does not itself convey a theory of how to aggregate company-level ESG characteristics to construct a portfolio-level ESG score.[221] For example, it is not clear whether an investor who values board diversity would prefer a portfolio that maximizes companies with at

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[217] *Id.* at 228–31; *see also* Lubos Pastor, Robert F. Stambaugh & Lucian A. Taylor, *Dissecting Green Returns* 5 (Univ. of Chi. Becker Friedman Inst. for Econ., Working Paper No. 2021-70, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3869822 ("[O]ur findings imply that greener firms have lower costs of capital than their recent stock performance might suggest. This is good news for ESG investors, because one way they exert social impact is by decreasing green firms' cost of capital.").

[218] *See, e.g.*, Pastor et al., *supra* note 217, at 1, 31 (observing that "green stocks typically outperform brown when climate concerns increase" and noting "[g]reen assets delivered high returns in recent years" because of "unexpectedly strong increases in environmental concerns, not high expected returns" and predicting that future years will see "lower expected returns for green stocks than for brown, consistent with theory"); Pucker, *supra* note 196 (noting some impact investors are explicit about their willingness to tradeoff financial returns).

[219] King & Pucker, *supra* note 6. The SEC's proposed enhanced disclosures for ESG funds uses three categories: "integration, ESG-Focused, and impact investing." SEC, Proposed Rule, Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices (May 25, 2022), https://www.sec.gov/rules/proposed/2022/ia-6034.pdf.

[220] Madison Condon, *Externalities and the Common Owner*, 95 Wash. L. Rev. 1, 5 (2020); Frederick Alexander, *An Honorable Harvest: It Is Time for Universal Owners to Take Responsibility for Their Portfolios*, The Shareholder Commons (Aug. 7, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3433845; Jeffrey N. Gordon, *Systematic Stewardship*, 47 J. Corp. L. 627 (2023); John C. Coffee, *The Future of Disclosure: ESG, Common Ownership, and Systematic Risk*, (Eur. Corp. Governance Inst. Working Paper No. 541/2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3678197.

[221] Adriana Z. Robertson & Sarath Sanga, *Aggregating Values: Mutual Funds and the Problem of ESG*, U. Chi. L. Rev. Online *1 (2023).

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least one or two women on the board or instead maximizes total representation of women directors across the portfolio.[222]

None of these issues are necessarily fatal to the continued use of the term ESG, but they can be understood at least in part as stemming from the choice to combine issues in one term that may be in tension with each other and ambiguity about normative goals that were not addressed in the initial framing. Although the initiative participants espoused the view that the "entire range" of ESG issues relevant to a business should be considered by companies and integrated into investment analysis,[223] and suggested that this approach was aligned with long-term shareholder value,[224] they did not explain how to do so or what to do when an individual component or activity may not enhance value for shareholders. Quite understandably, much was left to be figured out after the initial coining of the term ESG and championing consideration of a broad set of issues. In hindsight, however, it can be appreciated that the choice of the ESG term came with consequences, such as that priorities were not set in advance as would have been the case had initiative participants instead focused their firepower on a particular issue such as climate change. Critically, it also was not clear at the outset whether the goal of mainstreaming ESG was to pressure corporations to reduce their externalities or instead to increase their long-term value for shareholders or allow for more holistic investment analysis towards that end. Additionally, the very flexibility and broad approach embodied by the ESG acronym that contributed to its meteoric rise has also led to criticism.

The critiques of ESG are wide-ranging, from assertions of confusion, unrealistic expectations, and greenwashing to notions that it is crowding out other solutions or inhibiting accountability.[225] As George Serafeim, a leading scholar of ESG has succinctly observed, "ESG has rapidly become a household name leading to both confusion about what it means and creating unrealistic expectations about its effects."[226]

Commentary and changing positions from regulators can contribute to these impressions of problems with the term ESG. For example, some U.S. securities regulators have noted that ESG "encompasses a wide variety of investments and strategies" and "it can be very difficult to understand what some funds mean when they say they're an ESG fund" and some may mislead investors by "overstating their ESG focus."[227] On the other hand, some

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[222] *Id.*

[223] Who Cares Wins, *supra* note 50, at 9.

[224] *Id.*

[225] *See, e.g.*, King & Pucker, *supra* note 6 ("Managers of ESG investments create false hope, oversell outperformance, and contribute to the delay of long-past-due regulatory action.").

[226] Serafeim, *supra* note 1, at 1.

