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Poor ESG: Regressive Effects of Climate Stewardship

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Poor ESG: Regressive Effects of Climate Stewardship

Zohar Goshen,[*] Assaf Hamdani,[**] Alex Raskolnikov[***]

The rise of inequality and global warming are the two ultimate challenges of our time. After decades of congressional failure to address climate change, the private sector has stepped in and adopted a set of environmental, social, and governance (ESG) policies as a market-based solution to a public policy failure. ESG advocates hope that corporate executives would save our planet. Where Congress failed, ESG will succeed.

This Article argues that if ESG-driven climate stewardship ever achieves the scale necessary to have a real impact on global warming, it will hurt the poor. Legislative interventions to combat climate change are nearly always regressive, impacting those with the least, the most. ESG implemented at scale will inevitably replicate the regressive effects of these interventions on which all ESG carbon-reduction strategies are based. But, in contrast with congressional action, ESG solutions will not raise any revenue that could be used to offset ESG regressivity. ESG solutions may appear attractive because they seem to avoid the contentious politics of redistribution. But as the backlash against ESG vividly demonstrates, opponents will seize every opportunity to remind voters—especially middle- and low-income voters—of the job losses and increased energy costs that will follow ESG policies aimed at curbing carbon emissions.

One possible response to these concerns would be legislation that offsets the regressive impact of ESG. That is, while ESG

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would protect the planet, Congress would protect the poor. However, as this Article will demonstrate, Congress will be unable to address the regressive implications of the varied and opaque ESG policies adopted by thousands of corporations. Furthermore, Congress will not have strong incentives to do so.

We conclude that ESG-driven climate stewardship is a poor solution to global warming because the poor will pay the price. There is no alternative to legislation in tackling both global warming and economic inequality. Institutional investors may nudge this legislation forward by ensuring that the lobbying efforts of their portfolio companies are aligned with the companies' pledges to protect the environment.

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INTRODUCTION

Rising economic inequality and global warming are the two ultimate challenges of our time.[1] The U.S. government's attempts to address these challenges, however, have fallen woefully short. With regards to inequality, the United States holds the unfortunate distinction of being one of the most unequal developed nations on Earth.[2] The picture is equally bleak when it comes to the environment. For three long decades, the United States failed to pass any significant environmental legislation,[3] until the Inflation Reduction Act (IRA) of 2022 finally ended the drought.[4] While the IRA represents a promising initial step, it offers only a partial solution.[5] And the U.S. has fared no better on the international stage: U.S. participation in international efforts to counter global warming has been embarrassing.[6] Worse yet, the Supreme Court has found new determination to curtail the regulatory power of the Environmental Protection Agency.[7] With the future of our planet

1. On inequality, see Zia Qureshi, *Rising Inequality: A Major Issue of Our Time*, BROOKINGS (May 16, 2023), https://www.brookings.edu/articles/rising-inequality-a-major-issue-of-our-time (on file with the BYU Law Review). On climate change, see *Global Issues: Climate Change*, UNITED NATIONS, https://www.un.org/en/global-issues/climate-change#:~:text=Climate%20Change%20is%20the%20defining,scope%20and%20unprecedented%20in%20scale (on file with the BYU Law Review) (last visited Mar. 12, 2026).

2. *See* Thomas Blanchet, Lucas Chancel & Amory Gethin, *Why Is Europe More Equal than the United States?*, 14 AM. ECON. J.: APPLIED ECON. 480, 480 (2022) (reporting that U.S. inequality is higher than in any of the twenty-six European countries).

3. The most recent significant environmental legislation enacted prior to 2022 is the 1990 Clean Air Act Amendments. *See* Jedediah Purdy, *Coming into the Anthropocene*, 129 HARV. L. REV. 1619, 1635 (2016) ("Political deadlock has prevented passage of significant new environmental legislation since the 1990 amendments to the Clean Air Act.").

4. *See* Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818.

5. The IRA's expected effect is a fifteen percent reduction in greenhouse gas emissions from their 2005 level by 2030. Martin A. Sullivan, *How Much Do IRA Energy Credits Reduce Emissions?*, 178 TAX NOTES FED. 9, 9 (2023).

6. *See* Max Bearak, *Trump Orders a U.S. Exit From the World's Main Climate Pact*, N.Y. TIMES (Jan. 29, 2025), https://www.nytimes.com/2025/01/20/climate/trump-paris-agreement-climate.html (on file with the BYU law Review) (reporting Trump's executive order to withdraw from the Paris Agreement); Jim Tankersley & Lisa Friedman, *U.S. and China Restart Climate Talks*, N.Y. TIMES (Nov. 15, 2022), https://www.nytimes.com/2022/11/14/business/china-us-climate-change.html (on file with the BYU Law Review) (reporting that talks over climate between China and the United States, the world's largest emitters, have been frozen for months).

7. West Virginia v. EPA, 597 U.S. 697, 735 (2022) (finding that the EPA lacked authority to promulgate major environmental regulations).

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hanging in the balance, counting on the U.S. government to fix it is a risky bet.

The failure of the U.S. political system to adequately address climate change has shifted focus from public to private action. Driven by the Environmental, Social, and Governance (ESG) movement, corporate climate policies seek to save the planet through the actions of private firms rather than elected representatives.[8] Today, many view ESG as a market-based solution to a public policy failure.[9] Where Congress failed, ESG will succeed.

ESG-driven climate stewardship is closely related to advocacy for greater redistribution. Most academics and politicians who support one of these goals also endorse the other.[10] Yet this Article posits that the pursuit of these two objectives suffers from a profound and unavoidable contradiction. If corporate climate policies reach the scale sufficient to reduce carbon emissions, they will also harm the poor.[11] Granted, the ESG movement's recent emergence and ESG's vague definition mean that no distributional ESG impact estimates currently exist. But because climate stewardship policies invariably resemble different forms of environmental regulations, these policies will inevitably replicate the well-known regressive effects of these regulations.[12]

8. *See* Elizabeth Pollman, *The Making and Meaning of ESG*, 14 HARV. BUS. L. REV. 403 (2024) (describing the origins of the ESG movement).

9. *See* Wolf-Georg Ringe, *Investor-Led Sustainability in Corporate Governance*, 7 ANN. CORP. GOVERNANCE 93, 95 (2022) (describing the increasingly broad global consensus that the asset management sector has a vital role to play in helping society solve existential challenges such as the current climate crisis).

10. For example, the ambitious Green New Deal proposal combined net-zero strategies with vastly expanded social protection measures. *See* H.R. Res. 109, 116th Cong. (2019). *See also* Shelley Welton, *Neutralizing the Atmosphere*, 132 YALE L.J. 171, 211 (2022) ("[M]any activists, politicians, and academics have come to view the [decarbonization] challenge as an opportunity to dramatically reorient the relationship between infrastructure and social structure in the United States.").

11. Our argument differs from concerns about "just transition" in either of the two prevalent meanings of this term. Thus, our concerns about ESG harming the poor are not limited to the worries about individuals (such as coal miners and oil refinery workers) employed in industries directly affected by the green transition. Nor do we address the debate about how to make the future green society more just overall than our current one. *See* Ann M. Eisenberg, *Just Transitions*, 92 S. CAL. L. REV. 273, 285–89 (2019) (discussing both meanings and advocating the former).

12. *See infra* Part II.

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Policies that reduce carbon emissions are regressive due to their disproportionate impact on low-income households. For example, a carbon tax leads to higher energy prices.[13] This price increase affects low-income households the most, as these households allocate a larger portion of their income towards energy-related expenses and are less likely to afford energy-efficient alternatives.[14] Similarly, the increase in gasoline prices further burdens low-income households, who often own fuel-inefficient cars and may live in areas with limited public transportation.[15] Rising prices of goods resulting from higher energy and transportation costs also have a disproportionate impact on low- and middle-income households that already allocate a significant portion of their income to essential goods.[16] Moreover, the fossil fuel sector's expected shrinkage could result in significant job losses, particularly affecting low-income workers and leading to unemployment concentrated in specific geographic areas.[17]

These regressive effects remain theoretical because the United States has not adopted a carbon tax. But many companies have adopted a climate policy that mimics this tax: the internal carbon fee.[18] This private sector "carbon tax" is similarly likely to result in disproportionate harms to the poor. But in contrast with the real carbon tax, the internal carbon fees will generate no revenue

13. Govinda R. Timilsina, *Carbon Taxes*, 60 J. ECON. LITERATURE 1456, 1472 (2022); Diego R. Känzig, *The Unequal Economic Consequences of Carbon Pricing* 5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31221, 2022), https://www.nber.org/papers/w31221 (on file with the BYU Law Review) (finding that the EU carbon pricing scheme "has been more regressive than commonly thought").