[227] Gary Gensler, Chair, Sec. & Exch. Comm'n, Statement on ESG Disclosure Proposal (May 25, 2022), https://www.sec.gov/news/statement/gensler-statement-esg-disclosures-proposal-052522; *cf.* Roisman, *supra* note 114 (expressing concern that the vagueness of the

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regulators warn that having the Securities and Exchange Commission (SEC) "standardize" the definition of ESG would limit investor choice and put the SEC in the position of being the arbiter of what constitutes an acceptable ESG strategy.[228] As one SEC commissioner observed, "One person's ecofriendly windmill is another person's bird killer."[229]

To take another example, in 2020, the U.S. Department of Labor (DOL) issued a rule that removed all references to ESG and required that ERISA plan fiduciaries focus only on pecuniary factors in investment decisions for beneficiaries. It explained that "by conflating unrelated environmental, social, and corporate governance factors into a single term, ESG invites a less than appropriately rigorous analytical approach" for corporate officers and directors to manage as part of the company's "business plan" and for qualified investment professionals to "treat as economic considerations" in evaluating investment.[230] After a change in presidential administration, however, the DOL reversed course and proposed a rule that would remove barriers to consideration of ESG factors in selecting investments and exercising shareholder rights.[231] The DOL's disparagement of combining E, S, and G, and varied positions with changing political administrations, ultimately contribute to perceptions that it is not clear whether consideration of ESG issues comes at the expense of financial returns and, moreover, that ESG is ideologically or politically tinged.

Such connotations and understandings could in turn fuel challenges to rulemaking that might otherwise help to address some of the existing problems, such as First Amendment challenges to the climate disclosure rules adopted by the SEC.[232] In spring 2022, the agency proposed rule changes that aim to provide investors with "consistent, comparable, and decision-useful information" regarding the climate-related risks and greenhouse gas emissions of public companies.[233] The rules were based in part on the voluntary

ESG term and amorphous issues it encompasses can give investors misimpressions). In fall 2023, the SEC adopted rule enhancements to address investment fund names. Press Release, Sec. & Exch. Comm'n, SEC Adopts Rule Enhancements to Prevent Misleading or Deceptive Investment Fund Names (Sept. 20, 2023), https://www.sec.gov/newsroom/press-releases/2023-188.

[228] Hester M. Peirce, Comm'r, Sec. & Exch. Comm'n, Lucy's Human: Remarks at Virtual Roundtable on The Role of Asset Management in ESG Investing (Sept. 17, 2020), https://www.sec.gov/news/speech/peirce-lucys-human-091720.

[229] *Id*.

[230] Financial Factors in Selecting Plan Investments, 28 C.F.R. § 2550.404a-1 (2020).

[231] Press Release, U.S. Dep't Lab., US Department of Labor Announces Final Rule to Remove Barriers to Considering Environmental, Social, Governance Factors in Plan Investments (Nov. 22, 2022), https://www.dol.gov/newsroom/releases/ebsa/ebsa20221122.

[232] *See* Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220, 251–54 (2021) (discussing potential First Amendment challenges to ESG-related disclosure rules).

[233] Press Release, Sec. Exch. Comm'n, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 21, 2022), https://www.sec.gov/news/press-release/2022-46.

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framework published by the Task Force on Climate-related Financial Disclosures (TCFD) of the Financial Stability Board, an international body that makes recommendations for the global financial system.[234] The TCFD framework is being incorporated in varying degrees into legislation or securities exchange requirements around the world, including in Canada, Hong Kong, Japan, New Zealand, Singapore, Switzerland, and the United Kingdom.[235]

Despite alignment with the TCFD's framework and over 4,000 investment firms managing over $120 trillion in assets supporting the PRI's commitment to seeking ESG disclosures from portfolio companies,[236] the SEC's proposed rules faced pushback in the United States. The SEC received thousands of letters of public comment from companies, investors, auditors, academics, and trade groups—much of the response was positive, but a vocal group of critics also emerged.[237] Most notably, critics of the rules, ranging from a group of U.S. senators to an SEC Commissioner who issued an extensive dissenting statement, argued that the SEC lacks authority for its actions, the cost-benefit analyses in the proposed rules do not meet the requirements of the Administrative Procedure Act, and the proposed rules violate First Amendment restrictions against compelled speech.[238] These arguments ended up in court battles after finalization of the rules in spring 2024 and, through an unfortunate twist, the various commentary and changing positions of regulators on ESG-related issues that have been pushing towards transparency may be harnessed in attacks against the final rules.[239] Through such challenges, global efforts to standardize and incorporate climate-related information into investment analysis and decision-making may be significantly delayed or weakened.

Another obstacle for the ESG movement is that limited progress on E and S can lead observers to dismiss the movement as largely ineffectual or raise

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[234] Michael Littenberg et al., *Ten Thoughts on the SEC's Proposed Climate Disclosure Rules*, Harv. L. Sch. F. on Corp. Governance (Apr. 30, 2022), https://corpgov.law.harvard.edu/2022/04/30/ten-thoughts-on-the-secs-proposed-climate-disclosure-rules/.

[235] *Id.*

[236] Sara Dewey, *What to Know about the SEC's Proposed Climate Risk Disclosure Rule*, Harv. L. Sch. Env't & Energy L. Prog. (Apr. 27, 2022), https://eelp.law.harvard.edu/2022/04/what-to-know-about-the-sec-proposed-climate-risk-disclosure-rule/.

[237] Mark Maurer, *Companies Skewer SEC's Climate-Disclosures Plan in Comment Letters*, Wall St. J. (June 21, 2022), https://www.wsj.com/articles/companies-skewer-secs-climate-disclosures-plan-in-comment-letters-11655834912.

[238] Littenberg et al., *supra* note 234.

[239] *See, e.g.*, Sean J. Griffith, *What's "Controversial" About ESG? A Theory of Compelled Commercial Speech Under the First Amendment* 101 Neb. L. Rev. 876, 877 (2023) (arguing that "the proposed climate rules create controversy by imposing a political viewpoint, by advancing an interest group agenda at the expense of investors generally, and by redefining concepts at the core of securities regulation" and are thus subject to heightened scrutiny and "will likely be invalidated"). Following adoption of final climate disclosure rules, the SEC decided to stay the rules pending judicial review. The Enhancement and Standardization of Climate-Related Disclosures for Investors; Delay of Effective Date, Securities Act Release No. 11280, Exchange Act Release No. 99908, 89 Fed. Reg. 25804 (Apr. 12, 2024).

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concerns about "greenwashing."[240] Investigations into greenwashing have indeed become salient with global behemoths such as Goldman Sachs and Deutsche Bank coming under scrutiny.[241] The SEC's enforcement efforts have already yielded a settlement with asset manager BNY Mellon for allegedly misleading investors about ESG claims.[242] Further, greenwashing claims are not limited to concerns about investors, but also encompass consumer protection issues. For example, several environmental organizations have filed a complaint with the Federal Trade Commission, which is charged with enforcing false advertising law, that contends that Chevron has overstated and misrepresented its efforts to reduce greenhouse gas emissions and increase investments in renewable energy.[243] A slew of claims and ESG-related litigation are on the horizon as corporate statements and pledges about environmental and social issues have seen "exponential growth."[244]

More generally, attacks on ESG as an ineffective or "woke" movement due for a reckoning are on the rise.[245] Tariq Fancy, the former chief investment

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[240] *See, e.g.*, Tim Quinson, *Greenwashing Is Increasingly Making ESG Moot*, Bloomberg (Mar. 16, 2022), https://www.bloomberg.com/news/articles/2022-03-16/greenwashing-is-increasingly-making-esg-investing-moot-green-insight. On "greenwashing" as a term referring to "misleading environmental communication," see Amanda Shanor & Sarah E. Light, *Greenwashing & The First Amendment*, 122 Colum. L. Rev. 2033, 2043 (2022). The alternative term "bluewashing" is sometimes used to refer to deceptive or misleading social claims. Sarah Dadush, *Identity Harm*, 89 U. Colo. L. Rev. 863, 877 (2018).

[241] *See* Patrick Temple-West & Joshua Franklin, *SEC Investigating Goldman Sachs for ESG Claims*, Fin. Times (June 10, 2022), https://www.ft.com/content/5812ab1f-c2d4-4681-a6be-45f0befd92df; William Langley & Joe Miller, *DWS Chief Resigns After Police Raid Over Greenwashing Claims*, Fin. Times (June 1, 2022), https://www.ft.com/content/50f5c4a1-5ebe-40cc-a89f-2952f58ba324; Patrick Temple-West & Stefania Palma, *SEC Prepares to Crack Down on Misleading ESG Investment Claims*, Fin. Times (May 24, 2022), https://www.ft.com/content/6fefdb2c-f72e-4e52-b95b-c0727aeb1a94.