14. Timilsina, *supra* note 13; Känzig, *supra* note 13, at 23.

15. *See* Roberton C. Williams III, Hal Gordon, Dallas Burtraw, Jared C. Carbone & Richard D. Morgenstern, *The Initial Incidence of a Carbon Tax Across Income Groups*, 68 NAT'L TAX J. 195, 207 tbl. 3 (2015) (showing larger welfare losses from a carbon tax due to gasoline consumption for lower income quintiles); Anders Fremstad & Mark Paul, *The Impact of a Carbon Tax on Inequality*, 163 ECOLOGICAL ECON. 88, 89 (2019) (summarizing studies).

16. *See* Lawrence H. Goulder, Marc A.C. Hafstead, GyuRim Kim & Xianling Long, *Impacts of a Carbon Tax Across US Household Income Groups: What Are the Equity-Efficiency Trade-Offs?*, 175 J. PUB. ECON. 44, 51 tbl. 4 (2019) (showing that food and clothing are a higher portion of expenditures for lower income deciles).

17. *See* Akio Yamazaki, *Jobs and Climate Policy: Evidence from British Columbia's Revenue-Neutral Carbon Tax*, 83 J. ENV'T ECON. & MGMT. 197, 208–10 (2017) (reporting large job losses in trade-intensive industries after enactment of a carbon tax).

18. Sarah E. Light & Christina P. Skinner, *Banks and Climate Governance*, 121 COLUM. L. REV. 1895, 1906 (2021) (reporting that over 850 companies disclosed in 2020 that they employ internal carbon pricing).

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for the government that may be used to compensate low-income individuals. So the climate stewardship measure modeled on the carbon tax will be even more regressive than the carbon tax itself.

Another example of a regressive climate change mitigation policy is the U.S. Corporate Average Fuel Economy (CAFE) standards that require automakers to sell more fuel-efficient cars. These standards essentially subsidize fuel-efficient vehicles and tax fuel-inefficient ones.[19] If ESG-pursuing automakers prioritize environmental goals, they would lower the prices of electric cars while raising prices on gas-guzzlers.[20] This would replace the implicit tax/subsidy regime under CAFE with an explicit one, likely resulting in a comparable regressive impact. The analysis is similar for other government policies and their climate stewardship analogues.

Overall, the more effective ESG measures become in reducing carbon emissions, the greater the economic burden these measures will impose on the poor. In theory, companies may avoid this outcome if they not only adopt climate-friendly policies but also accompany them with offsetting compensatory measures. But, unfortunately, there will be no such offsetting adjustments in practice. While it is conceivable that some firms may try to pursue both environmental and distributional goals,[21] we have serious doubts about the effectiveness of a general strategy that relies on private firms to redress the disproportionate impact of their climate policies on economically vulnerable Americans.[22]

19. Lucas W. Davis & Christopher R. Knittel, *Are Fuel Economy Standards Regressive?*, 6 J. ASS'N ENV'T & RES. ECONOMISTS S37, S38 (2019) (reaching conclusion stated in the text).

20. Some argue that although electric vehicles cost more to buy than internal combustion engine cars, their operating costs are much lower. Thus, over the life of a vehicle, it might be less expensive to buy and drive an electric vehicle. *See* Roberto Baldwin, Sasha Richie & Dave VanderWerp, *EV vs. Gas: Which Cars Are Cheaper to Own?*, CAR AND DRIVER (Oct. 28, 2022), https://www.caranddriver.com/shopping-advice/a32494027/ev-vs-gas-cheaper-to-own (on file with the BYU Law Review). However, as explained in the article itself, without tax subsidies this statement is not true of all cars. More importantly, without subsidies the poor cannot pay the high initial price to enjoy the future savings.

21. *E.g.*, *Citi Releases First Environmental, Social and Governance (ESG) Report*, CITI (Apr. 29, 2020), https://www.citigroup.com/global/news/press-release/2020/citi-releases-first-environmental-social-and-governance-esg-report (on file with the BYU Law Review) ("[B]road themes [in the Citi ESG are] fighting climate change, addressing the affordable housing crisis and reducing economic inequality . . . .").

22. In addition to the practical problems described in the text below, firms may quickly run into thorny legal issues. Under Delaware law directors of a corporation owe fiduciary duties to shareholders and the company, not to other actors in the market.

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While private firms cannot redistribute effectively, Congress can. Could the regressive effects of private-sector ESG policies be offset through a new division of labor of sorts: Private firms would combat global warming through ESG while Congress would protect low-income Americans from ESG regressivity?

While facially plausible, this is not a viable solution. Relying on Congress to remedy regressive ESG policies belies the realities of congressional (in)action over the past fifty years. During that time Congress has found it much easier to enact economic legislation than to pass measures addressing the country's ever-increasing inequality.[23] And for Congress to pass distributional offsets to address the regressive effects of the varied and opaque ESG policies adopted by thousands of corporations would pose an even greater challenge. Even worse, private ESG initiatives could provide Congress with a pretext not only to avoid implementing its own climate-saving measures but to ignore the regressive effects of ESG policies as someone else's problem.

In contrast, Congress is far better incentivized to provide compensating adjustments when its own actions impose new burdens on the poor. Despite its disappointing record,[24] Congress remains a political body with exposure to the views of low-income Americans, among others, and the means to redistribute. Corporate boards, in contrast, possess neither of these attributes.[25]

This Article will also consider, and ultimately reject, two arguments in favor of pursuing ESG despite its shortcomings. The first argument is that even if ESG-driven climate stewardship will disproportionately harm the poor, the harm will be temporary. Sooner or later, the argument goes, the world will transition to a green economy, energy prices will fall, and the poor will benefit from this fall more than others for the same reason that a rise in energy prices disproportionately harms the poor. While we have no conceptual objections to this argument, this temporary

Redistributing funds, and potentially profits, from the pockets of shareholders into programs designed for the benefit of low-income individuals may jeopardize those duties, notwithstanding how commendable the directors' intentions may be. *See* Marcel Kahan & Edward Rock, *Systemic Stewardship with Tradeoffs*, 48 J. CORP. L. 497, 497–98 (2023).

23. *See* Alex Raskolnikov, *Distributional Arguments, in Reverse*, 105 MINN. L. REV. 1583, 1624–31 (2021) (arguing that Congress failed to offset the effects of its own regressive policies).

24. *See id.*

25. *See infra* Part III.

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transition period will feel like a very permanent plunge in living standards for millions of people.[26] The increasingly unrealistic goal set in the Paris Agreement is for the world to go carbon-neutral by 2050.[27] It may easily take twice that long.[28] Even if the 2050 goal is met, reaching it would mean decades of higher energy prices. So what may be viewed as a "transition" in policy briefings and economics models will feel much more permanent to those most negatively affected.

The second argument is that, to put it bluntly, the poor will bear the brunt of negative consequences regardless of the chosen approach. It is true that corporate climate policies will impose losses on low-income Americans, and it is also true that neither private nor public sector actors are likely to alleviate these losses. However, the poor are the ones who suffer the most from air pollution, environmental degradation, and climate change today.[29] Furthermore, if ESG initiatives fail, everyone—particularly low-income households—will face even greater costs due to global warming.[30] This boils down to an argument that even if the poor

26. For a warning that economists and policymakers should take transition losses much more seriously than they have in the past, see Gordon H. Hanson, *Local Labor Market Impacts of the Energy Transition: Prospects and Policies* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 30871, 2023), https://www.nber.org/papers/w30871 (on file with the BYU Law Review).