[242] *Id.*

[243] Myles McCormick, *Chevron Accused of 'Greenwashing' in Complaint Lodged with FTC*, Fin. Times (Mar. 16, 2021), https://www.ft.com/content/2985e18a-fdcb-4cd2-aee3-d5a0fe4cdab2.

[244] *See* Shanor & Light, *supra* note 240 (discussing "exponential growth in environmental marketing claims"); Adam B. Badawi & Frank Partnoy, *Social Good and Litigation Risk*, 12 Harv. Bus. L. Rev. 315 (2022) (examining the relationship between ESG metrics and securities litigation); Aisha I. Saad & Diane Strauss, *The New "Reasonable Investor" and Changing Frontiers of Materiality: Increasing Investor Reliance on ESG Disclosures and Implications for Securities Litigation*, 17 Berkeley Bus. L.J. 397 (2020) (examining securities litigation trends related to ESG disclosures); Emily Strauss, *Climate Change and Shareholder Lawsuits*, 20 N.Y.U. J.L. & Bus. 95 (2023) (examining climate-related shareholder suits and arguing that "climate disclosures may not be enforced in a socially optimal way" under the current regime for shareholder litigation); Veronica Root Martinez & Gina-Gail Fletcher, *Equality Metrics*, 130 Yale L.J. F. 869, 869 (2021) (discussing how "many of the statements issued by corporations in support of the Black Lives Matter movement look more like marketing campaigns than like blueprints for the implementation of specific strategies"); John Rice, *Rainbow-Washing*, 15 Ne. U. L. Rev. 285, 289 (2023) (examining how shareholder litigation could address corporate "rainbow-washing" claims in support of the LGBTQIA+ community).

[245] *See, e.g.*, Michael O'Leary & Warren Valdmanis, *An ESG Reckoning Is Coming*, Harv. Bus. Rev. (Mar. 4, 2021), https://hbr.org/2021/03/an-esg-reckoning-is-coming (expressing concern that "[a] movement meant to benefit the public good risks becoming a buzzword coopted to keep maximizing short-term profits").

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officer for sustainable investing at BlackRock attracted global attention with his claim that ESG is "marketing gobbledygook" that "is actively misleading people" and creating a "dangerous distraction" from regulation that would fit the scale of problems such as climate change.[246] Corporate finance expert Aswath Damodaran has memorably called the ESG movement a "gravy train" and asserted that investment funds, accounting firms, consulting firms, and ESG measurement services are its real beneficiaries rather than stakeholders.[247] In his view, CEOs have encouraged this gravy train to keep rolling because of "the power it gives them to bypass shareholders and evade accountability."[248]

Many of these challenges and critiques are "hyperboles"[249] or at least could be partially sorted out with time. For example, although there is some cause for concern about the opacity to investors of relying on the ESG label,[250] there is also evidence that ESG funds are offering their investors increased ESG exposure without increasing costs or reducing returns.[251] To the extent consideration of ESG issues adds value to the investment decision-making process, it is likely asset managers will persist in doing so.[252] New taxonomies could also be created to help investors make informed investment decisions.[253] Regulatory rulemaking could increase transparency about investment company names.[254] Cracking down on greenwashing or other misleading claims could aid in long-term efforts to ensure the credibility of ESG-related statements and disclosures.

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[246] Robert Armstrong, *The ESG Investing Industry Is Dangerous*, Fin. Times (Aug. 24, 2021), https://www.ft.com/content/ec02fd5d-e8bd-45bd-b015-a5799ae820cf (quoting essay by Tariq Fancy); *see also* King & Pucker, *supra* note 6 (noting that "every former asset manager professional" interviewed in their study expressed "skepticism" and "were doubtful about ESG investing"). On the false dichotomy between internal and external reforms for corporate governance and regulation, see Aneil Kovvali, *Stark Choices for Corporate Reform*, 123 Colum. L. Rev. 693 (2023).

[247] Damodaran, *supra* note 155.

[248] *Id.*

[249] Serafeim, *supra* note 1, at 19; *see also* Judy Samuelson, *ESG: Not Woke Capitalism or Greenwashing—But an Opportunity for Employee Voice*, Quartz (July 6, 2022), https://qz.com/2185351/esg-not-woke-capitalism-or-greenwashing-but-an-employee-arena/ (arguing that ESG has become "a political issue" but it is "neither woke capitalism nor cynical greenwashing," rather an "imperfect, ever-evolving effort to assess the risk companies face if they fall short in the race to contain the Earth's temperature rise and make capitalism work for more people").