27. *See* Anders Fremstad & Mark Paul, *Neoliberalism and Climate Change: How the Free-Market Myth Has Prevented Climate Action*, 197 ECOLOGICAL ECON. 1, 1, 3 (2022) (referring to the Paris Agreement target to "limit global temperature increases to 'well below 2 degrees[,]'" explaining that it would take eliminating carbon emissions by 2050 to limit the increase to 1.5°C, and observing that "if countries continue on their current course the planet will likely warm by 3°C to 4°C by the end of the century" (citations omitted)).

28. According to one of the leading environmental economists, "putting a price on carbon to limit warming to 1.5°C is simply 'not feasible.'" *Id.* at 3 (citing William Nordhaus, *Climate Change: The Ultimate Challenge for Economics*, 109 AM. ECON. REV. 1991, 1998 (2019)).

29. ENV'T PROT. AGENCY, EPA 430-R-21-003, CLIMATE CHANGE AND SOCIAL VULNERABILITY IN THE UNITED STATES: A FOCUS ON SIX IMPACTS 21, 33 (2021), https://www.epa.gov/cira/social-vulnerability-report (on file with the BYU Law Review) (finding low-income Americans are more vulnerable to air pollution and elevated temperatures); Solomon Hsiang, Paulina Oliva & Reed Walker, *The Distribution of Environmental Damages*, 13 REV. ENV'T. ECON. & POL'Y 83, 95 (2019) (referring to "the 'folk wisdom' in policy circles that poor populations are systematically exposed to the most damaging climates today and will face the largest changes in the future" and explaining why this wisdom is an oversimplification).

30. ENV'T PROT. AGENCY, *supra* note 29, at 4, 7 (referring to "disproportionate risks to socially vulnerable groups" such as low-income Americans from climate change); Hsiang, Oliva & Walker, *supra* note 29, at 99 (noting that because of heterogeneous marginal effects

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would bear the brunt of the harm of ESG reforms, these reforms are better than nothing.

We reject this "the poor will suffer no matter what" assertion because it ignores the fact that *public* climate-saving policies can avoid regressive outcomes. In contrast with ESG measures, a carbon tax generates a lot of revenue.[31] Redistributing only eleven percent of the revenue raised by a modest carbon tax would be sufficient to counteract the entire negative impact of the tax on the lowest two quintiles of the income distribution.[32] Consequently, a carbon tax could easily be structured to be progressive overall. The same holds true for other carbon pricing policies and even targeted government spending programs.[33]

It is undoubtedly difficult for Congress to overcome the challenges posed by interest groups and the fossil fuel lobby. But it is not impossible to do so, as evidenced by the 2022 passage of the IRA.[34] That passage, we believe, reflects a fundamental shift. The Earth is warming, and the consequences of that warming are growing increasingly dire.[35] Remarkably, the oil industry has turned from vigorously opposing a carbon tax to supporting it.[36]

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of climate change on the poor and the rich, "it does appear likely that poor populations will face larger future damages from climate change.").

31. *See, e.g.*, Goulder et al., *supra* note 16, at 51, 58 (estimating that a modest $40 per ton CO_2 tax would generate $4 trillion between 2018 and 2040, for an average annual revenue of over $180 billion).

32. Aparna Mathur & Adele C. Morris, *Distributional Effects of a Carbon Tax in Broader U.S. Fiscal Reform*, 66 ENERGY POL'Y 326, 333 (2014). In fact, available data suggests that it would be possible to implement a carbon tax whose net burden will fall only on the top ten or twenty percent. Alex Raskolnikov, *Taxing the Ten Percent*, 62 HOUS. L. REV. 57, 91–92 (2024) (summarizing the evidence).

33. For example, emission trading schemes raise revenue from sales of emissions allowances, and that revenue may be redistributed just as the revenue from a carbon tax. David Weisbach, *Instrument Choice Is Instrument Design*, *in* U.S. ENERGY TAX POLICY 113, 135 (Gilbert E. Metcalf ed., 2011). Spending policies adopted as part of the IRA have multiple incentives to support disadvantaged communities. *See* John Bistline, Neil Mehrotra & Catherine Wolfram, *Economic Implications of the Climate Provisions of the Inflation Reduction Act* 10, 13 fig. 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31267, 2023), https://www.nber.org/papers/w31267 (describing and quantifying incentives to invest in low-income and energy communities).

34. *See* Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818.

35. *See, e.g.*, Rebecca Falconer, *NOAA: 2023 Worst Year on Record for Billion-Dollar Disasters*, AXIOS (Sep. 12, 2023), https://www.axios.com/2023/09/12/disasters-weather-climate-record-2023-noaa (on file with the BYU Law Review).

36. Matt Egan, *America's Most Powerful Oil Lobby Is Changing Its Tune on a Carbon Tax*, CNN (Mar. 25, 2021, at 14:49 ET), https://www.cnn.com/2021/03/25/business/oil-lobby-

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A recent decision by the European Union to enact a carbon border tax is a further strong inducement for the United States to start implementing carbon pricing.[37] And while the results of the 2024 election raise doubts about the likelihood of environmental legislation in the short term, perhaps tragic and costly events like the recent Los Angeles wildfires will change some minds in Congress sooner than later.[38]

At the same time, the ESG movement faces increasing political constraints. As the backlash against ESG vividly demonstrates, opponents will seize every opportunity to remind voters—especially middle- and low-income voters—of the job losses and increased energy costs that will follow ESG policies aimed at curbing carbon emissions.[39] This backlash reveals that using private-sector workarounds to bypass political challenges at the front end will merely lead to confronting similar challenges at the back end.

ESG-driven climate stewardship came with a promise of action in the face of congressional failure to act. It has swept across

carbon-pricing-api/index.html (on file with the BYU Law Review) (describing the newly adopted support of a carbon tax by American Petroleum Institute).

37. Michael Copley, *How a European Law Might Get Companies Around the World to Cut Climate Pollution*, NPR (May 17, 2023, at 05:04 ET), https://www.npr.org/2023/05/17/1171238285/how-a-european-law-might-get-companies-around-the-world-to-cut-climate-pollution (on file with the BYU Law Review). Moreover, some influential Republican politicians now favor a carbon tax even though most Republican politicians still do not. *See* Ella Nilsen, *Why Republicans Can't Get Out of Their Climate Bind, Even as Extreme Heat Overwhelms the US*, CNN (July 30, 2023, at 12:05 ET), https://www.cnn.com/2023/07/30/politics/republicans-climate-solutions-heat-wave/index.html (on file with the BYU Law Review) (describing disagreements within the party); Timothy Puko & Bradley Olson, *Exxon Puts Up $1 Million to Promote Carbon Tax*, WALL ST. J. (Oct. 9, 2018, at 19:23 ET), https://www.wsj.com/articles/exxon-puts-up-1-million-to-campaign-for-a-carbon-tax-1539079200 (on file with the BYU Law Review) (citing support for carbon tax from two former Republican Secretaries of State and a Republican former Senate Majority Leader).

38. Zachary B. Wolf, *Montana Elected a Firefighter to the Senate. He's Already Pushing for Solutions*, CNN (Jan. 10, 2025, at 15:06 ET), https://www.cnn.com/2025/01/10/politics/tim-sheehy-wildfire-legislation-what-matters/index.html (on file with the BYU Law Review) (describing proposed bipartisan legislation).

39. *See* Jim Puzzanghera, *Republicans Taking Page from Democrats When Talking About Effect of Investing Rule that Allows Retirement Funds to Consider Climate Risks*, BOS. GLOBE (Mar. 5, 2023, at 16:11 MT), https://www.bostonglobe.com/2023/03/05/nation/republicans-try-scare-americans-about-impact-new-investing-rule-that-allows-retirement-funds-consider-climate-risks (on file with the BYU Law Review) (reporting that Republicans "predicted that ESG, if unchecked, would [cause] prices to rise and jobs in the [fossil fuel] industry to plummet").