[250] *See, e.g.*, Brakman Reiser & Tucker, *supra* note 180, at 1921 (providing data from 2018-2019 showing great variation among ESG funds that is "largely opaque to consumers—who rely on the ESG acronym at their peril").

[251] Curtis et al., *supra* note 149, at 393.

[252] *See* Lieber, *supra* note 123 (noting that Vanguard, Fidelity, and TIAA have ESG products "because it adds value to the investment decision-making process" and so "[i]t's here to stay").

[253] *See, e.g.*, Eric C. Chaffee, *Index Funds and ESG Hypocrisy*, 71 Case W. Res. L. Rev. 1295, 1317–20 (2021) (proposing a taxonomy for ESG fund names).

[254] *See supra* note 227 and accompanying text. For a critical analysis of the SEC's Names Rule, see Jill E. Fisch & Adriana Z. Robertson, *What's in a Name? ESG Mutual Funds and the SEC's Names Rule*, 96 S. Cal. L. Rev. 1417 (2024).

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Yet, some aspect underlying the challenges and critiques stem from the construction itself of combining "E," "S," and "G" without definition into a singular term and with the stated intention of relevant issues varying by geography and company. Further, as the alignment between shareholder value creation and ESG performance was asserted from the outset but never fully proven or reconciled, a variety of meanings will likely continue to be ascribed to the ESG term. Understood in this light, we can see that the challenges and critiques of ESG will not likely be resolved definitively because they are intertwined with the term and its origins. Appreciating the existing limits and uncertainties of ESG might, however, help identify areas in which investors, corporations, and regulators can take a more thoughtful approach.

C. Proposals for the Future of ESG

Finally, as debate about ESG continues and memories of its origins fade, new proposals arise to change or define the term. Each of these proposals reveals a critical perspective with the aim of improving the term or related efforts, but none provide a silver bullet against ESG critiques.

The first set of proposals suggest a friendly amendment by adding or subtracting words from the acronym. Such proposals might add emphasis to certain existing components, which is generally the authors' aims, but would not likely alter the fundamental tension that exists between the term's flexibility and big tent approach and the corresponding challenges and critiques it engenders.

For example, Leo Strine, the former Chief Justice of the Delaware Supreme Court, has proposed that another "E" be added to ESG to increase the salience of employees in ESG discussions and analyses.[255] Although such construction might laudably keep the treatment of workers in the mix of ESG issues commonly addressed, the "S" in ESG already included such a possibility and labor-related issues have been a key example since the *Who Cares Wins* initiative, building on one of the core principles of the *Global Compact*. Further, adding a component does not change the difficulty of empirical measurement and the potential for tensions and tradeoffs.[256]

Another proposal, advanced by David Larcker and Brian Tayan, is to take the "G" out of ESG.[257] As a reflection of how the history of the term ESG has

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[255] *See* Leo E. Strine, Jr., *Toward Fair and Sustainable Capitalism* 6 (Roosevelt Inst., Working Paper No. 202008, 2020), https://rooseveltinstitute.org/publications/toward-fair-and-sustainable-capitalism/.

[256] Another proposal championed adding an "H" for health to ESG. Michell A. Williams & Patricia Geli, *ESG Is Not Enough. It's Time to Add an H*, FORTUNE (Mar. 14, 2022), https://fortune.com/2022/03/14/esg-is-not-enough-time-to-add-health-wellbeing-csr-workers-pandemic-leadership-geli-williams/.

[257] *See* Larcker et al., *supra* note 11, at 3 (arguing that it is a "myth" of ESG that it should include governance because "[t]he need for governance quality is universal among organizations");

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been lost, they observe that "[a] perplexing question is why governance—the 'G' in ESG—is included as a third factor."[258] In their view, "[g]overnance is unlike E and S" and "an ineffective measure of how socially responsible a company is" and so "[a] more honest assessment of a company's commitment to stakeholders would leave governance variables out of the rating."[259] Yet, Larcker and Tayan seem to simply conceive of governance differently from the institutions that originally coined the term ESG. Instead of integrating consideration of governance mechanisms that are interlinked with E and S, and that execute on such policies, Larcker and Tayan characterize "governance [a]s an *overlay*" and "environmental and social components of ESG a[s] *outcomes*."[260] Such an approach might appeal to some ESG proponents, but likely only a fraction as the endorsing institutions of the *Who Cares Wins* initiative included some of the world's largest banks and they viewed "G" as crucially interlinked to fulfilling the promise of better environmental and social performance. Traders at asset management funds also find the "G" in ESG to be critical, especially in vendor and counterparty relationships as it can help to avoid government scrutiny by providing a window into compliance with ethical standards, internal controls, and codes of conduct.[261] Moreover, even if a component of ESG was removed, there would still be two, each with a multiplicity of possible sub-issues that could vary widely by context and over time, and thus not solving the difficulty of empirical measurement or the potential for tensions and tradeoffs.

Interestingly, it is often the "S" instead of "G" that is "single[d] out . . . as a different kind of category from its peers."[262] As David Wood explained, "The E invokes issues as such carbon intensity or energy and resource consumption that are easily quantifiable and with comparable units of measure; The G invokes industry standards of board structure, shareholder rights, or standards of business ethics on which there is relatively widespread agreement in principle; but the S invokes issues which are often hard to quantify, not so clearly linked to the risk/reward analysis in investment decision-making, and may touch on culturally specific norms that do not so easily translate into guidance

David F. Larcker & Brian Tayan, *The Case for Taking the 'G' Out of ESG*, Wall St. J. (Apr. 28, 2022), https://www.wsj.com/articles/esg-the-case-for-taking-out-the-g-11651004068.

[258] Larcker & Tayan, *supra* note 257; *cf.* Jonathan R. Macey, *ESG Investing: Why Here? Why Now?* (Mar. 10, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3942903 (arguing that "ESG investing and governance can be explained, at least in part, as a response to the failure of government" to address broad social problems and "[t]his explains the 'E' and the 'S' in ESG [b]ut it does not explain the 'G' or governance component").

[259] Larcker & Tayan, *supra* note 257.

[260] *Id.*

[261] Tim Quinson, *Traders Are Big Fans of the 'G' in ESG*, Bloomberg (Aug. 3, 2022, 6:00 AM), https://www.bloomberg.com/news/articles/2022-08-03/traders-are-really-big-fans-of-the-g-in-esg-green-insight.

[262] Wood, *supra* note 125, at 554–55 ("There have been dozens, if not hundreds, of conference panels, blog posts, listserve chats, and other discussions that pose the S in ESG as a problem to be solved.").

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for (often globally focused) investment decision-makers."[263] The S might be seen as "softer" or "mushier" than E and G, as well as "more likely to invoke ethical issues that lie beyond the scope of proper investment strategy or to require cultural judgments about potential consumer, reputational, or political risks that are particularly difficult to gauge."[264] In any event, whether it is the S or the G that is more unlike the others, such proposals and analyses of the divergence between ESG components only underscore that the term will likely continue to be the site of contestation even as its embrace has gone mainstream.

And, by contrast to those who wish to add or subtract a letter from ESG, some scholars have pushed for deconstructing the term altogether. Tracing the history of ESG's origins indeed raises the counterfactual question of what might have occurred if instead of lumping E, S, and G together, the underlying issues had been pursued separately. Swasti Gupta-Mukherjee has proposed disentangling climate change from ESG as "our era's defining issue" and because it is a macro risk factor that impacts physical assets and produces direct costs.[265] According to this view, combining ESG mandates "could inadvertently dilute the awareness, understanding, and action pertaining to climate risk in particular."[266] For some this argument carries great weight, and the market has already launched some novel environmentally-focused financial instruments such as green bonds.[267] But for others, climate change is correlated or intertwined with other important socio-economic concerns, or linked to other environmental issues such as biodiversity loss, and trying to distance climate change from ESG would not be palatable or perhaps even feasible as the term ESG would still exist as an umbrella term for a great number of efforts and investments.

A different set of proposals aims to narrow the meaning of ESG or create a larger set of more precise terms. Fixing a narrower definition of ESG could help protect against misunderstandings and greenwashing, but it might also lose the benefits of flexibility and adaptability that has allowed ESG to evolve over time and vary by geographic region and company. Narrowing ESG would also likely mean that some of the proponents of ESG would no longer embrace it as a concept that serves their goals or interests—some of the existing proponents would no longer fit under the big tent.

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[263] Wood, *supra* note 125, at 554–55.