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corporate America and started producing tangible results.[40] But ESG is a poor strategy. If it succeeds in tackling one ultimate challenge of our time, it will do so only at the price of exacerbating the other.[41] For all of its shortcomings, only Congress can produce an equitable and sustainable solution to our environmental problems. And to increase the likelihood of congressional action, we argue that institutional investors should channel their resources toward ensuring that the lobbying efforts of their portfolio companies are aligned with the companies' pledges to protect the environment.

This Article proceeds in three parts. Part I outlines Congress's failure to enact effective climate legislation and the emergence of ESG as a response to that failure. Part II elucidates the regressive nature of ESG policies. Part III explains why neither Congress nor the private sector will counteract ESG regressivity. In the end, there is no alternative to legislation in tackling both global warming and economic inequality, as we reiterate in a brief conclusion.

I. FROM THE GOVERNMENT TO THE PRIVATE MARKET

Despite decades of scientific evidence on the dangers of carbon emissions,[42] governments have struggled to implement effective policies against this major threat. Climate change, or global

40. ESG skeptics argue that relying on the private sector's embrace of ESG initiatives would prevent Congress from taking action to protect the planet. Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORN. L. REV. 91, 173 (2020) (arguing that corporate leaders might support ESG measures "to deflect the demand for legal, regulatory, and policy reforms aimed at stakeholder protections"); Matteo Gatti & Chrystin Ondersma, *Can A Broader Corporate Purpose Redress Inequality? The Stakeholder Approach Chimera*, 46 J. CORP. L. 1, 68 (2020) (claiming that a stakeholder approach would not leave room for more consequential legislative reforms).

41. Much ink has been spilled on whether ESG is an effective way to fight climate change. *See, e.g.*, Sanjai Bhagat, *An Inconvenient Truth About ESG Investing*, HARV. BUS. REV. (Mar. 31, 2022), https://hbr.org/2022/03/an-inconvenient-truth-about-esg-investing (on file with the BYU Law Review). Our critique, however, holds whether or not this is true. Others have written about the costs of carbon taxes and the dangers inherent in ESG polices that ultimately ignore equity concerns. *See, e.g.*, Welton, *supra* note 10. But we are the first to draw a direct comparison between ESG as an implicit carbon tax with all the associated regressive effects.

42. *See GSA Position Statement: Climate Change*, GEOLOGICAL SOC'Y AM. (Sep. 2024), https://www.geosociety.org/gsa/positions/position10.aspx (on file with the BYU Law Review); *The Basics of Climate Change*, ROYAL SOC'Y, https://royalsociety.org/topics-policy/projects/climate-change-evidence-causes/basics-of-climate-change (on file with the BYU Law Review) (last visited Mar. 12, 2026).

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warming, refers generally to an overall rise in average global temperatures. Humans have vastly accelerated this rise in recent centuries by burning fossil fuels and relying on technologies that add to atmospheric greenhouse gases—mainly carbon dioxide, one of the single largest contributors to climate change.[43] And even though governments, scientists, and businesses have known this since the 1970s,[44] no one in the private or public sector has been able to convince the world to stop using fossil fuels.

Section A will discuss the failure of the government and political establishment to address carbon emissions. Section B will explore the rise of ESG-driven climate stewardship as an alternative route to implement climate policy. Proponents of ESG argue that sustainability is essential not only for the planet but also to the performance of corporations.[45] Free from government gridlock and lobbyist influence,[46] investors should pressure companies to adopt climate policies, achieving emission reductions while also improving—or at least not harming—firms' performance.[47]

A. A Regulatory Wasteland

The United States has repeatedly failed to pass significant environmental regulation to effectively combat climate change.[48] One early culprit is the fossil fuel industry's efforts to discredit the science of climate change through misinformation campaigns over the past few decades.[49] For example, the Global Climate Coalition

43. *CO2 Emissions (Metric Tons Per Capita)*, WORLD BANK – WORLD DEV. INDICATORS (Dec. 16, 2020), https://worlddataview.com/topics/environment/co2_emissions_metric_tons_per_capita (on file with the BYU Law Review).

44. *See, e.g.*, Charles D. Keeling, *Is Carbon Dioxide from Fossil Fuel Changing Man's Environment?*, 114 PROCS. AM. PHIL. SOC'Y 10 (1970).

45. Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2613 (2021).

46. Michael P. Vandenbergh & Jonathan A. Gilligan, *Beyond Gridlock*, 40 COLUM. J. ENV'T L. 217, 286 (2015).

47. *See* DAVID VOGEL, THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY 9 (2005).

48. International law has also struggled to implement effective environmental measures. As in other areas of international law, these measures suffer from enforceability challenges and the incentives for governments to avoid adopting costly climate policies. *See* Moise Jean, *Customary International Law and the Challenge of Climate Change: How to Deal with the Stagnation of the Paris Agreement*, 54 NYU J. INT'L L. & POL. 85, 85 (2022).

49. Jeffrey Pierre & Scott Neuman, *How Decades of Disinformation About Fossil Fuels Halted U.S. Climate Policy*, NPR (Oct. 27, 2021, at 10:35 ET), https://www.npr.org/

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was established in the early 1990s to counter government proposals targeting carbon emissions. It emphatically questioned prevailing climate change models and disputed any connection between fossil fuels, greenhouse gases, and global warming.[50] This coalition also played a significant role in lobbying against regulations and influencing media coverage until 2001. Additionally, Charles and David Koch donated over $145 million to climate denial groups from 1997 to 2018, while Exxon contributed around $37 million.[51] The industry misinformation campaigns were so deleterious that the House Oversight and Reform Committee commenced an investigation into these practices in 2021.[52] A 2022 report concluded that major oil companies knew about climate risks for decades but consistently misled the public with greenwashing campaigns in pursuit of higher profits.[53] As early as 1979, internal Exxon research confirmed the likelihood of severe environmental consequences from global warming.[54] However, instead of acting on this knowledge, Mobil and Exxon deployed advertisements masquerading as editorials in prominent newspapers, such as the New York Times, and other fear-mongering ads aimed at regular Americans.[55]

Moreover, slim party majorities and congressional gridlock have become a political norm, making it difficult to enact environmental legislation. Though there were significant regulatory

2021/10/27/1047583610/once-again-the-u-s-has-failed-to-take-sweeping-climate-action-heres-why (on file with the BYU Law Review).

50. *See* Catherine Rocchi, Note, *Climate Protagonists? Strategic Misrepresentation and Corporate Resistance to Climate Legislation*, 74 STAN. L. REV. 1153, 1165 (2022).

51. Pierre & Neuman, *supra* note 49.

52. Ella Nilsen, *Lawmakers Launch Investigation Into Climate Crisis Disinformation by Fossil Fuel Industry*, CNN (Sep. 16, 2021, at 15:56 ET), https://edition.cnn.com/2021/09/16/politics/house-investigation-fossil-fuel-disinformation-climate/index.html (on file with the BYU Law Review).

53. René Marsh, *Big Oil Has Engaged in a Long-Running Climate Disinformation Campaign While Raking in Record Profits, Lawmakers Find*, CNN (Dec. 9, 2022, at 15:29 ET), https://edition.cnn.com/2022/12/09/politics/big-oil-disinformation-record-profits-climate/index.html (on file with the BYU Law Review).

54. Geoffrey Supran & Naomi Oreskes, *The Forgotten Oil Ads That Told Us Climate Change Was Nothing*, GUARDIAN (Nov. 18, 2021, at 05:00 ET), https://www.theguardian.com/environment/2021/nov/18/the-forgotten-oil-ads-that-told-us-climate-change-was-nothing (on file with the BYU Law Review).

55. *Id.*

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victories in the 1970s,[56] progress stalled after the Clean Air Act Amendments in 1990.[57] Regulatory capture and lobbying exacerbated the gridlock. Fossil fuel companies have invested heavily in lobbying Congress and agencies to block climate change bills or slow the transition to low-carbon energy.[58] For instance, the American Petroleum Institute, a major trade organization and lobbying group for the oil and natural gas industry, has consistently advocated against climate change regulation. Various presidential administrations have had exceptionally close relationships with the fossil fuel industry. George W. Bush—himself a former oil man—and Donald Trump both appointed former oil executives to political roles.

Importantly, while climate change has been something of a partisan issue over the years, government inaction has largely persisted regardless of party control of the White House or Congress. George H.W. Bush's administration saw the unanimous ratification of the United Nations Framework Convention on Climate Change in 1992, which outlined general goals but was effectively nonbinding.[59] The Kyoto Protocol, adopted in 1997 during the Clinton administration, required countries to individually ratify it to make it legally binding. However, the U.S. Senate passed the Byrd-Hagel Resolution, restricting the U.S. from participating in climate agreements that treated developing

56. Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619, 621 (2006).

57. *See* Todd S. Aagaard, *Environmental Law Outside the Canon*, 89 IND. L.J. 1239, 1240–41 (2014).

58. Rachel Licker, Brenda Ekwurzel, Jean Sideris & Peter Frumhoff, UNION CONCERNED SCIENTISTS, *Tracing Fossil Fuel Companies' Contribution to Climate Change and Ocean Acidification* (2019), https://www.ucsusa.org/sites/default/files/2019-12/UCS_acidification_FS_191210a_low-res.pdf (on file with the BYU Law Review); Jenny Rowland-Shea & Zainab Mirza, *How Oil Lobbyists Use a Rigged System to Hamstring Biden's Climate Agenda*, CTR. FOR AM. PROGRESS (Sep. 30, 2021), https://www.americanprogress.org/article/oil-lobbyists-use-rigged-system-hamstring-bidens-climate-agenda (on file with the BYU Law Review); Chris McGreal, *How a Powerful US Lobby Group Helps Big Oil to Block Climate Action*, GUARDIAN (July 19, 2021, 06:00 ET), https://www.theguardian.com/environment/2021/jul/19/big-oil-climate-crisis-lobby-group-api (on file with the BYU Law Review).

59. United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107; Vicki Arroyo, *Maryland Journal of International Law Symposium Keynote Address: A Brief History of U.S. Climate Policy and a Call to Action*, 34 MD. J. INT'L L. 1, 3 (2019).

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countries differently or imposed economic hardships.[60] This prevented the U.S. from ratifying the Kyoto Protocol and set a high bar for joining future agreements.

In the 2000s, multiple bills were introduced, including cap-and-trade proposals,[61] carbon taxes,[62] and energy efficiency standards.[63] None were enacted by Congress.[64] Regulatory stagnation continued into the 2010s, with carbon taxes and clean energy standards repeatedly introduced but never enacted.[65] The sense of urgency about climate change grew during Obama's second term.[66] Under his leadership, the U.S. joined the Paris Agreement in 2015, a major international initiative signed by over 190 countries. It aimed to limit global temperature increase to 1.5–2 degrees Celsius above pre-industrial levels and established the Green Climate Fund to support developing countries in coping with the effects of climate change.[67] In 2016, Obama introduced the Clean Energy Savings for All Americans initiative to make green energy affordable.[68] The Environmental Protection Agency even

60. S. Res. 98, 105th Cong. (1997).

61. *See infra* Section II.3.B.

62. *See infra* Section II.A.

63. Energy or efficiency standards regulate equipment and building design to reduce energy consumption. *Energy-Efficiency Standards*, HOUS. SOLS. LAB (May 11, 2021), https://localhousingsolutions.org/housing-policy-library/energy-efficiency-standards (on file with the BYU Law Review).

64. Under the George W. Bush administration, the bipartisan Climate Stewardship Act of 2003, which aimed to curb emissions through cap-and-trade programs, failed with only 43 votes in the Senate. Press Release, U.S. Senate Comm. on Commerce, Sci., & Transp., Senate Casts Historic Vote on McCain-Lieberman Global Warming Bill (Oct. 30, 2003), https://www.commerce.senate.gov/2003/10/senate-casts-historic-vote-on-mccain-lieberman-global-warming-bill (on file with the BYU Law Review). Similarly, during Obama's first term, the American Clean Energy and Security Act of 2009 also failed. *See Congress Climate History*, CTR. FOR CLIMATE & ENERGY SOLS., https://www.c2es.org/content/congress-climate-history (on file with the BYU Law Review) (last visited Mar. 12, 2026). Another unsuccessful plan, introduced by Republicans, was the Practical Energy and Climate Plan, which proposed limiting oil imports and implementing clean energy and efficiency standards. *Id.*

65. *See Congress Climate History*, CTR. FOR CLIMATE & ENERGY SOLS., https://www.c2es.org/content/congress-climate-history (on file with the BYU Law Review) (last visited Mar. 7, 2026).

66. *See* PARIS AGREEMENT TO THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, Dec. 12, 2015, T.I.A.S. No. 16-1104.

67. *Id.*

68. *See* THE WHITE HOUSE OFF. OF THE PRESS SEC'Y, *Fact Sheet: Obama Administration Announces Clean Energy Savings for All Americans Initiative* (July 19, 2016),

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instituted the Clean Power Plan, which capped emissions from power plants.[69] However, the 2016 Congressional Review Act reversed much of this progress with a simple majority vote in Congress and a presidential signature.[70] The first Trump administration rolled back many of Obama's environmental regulations and withdrew the U.S. from the Paris Agreement.[71] And the Supreme Court invalidated the Clean Power Plan regulations, concluding that the Environmental Protection Agency overstepped its authority in issuing them.[72]

Congressional gridlock continued throughout the rest of the 2010s. Congress did not even put to a vote several bipartisan bills.[73] Even the Baker Proposal, a bipartisan plan from the Climate Leadership Council that gained support from both parties and the fossil fuel industry, was never introduced as a bill in Congress.[74]

Notably, the American Petroleum Institute, the largest oil and gas trade group, which had long opposed climate legislation, proposed a carbon tax in 2021.[75] Their Climate Action Framework, endorsing a carbon pricing policy, was supported by fossil fuel

https://obamawhitehouse.archives.gov/the-press-office/2016/07/19/fact-sheet-obama-administration-announces-clean-energy-savings-all (on file with the BYU Law Review).

69. *See* NAT'L RES. DEF. COUNCIL, *What Is the Clean Power Plan?* (Sep. 29, 2017), https://www.nrdc.org/stories/what-clean-power-plan.

70. *See Congressional Review Act*, U.S. GOV'T ACCOUNTABILITY OFF., https://www.gao.gov/legal/other-legal-work/congressional-review-act#:~:text=The%20Congressional%20Review%20Act%20requires,the%20rules%20can%20take%20effect (on file with the BYU Law Review) (last visited Mar. 12, 2026).

71. *See* Jim Daley, *U.S. Exits Paris Climate Accord after Trump Stalls Global Warming Action for Four Years*, SCIENTIFIC AMERICAN (Nov. 4, 2020), https://www.scientificamerican.com/article/u-s-exits-paris-climate-accord-after-trump-stalls-global-warming-action-for-four-years (on file with the BYU Law Review). The U.S. under President Biden rejoined the Agreement in 2022. On the first day of his second term, however, President Trump withdrew (again) from the Agreement. Bearak, *supra* note 6.

72. West Virginia vs. EPA, 597 U.S. 697, 735 (2022).

73. *See* Jason Ye, *Climate Change Bills in the 113th Congress*, CTR. FOR CLIMATE & ENERGY SOLS. (Nov. 21, 2013), https://www.c2es.org/2013/11/climate-change-bills-in-the-113th-congress (on file with the BYU Law Review). For example, in 2018, the Market Choice Act and the Carbon Reduction and Tax Credit Act were proposed but never passed. *See id.*

74. John Schwartz, *'A Conservative Climate Solution': Republican Group Calls for Carbon Tax*, N.Y. TIMES (Feb. 7, 2017), https://www.nytimes.com/2017/02/07/science/a-conservative-climate-solution-republican-group-calls-for-carbon-tax.html (on file with the BYU Law Review).

75. Kayla Tausche, Stephanie Dhue & Emma Newburger, *American Petroleum Institute Endorses Carbon Pricing as Oil and Gas Industry Faces Pressure on Emissions*, CNBC (Mar. 25, 2021, at 15:20 ET), https://www.cnbc.com/2021/03/25/climate-change-american-petroleum-institute-endorses-carbon-pricing.html (on file with the BYU Law Review).