[264] *Id.* at 555.

[265] Gupta-Mukherjee, *supra* note 17; *see also* The Economist, *supra* note 8 (arguing that E, S, and G should be unbundled and "[i]t is better to simply focus on E" and that E should stand "for emissions alone").

[266] Gupta-Mukherjee, *supra* note 17; *see also* Jeffrey N. Gordon, *Unbundling Climate Change Risk From ESG* (Colum. L. & Econ., Working Paper No. 667, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4547679.

[267] *See, e.g.*, Dorothy S. Lund, *Corporate Finance for Social Good*, 121 Colum. L. Rev. 1617 (2021) (discussing impact bonds, green bonds, carbon offsets, and related financial instruments).

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Creating a sufficiently clear and narrow definition is also a considerable challenge as attempts at drafting legal terms often give way to more interpretational disputes than clarity. For example, the European Union Commission has notably aimed to take major steps forward in defining various ESG and sustainability-related obligations with the Corporate Sustainability Reporting Directive and Corporate Sustainability Due Diligence Directive,[268] but such efforts have in turn led to a new batch of interpretational issues to be worked through and critiques about loopholes and other concerns.[269]

Another idea would be to create a taxonomy of different, more precise terms for concepts related to ESG.[270] This could provide for greater market differentiation of investment products and accountability. A key potential area for greater clarity and precision could be distinguishing between ESG as "inputs" into an investment process and ESG as "outputs" or goals to be maximized, with the latter carrying an understanding that it may involve trade-offs with financial returns and the need for further specification of the type of goals being pursued.[271] The SEC's efforts to enhance disclosures by investment advisers about ESG practices, and the use of the ESG label on funds, moves in this direction.[272] The European Union's taxonomy on sustainability aims to provide definitions for which economic activities can be considered environmentally sustainable.[273] A taxonomy of different ESG terms or labels might, however, multiply terminology that might be confusing or unwieldy, and global variation would amplify this dynamic.

Some critics and proponents have advocated for the death of ESG—scrapping the term altogether.[274] A special report in *The Economist* concluded,

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[268] Directive 2024/1760 of the European Parliament and of the Council of 13 June 2024 on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 (text with EEA Relevance) 2024 O.J. (L); *Corporate Sustainability Reporting,* Eur. Comm'n, https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en (last visited Aug. 12, 2024).

[269] *See, e.g.*, Sarah Ellington et al., *Ten Areas of Continued Uncertainty in the EU Commission Proposal for a Corporate Sustainability Due Diligence Directive*, Watson Farley & Williams (July 6, 2022), https://www.wfw.com/articles/ten-areas-of-continued-uncertainty-in-the-eu-commission-proposal-for-a-corporate-sustainability-due-diligence-directive/; *EU: Disappointing Draft on Corporate Due Diligence*, Hum. Rights Watch (Feb. 28, 2022, 1:00 AM), https://www.hrw.org/news/2022/02/28/eu-disappointing-draft-corporate-due-diligence.

[270] *See, e.g.*, Chaffee, *supra* note 253.

[271] *See* Kirk, *supra* note 124 (arguing to split the meaning of ESG between inputs and outputs).

[272] *See supra* notes 227 & 254. On navigating First Amendment issues related to regulating greenwashing, see Shanor & Light, *supra* note 240.

[273] *EU Taxonomy for Sustainable Activities*, Eur. Comm'n, https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/eu-taxonomy-sustainable-activities_en. The EU has also made efforts at comprehensive sustainability disclosure requirements under the umbrella of Sustainable Finance Disclosure Regulation (SFDR). *SDFR*, Eurosif, https://www.eurosif.org/policies/sfdr/ (last visited Aug. 12, 2024).

[274] *See Measure Less, But Better*, The Economist (July 21, 2022), https://www.economist.com/special-report/2022/07/21/measure-less-but-better ("Ideally, the term ESG should be scrapped.").

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"As an amalgam of three words, environmental, social and governance, which sound more like a pious mantra than a force for change, its reputation is now tarnished."[275] Similarly, the former head of sustainability at CalPERS, one of the world's largest pension funds, remarked, "I think it's time for RIP ESG."[276] A different perspective arguing for "the end of ESG" asserts that it is "no better or worse than other factors that drive long-term value" and thus it should not be politicized, treated as special, or "put on a pedestal."[277] Such views do not necessarily reflect a belief that all efforts at investing based on environmental or social issues should be abandoned, but that a major rethinking is due or a shift in discourse.[278] Many companies have already changed how they discuss their ESG-related activity and specifically steer clear of the term ESG to avoid regulatory or political scrutiny.[279]

In all, these various proposals for improving the term ESG or creating new definitions or taxonomies, or even jettisoning it from usage, highlight the underlying tension at the heart of ESG and its origins that this Article has revealed. The big tent of ESG, and its ambiguity about whether it is a tool for financial and risk analysis or a vehicle to creating social good, are closely connected to its challenges and critiques. The path forward is uncertain. The profit-making motive of industry players, which to date has pushed towards making ESG ever bigger, could eventually hasten its collapse if credibility concerns continue. Efforts to fight greenwashing and establish some measure of accountability are important to avoid such a fate,[280] but are unlikely to save the term from continued battle, particularly as politicians have attempted to cast it as a lightning rod in the culture wars of a polarized citizenry.[281]

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[275] *Id.*

[276] Tett, *supra* note 134.

[277] Edmans, *supra* note 123, at abstract, 10–11.

[278] Tett, *supra* note 134 (noting the former CalPERS sustainability head argued for rethinking what ESG means and devising "a broader, human centered approach"); The Economist, *supra* note 274 (arguing for the demise of ESG and "a suitable new name" such as "natural-capital investing" that would blend climate and capitalism).

[279] Chip Cutter & Emily Glazer, *The Latest Dirty Word in Corporate America: ESG*, Wall St. J. (Jan. 9, 2024, 5:20 PM), https://www.wsj.com/business/the-latest-dirty-word-in-corporate-america-esg-9c776003?mod=hp_lead_pos4.

[280] *See, e.g.*, Tett, *supra* note 134 (observing that the ESG backlash "is a sign that the market is maturing and evolving, in the face of more scrutiny" and asserting that challenges might make the concept more durable as other financial innovations in history have similarly followed a pattern of pendulum swings between fast uptake and inevitable reaction and regulation); Kishan & Bloomberg, *supra* note 113 (discussing the view that the ESG "shakeout" will lead to more "honesty in markets").

[281] *See* Jeff Green & Saijel Kishan, *America's Political Right Has a New Enemy No. 1: ESG Investors*, Bloomberg (May 20, 2022), https://www.bloomberg.com/news/articles/2022-05-20/why-esg-investing-is-under-republican-attack#xj4y7vzkg; Sustainable Investment Survey, PitchBook 10 (2022), https://pitchbook.com/news/reports/2022-sustainable-investment-survey (observing that investment managers must thread the needle by "ensuring they have a robust ESG approach for the majority of investors . . . but they must also avoid saying anything too strongly or publicly about their ESG practices to avoid being blacklisted by groups who have negatively politicized ESG").

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A better understanding of the history, usages, and consequences of ESG might help chart the course forward in these possible futures. Most notably, key normative choices between the pursuit of shareholder value and a social good independent of such value must be directly confronted to achieve greater clarity. Critical analysis of combining E, S, and G further reveals the underlying tradeoffs at stake. Without progress on giving greater precision of meaning to ESG, efforts to create an altogether new term might also arise again, restarting a journey that other terms such as CSR and sustainability have also traveled.

Conclusion

Within just a couple decades the term ESG has gone from closed-door sessions of financial industry executives and other institutional leaders gathered by the United Nations to the everyday lingo of investors, asset managers, corporate officers and directors, employees, consumers, and regulators around the world. This Article has provided an in-depth examination of the term and its implications, starting from its history and evolution in usage to the promise and perils of its construction.

This exploration reveals that ESG has a specific origin but is not a fixed concept beyond the combination of three categories of issues that comprise the acronym. Just as the opaque features of legal standards can create a salutary "fog" that allows for moral deliberation,[282] the flexibility of the term ESG, and its facilitation of claims of alignment between value and values, are at once part of the success story in diffusing ESG widely and forming a diverse movement of proponents. The ambiguity of ESG and varying usages that developed over time have facilitated buy-in from a great variety of market actors. However, these very features that have fostered a global dialogue, attracted trillions of investment dollars, and fueled regulatory reform, are also the source of challenges and critiques that have emerged and will continue into the foreseeable future until the ambiguity of normative goals being pursued under the fragile big tent of ESG is resolved.

[282] Seana V. Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 Harv. L. Rev. 1214 (2010).

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