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industry leaders like Exxon, BP, and Chevron.[76] The American Petroleum Institute argued that an economy-wide carbon tax would be more effective at reducing emissions than the fragmented approach of federal and state regulations.[77] It also suggested that tax revenues could be returned to low-income households as rebates to cover rising energy costs and invested in clean energy technology development.[78] Despite the support of powerful lobbying organizations and major industry players, this proposal, like the Baker proposal, did not lead to a carbon tax.

The pattern of failed environmental legislation continued during the first years of the Biden administration. The Build Back Better Act included distributional measures targeted to help disadvantaged communities disproportionately affected by pollution.[79] But the Act was blocked by Senator Joe Manchin.

The 2022 IRA was proposed after three decades of failed environmental legislation.[80] In a startling break from past precedent, the Act was not only put to a vote, but it passed the House and the Senate, becoming the most significant federal law addressing climate change ever enacted.[81] Two key features of the IRA are notable when considering its likely distributional impact. First, unlike a carbon tax, which targets energy supply and thus puts the most pressure on the low- and middle-class households,[82] the IRA primarily targets fossil fuel demand through tax credits

76. *Id.*

77. *See* AM. PETROLEUM INST., CLIMATE ACTION FRAMEWORK, https://www.api.org/-/media/files/ehs/climate-change/2021/api-climate-action-framework.pdf (on file with the BYU Law Review) (last visited Mar. 12, 2026).

78. *See* Flannery Winchester, *Statement on API's Proposed Carbon Pricing Policy*, CITIZENS' CLIMATE LOBBY (Apr. 21, 2022), https://citizensclimatelobby.org/blog/news/statement-api-carbon-pricing (on file with the BYU Law Review).

79. *See* Bistline, Mehrotra & Wolfram, *supra* note 33, at 9–10, 12, 61.

80. *See* Press Release, Senate Democrats, Joint Statement from Leader Schumer and Sen. Manchin Announcing Agreement to Add the Inflation Reduction Act of 2022 to the FY2022 Budget Reconciliation Bill and Vote in Senate Net Week (July 27, 2022), https://www.democrats.senate.gov/newsroom/press-releases/senate-majority-leader-chuck-schumer-d-ny-and-sen-joe-manchin-d-wv-on-wednesday-announced-that-they-have-struck-a-long-awaited-deal-on-legislation-that-aims-to-reform-the-tax-code-fight-climate-change-and-cut-health-care-costs (on file with the BYU Law Review).

81. *See* Samantha Gross, *The Climate Bill's Oil and Gas Provisions Are a Worthwhile Tradeoff*, BROOKINGS (Aug. 4, 2022), https://www.brookings.edu/blog/planetpolicy/2022/08/04/the-climate-bills-oil-and-gas-provisions-are-a-worthwhile-tradeoff (on file with the BYU Law Review).

82. *See infra* Part II.A.

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and consumer rebates.[83] Second, the IRA retains many of the Justice40 commitments to benefit low- and middle-income households.[84] The IRA also contains incentives for consumers to adopt cleaner energy sources and use energy-efficient products.[85] And rather than pairing these tax incentives and other benefits with measures to penalize fossil fuel companies, the IRA uses carefully structured tax incentives to promote clean energy investments without making traditional energy sources more expensive.[86] The IRA is an important first step, but standing alone, it is not enough to reduce emissions to the required level.[87]

B. ESG as the Solution

In the face of Congress's poor record in addressing the grave risk of climate change, the climate stewardship component of ESG has emerged as a promising solution to the government's inaction.[88] The ESG movement among investors leverages the power of the market to force companies to adopt climate policies. ESG's appeal lies in its ability to drive companies towards emission reduction without the influence of corporate lobbying and other interest groups faced by politicians and governments.[89] The ESG

83. *See* Gross, *supra* note 81. We discuss the distributional impact of these tax incentives in Part III.D.

84. *See Justice40,* WHITE HOUSE, https://www.whitehouse.gov/environmentaljustice/justice40 [https://perma.cc/PJ5X-6GHL] (on file with the BYU Law Review) (last visited Mar. 12, 2026) (describing the Biden Administration's commitment to directing 40% of environmental and energy investments to disadvantaged communities).

85. *See* Jennifer L. Bragg, Avia M. Dunn, Maya P. Florence, Bill McConagha & Neepa K. Mehta, *Senate Passes Landmark Bill with Climate, Tax, Energy and Health Care Implications*, SKADDEN (Aug. 7, 2022), https://www.skadden.com/insights/publications/2022/08/senate-passes-landmark-bill (on file with the BYU Law Review).

86. *See id.*

87. *See* Sullivan, *supra* note 5.

88. *See* Lisa Friedman, *Biden 'Over-Promised and Under-Delivered' on Climate. Now, Trouble Looms in 2022.*, N.Y. TIMES (Jan. 4, 2022), https://www.nytimes.com/2022/01/04/climate/biden-climate-change.html (on file with the BYU Law Review); Joe Thwaites, Jake Schmidt & Brendan Guy, *US International Climate Finance Fails Again to Meet Moment*, NAT'L RES. DEF. COUNCIL (Dec. 21, 2022), https://www.nrdc.org/bio/joe-thwaites/us-international-climate-finance-fails-again-meet-moment (on file with the BYU Law Review).

89. *See* Colin Mayer, *Shareholderism versus Stakeholderism – A Misconceived Contradiction*, 106 CORN. L. REV. 1859, 1875 (2021) ("Corporations therefore lobby to moderate the severity of regulations, seek ways of circumventing them, minimizing their impact and, if possible, turning the regulations to a competitive advantage by using them to keep others out of the market.").

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movement also benefited from the rising influence of the ESG-focused "Big Three" institutional investors—BlackRock, Vanguard, and State Street—who collectively hold over a fifth of the equity of S&P 500 companies.[90]

The term ESG was introduced by the United Nations in 2004 through the Global Compact Report, "Who Cares Wins."[91] This report, involving fifty-five CEOs from the financial sector, aimed to encourage the integration of ESG factors into the decision-making processes of financial institutions.[92] The report argued that adopting ESG policies—including policies to counter global warming—would benefit the private sector by increasing resilience against systemic risks, promoting sustainable development, improving institutional management, and fostering societal trust.[93]

Following this report, the international law firm Freshfields Bruckhaus Deringer published a study supporting the legal right of directors to implement ESG measures while upholding their fiduciary duties.[94] This report played a significant role in promoting ESG integration in institutional investments.[95] In 2006, the United Nations Environment Programme Finance Initiative helped launch the Principles for Responsible Investment at the New York Stock Exchange.[96] These principles provide guidance for investors on incorporating ESG factors into their decision-making.[97] Currently, they are endorsed by signatories managing over $139.6

90. *See* Lund & Pollman, *supra* note 45, at 2590.

91. For a description of the origins of the ESG term, see Pollman, *supra* note 8, at 408–23.

92. *See* U.N. Financial Sector Initiative, WHO CARES WINS: CONNECTING FINANCIAL MARKETS TO A CHANGING WORLD vii (2004).

93. *See id.* at 12, 36.

94. *See* UNEP Fin. Initiative, *A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment*, UNEP 1 (Oct. 2005), https://www.unepfi.org/industries/investment/a-legal-framework-for-the-integration-of-environmental-social-and-governance-issues-into-institutional-investment (on file with the BYU Law Review).

95. *See* Joakim Sandberg, *Socially Responsible Investment and Fiduciary Duty: Putting the Freshfields Report into Perspective*, 101 J. BUS. ETHICS 143, 144 (2011) (describing the influence of the Freshfields report).

96. *See About the PRI*, PRI, https://www.unpri.org/about-us/about-the-pri (last visited Mar. 12, 2026) (on file with the BYU Law Review); UNEP FIN. INITIATIVE, *Principles for Responsible Investment* https://growthorientedsustainableentrepreneurship.wordpress.com/wp-content/uploads/2018/06/csr-un-principles-for-responsible-investment.pdf (on file with the BYU Law Review) (last visited Mar. 12, 2026).

97. *See id.*

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trillion in assets.[98] ESG-informed investing impacts business decisions worldwide.[99]

The ESG movement relies on asset managers, including the Big Three, to use their power to vote on shareholder proposals, board elections and other matters to push companies to increase their board diversity and pursue other social goals.[100] Climate policy—the main part of "E" in ESG—is perhaps the most active ESG domain. The Big Three and other asset managers have announced both their expectations for companies to adopt climate policies and their intent to use voting and other measures at their disposal to ensure that companies meet these expectations.[101] CEOs and board members have faced significant pressure to address climate concerns.[102]

Asset managers tend to focus on several key elements of climate policies. First, asset managers expect portfolio companies to cut emissions.[103] While refraining from supporting proposals that are overly prescriptive,[104] asset managers expect companies to adopt emission targets.[105] Second, asset managers expect companies to comply with climate disclosure standards that include scientific metrics, business model information, and engagement

98. *See id.* (describing that with more than 5,000 signatories from around the world, representing $139.6tr AUM, PRI's community is diverse, inclusive, and deeply committed to the shared goal of responsible investment).

99. While ESG was mentioned in less than 1% of earnings calls between 2004 and 2018, this figure rose to 19% by 2021. *See* Debbie Carlson, *Mentions of 'ESG' and Sustainability Are Being Made on Thousands of Corporate Earnings Calls*, MARKETWATCH (July 19, 2021, at 12:40 ET), https://www.marketwatch.com/story/mentions-of-esg-and-sustainability-are-being-made-on-thousands-of-corporate-earnings-calls-11626712848 (on file with the BYU Law Review).

100. *See* Michal Barzuza, Quinn Curtis & David H. Webber, *The Millennial Corporation: Strong Stakeholders, Weak Managers*, 28 STAN. J.L. BUS. & FIN. 255, 260 (2023). As we explain in Section III.E, the backlash against ESG has recently led some large asset managers to reduce their pursuits of ESG policies.

101. *See* Dorothy S. Lund, *Asset Managers as Regulators*, 171 U. PA. L. REV. 77, 79–81 (2023).

102. *Id.* at 105, 113.

103. *Id.* at 113.

104. *See* Hannah Orowitz, Rajeev Kumar & Lee Anne Hagel, *An Early Look at the 2022 Proxy Season*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 7, 2022), https://corpgov.law.harvard.edu/2022/06/07/an-early-look-at-the-2022-proxy-season (on file with the BYU Law Review).

105. *See, e.g.*, BlackRock Investment Stewardship, *Proxy Voting Guidelines for Benchmark Policies - U.S. Securities* 19 (Jan. 2026), https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf (on file with the BYU Law Review).

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with key stakeholders.[106] Finally, some asset managers expect companies to align executive compensation with climate goals.[107] If a company fails to meet these expectations, institutional investors may vote against the appointment of the company's preferred directors to the board.[108]

Many investors that are not as dominant as the Big Three have joined alliances and coalitions to formulate climate policies and leverage their collective power to influence companies to reduce emissions. Climate Action 100+, for example, is a global investor initiative launched in 2017 that brings together more than 600 institutional investors.[109] It seeks to support the Paris Agreement goals of keeping global warming to below two degrees above pre-industrial levels. This global network engages with companies to put them on track to meet net-zero goals, focusing on 168 companies that are key to driving the global transition to net zero.[110]

Another initiative is the Sustainable Procurement Pledge, an international nonprofit organization aiming to help implement sustainable procurement practices in supply chains worldwide by

106. *See* Breanne Dougherty, Victoria Gaytan & Hilary Novik-Sandberg, *BlackRock's 2022 Engagement Priorities*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 28, 2022), https://corpgov.law.harvard.edu/2022/03/28/blackrocks-2022-engagement-priorities (on file with the BYU Law Review).

107. *See* Lucian A. Bebchuk & Roberto Tallarita, *The Perils and Questionable Promise of ESG-Based Compensation*, 48 J. CORP. L. 37 (2022).

108. Indeed, State Street has refused to support specific corporate officers for failing to meet ESG disclosure obligations. *See Global Proxy Voting and Engagement Guidelines*, STATE ST. GLOB. ADVISORS 5–6 (Mar. 2023), https://www.ssga.com/library-content/assets/pdf/global/asset-stewardship/proxy-voting-and-engagement-policy.pdf (on file with the BYU Law Review). For instance, ExxonMobil, one of the largest corporations in the world, lost three board seats in a proxy fight with Engine No. 1, an activist fund, despite owning only 0.02% of the company's shares. Both BlackRock and Vanguard supported Engine No. 1 in a landmark campaign that replaced three members of the ExxonMobil's board for lagging in reducing emissions and investing in renewable energy. *See* Thomas Ball, James Miller & Shirley Westcott, *Was the Exxon Fight a Bellwether?*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 24, 2021), https://corpgov.law.harvard.edu/2021/07/24/was-the-exxon-fight-a-bellwether (on file with the BYU Law Review); Justin Jacobs, *What Is Really Driving ExxonMobil's Clean Energy Commitments?*, FIN. TIMES (May 7, 2023) https://www.ft.com/content/b79a9804-4f28-4945-a4bd-1144eb729e78 (on file with the BYU Law Review).

109. *See About Climate Action 100+*, CLIMATE ACTION 100+, https://www.climateaction100.org/about (on file with the BYU Law Review) (last visited Mar. 12, 2026).

110. *See Companies*, CLIMATE ACTION 100+, https://www.climateaction100.org/whos-involved/companies (on file with the BYU Law Review) (last visited Mar. 12, 2026). For an analysis of investors' climate coalitions, see Amelia Miazad, *Investor Climate Alliances*, 102 WASH. U. L. REV. 797, 822 (2025).

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2030.[111] The Climate Group is another international nonprofit that encourages businesses and organizations to utilize renewable energy and target net-zero emissions by 2050.[112] Both of these nonprofits also aim to hold companies publicly accountable for not fulfilling their commitments toward the net-zero goal. In collaboration with groups like the We Mean Business Coalition, which unites seven business-focused climate nonprofits, Sustainable Procurement Pledge is pushing companies towards net-zero emissions.[113]

Scholars have questioned the extent to which ESG will push companies to sacrifice profits or pursue efficient decarbonization strategies.[114] So far, however, the ESG movement seems to have led to measurable reductions in carbon emissions, particularly when institutional investors hold significant stakes in companies.[115] Major corporations have adopted various strategies to reduce their carbon footprints. Amazon's 2023 Sustainability Report highlights its use of renewable energy for 100% of electricity needs, and stresses its commitment to invest in creating carbon-free energy around the world.[116] Citi's report outlines its plan for a trillion-dollar investment in sustainable finance by 2030, and a goal of reaching net-zero emissions associated with its financing by 2050.[117] Ford's 2024 report explains that in 2023 its global manufacturing operations used 51% renewable electricity and more than 70%

111. *See We Are Procurement*, SUSTAINABLE PROCUREMENT PLEDGE, https://spp.earth/about (on file with the BYU Law Review) (last visited Mar. 12, 2026).

112. *See About Us*, CLIMATE GROUP, https://www.theclimategroup.org/about-us (on file with the BYU Law Review) (last visited Mar. 12, 2026).

113. *See Business Action*, WE MEAN BUS. COAL. https://www.wemeanbusinesscoalition.org/business (on file with the BYU Law Review) (last visited Mar. 12, 2026).

114. *See* Bebchuk & Tallarita, *supra* note 40, at 172–73; Zohar Goshen & Assaf Hamdani, *Will Systematic Stewardship Save the Planet?*, 70 VILL. L. REV. 467, 469–70 (2025).

115. *See* Othar Kordsachia, Maximilian Focke & Patrick Velte, *Do Sustainable Institutional Investors Contribute to Firms' Environmental Performance? Empirical Evidence from Europe*, 16 REV. MANAGERIAL SCI. 1409, 1409 (2022). One study found a 2% or more decrease in a company's carbon emissions when any institutional investor acquired a significant stake in the company. *See* José Azar, Miguel Duro, Igor Kadach & Gaizka Ormazabal, *The Big Three and Corporate Carbon Emissions Around the World*, 142 J. FIN. ECON. 674, 676 (2021).

116. *See 2023 Amazon Sustainability Report*, AMAZON 4, https://sustainability.aboutamazon.com/2023-sustainability-report.pdf (on file with the BYU Law Review) (last visited Mar. 8, 2026).

117. *See 2023 Citi Climate Report*, CITIGROUP 2 (2023), https://www.citigroup.com/rcs/citigpa/storage/public/2023-Citi-Climate-Report.pdf (on file with the BYU Law Review).

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carbon-free electricity, as part of its commitment to reaching carbon neutrality by 2050.[118] Netflix's 2023 report reveals progress towards the goal of reducing greenhouse gas emissions by half by 2030.[119] These examples represent just a few of the many corporate ESG initiatives detailed in annual company reports.[120]

While the recent backlash against ESG may reduce the pressure on companies to cut emissions, [121] the progress made thus far suggests that the ESG movement can be effective in privately combating carbon emissions when the government fails to act. We argue, however, that relying on ESG-driven climate stewardship to reduce emissions comes with a price. As we will see next, policies reducing carbon emissions are regressive, disproportionately impacting lower-income individuals. Unfortunately, and in stark contrast with government policymaking, private firms cannot redistribute resources to compensate the poor for the regressive effects of the firms' ESG reforms.

II. ESG'S REGRESSIVE EFFECTS

ESG-driven climate policies adopted by private firms are inevitably costly, and these costs are borne by people. To date, no research has asked—let alone answered—who these people are. There are no studies of the distributional effects of corporate climate stewardship, and there is no reason to expect that such studies will ever arrive. ESG policies are often vague, non-transparent, and difficult to verify. Even if these obstacles to econometric evaluation are overcome in the future, the effects of diverse policies implemented by individual companies will likely be varied, heterogeneous, and exceedingly difficult to estimate. Searching for direct evidence of winners and losers of ESG is not a promising strategy.

118. *See Environmental, Social, and Governance Review*, FORD MOTOR CO. 15 (Nov. 2024), https://s205.q4cdn.com/882619693/files/doc_downloads/ESG/2024/11/Ford-2024-ESG-Presentation.pdf (on file with the BYU Law Review).

119. *See* NETFLIX, ENVIRONMENTAL SOCIAL GOVERNANCE REPORT 2023, at 10, https://s22.q4cdn.com/959853165/files/doc_downloads/2024/6/2023-Netflix-Environmental-Social-Governance-Report.pdf (on file with the BYU Law Review) (last visited Mar. 12, 2026).

120. *See ESG Annual Report Examples from Fortune 500 Companies*, PURPOSE BRAND (Sep. 29, 2022), https://purposebrand.com/blog/esg-report-examples-fortune-500/#alpha-3 (on file with the BYU Law Review).

121. *See infra* Section III.E.

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Nonetheless, it is feasible to develop a well-informed view of the distributional effects of ESG-based climate initiatives. This is because ESG initiatives inevitably mimic government programs whose effects on prices, wages, jobs, and inequality are less of a mystery. In this Part, we examine the distributional consequences of various government climate policies, identify corresponding efforts in the private sector, and explain why the distributional consequences are likely to be comparable on the private and the public side.

Our fundamental conclusion is that the *direct* effects of nearly all major forms of climate-focused government regulation are regressive. Nevertheless, in several crucial instances, these regressive effects may be eliminated and even reversed through deliberate policy design. Unfortunately, while equivalent ESG policies have equivalent direct effects, private sector actors cannot reverse the regressive effects of their activities. Consequently, if ESG initiatives reach sufficient scale to produce meaningful environmental benefits, they will also disproportionately harm the poor.

A. Carbon Tax

Among the many approaches to environmental regulation, the carbon tax stands out, enjoying strong support among economists. Over thirty countries have already implemented a version of this tax, while others are exploring its potential to curb global warming to below two degrees above pre-industrial levels, in line with commitments under the Paris Climate Agreement.[122]

The carbon tax imposes a fee on fossil fuels based on their carbon content,[123] offering several distinct advantages. It provides companies the flexibility to tailor their emission reduction strategies, enabling them to consider industry-specific or company-specific factors and identify cost-effective solutions.[124] It minimizes the overall cost of emissions abatement.[125] And last but not least,

122. *See* Timilsina, *supra* note 13, at 1457, 1460.

123. *See* Lawrence H. Goulder, Marc A.C. Hafstead, GyuRim Kim & Xianling Long, *Impacts of a Carbon Tax Across US Households Income Groups: What Are the Equity-Efficiency Trade-Offs?*, 175 J. PUB. ECON. 44, 44 (2019).

124. *See id.* at 44 n.1.

125. *See id.*

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the carbon tax generates substantial revenue from the remaining taxed emissions.[126]

Private firms may mimic the carbon tax by adopting an internal carbon fee. A firm adopting such a fee would charge its business units a price for using energy-consuming resources and potentially for other emissions-generating activities. Many major U.S. companies have already adopted such carbon fees, with Microsoft being perhaps the best-known example.[127] According to one count, over 850 companies from around the globe have implemented internal carbon pricing, and over 1,100 firms are poised to join them in the next few years.[128]

1. Regressive Effects of Carbon Taxes

Despite the benefits associated with the carbon tax, it is widely acknowledged and supported by extensive research that this tax is regressive.[129] Its distributional effect has many sources.

a. Energy. The increase in energy prices is potentially the most regressive consequence of a carbon tax. Low-income households allocate a larger proportion of their income to energy-related purchases than those with higher incomes.[130] Thus, an increase in this cost will have a proportionally larger effect on the budget of low-income households. Low-income households also lack resources to invest in more energy-efficient options, such as

126. *See id.* at 44, 51, 58.

127. *See* TAMARA "TJ" DICAPRIO, THE MICROSOFT CARBON FEE: THEORY AND PRACTICE, MICROSOFT CORP. 4–5 (2013), https://download.microsoft.com/documents/en-us/csr/environment/amicrosoft_carbon_fee_guide.pdf (on file with the BYU Law Review). Other early examples include Disney and Royal Dutch Shell. *See* Sarah E. Light, *The New Insider Trading: Environmental Markets Within the Firm*, 34 STAN. ENV'T L.J. 3, 41 n.184 (2015).

128. *See* Sarah E. Light & Christina P. Skinner, *Banks and Climate Governance*, 121 COLUM. L. REV. 1895, 1906 (2021). These firms include such corporate giants as General Electric, Nissan Motor, Air France-KLM, and Unilever. *See* MICHAEL P. VANDENBERGH & JONATHAN M. GILLIGAN, BEYOND POLITICS: THE PRIVATE GOVERNANCE RESPONSE TO CLIMATE CHANGE 187 (2017).

129. *See* Julie Anne Cronin, Don Fullerton & Steven Sexton, *Vertical and Horizontal Redistributions from a Carbon Tax and Rebate*, 6 J. ASS'N ENV'T & RES. ECONOMISTS S169, S175 (2019); Aparna Mathur & Adele C. Morris, *Distributional Effects of a Carbon Tax in Broader U.S. Fiscal Reform*, 66 ENERGY POL'Y 326, 328 (2014).

130. *See* Känzig, *supra* note 13, at 3; Timilsina, *supra* note 13, at 1472.

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modern energy-efficient appliances or housing upgrades.[131] To make things worse, these households are already burdened with energy-related costs, with around one-third of them struggling to pay their energy bills.[132] Higher energy prices would hit these households particularly hard.

b. Gasoline. A carbon tax also increases the cost of gasoline.[133] As is true with energy costs, low-income households must allocate a larger proportion of their income to buying gas.[134] Further exacerbating the problem, the cars that low-income households use tend to be fuel-inefficient and old.[135] While higher-income households can afford to transition to electric or other fuel efficient vehicles in response to higher fuel prices, low and middle-income households are significantly less able to afford this adjustment. There are regressive regional consequences as well. Southern households both spend more on carbon-intensive transportation and have some of the lowest average incomes nationally.[136] Moreover, escalating air travel

131. *See* Grant D. Jacobsen, *An Examination of How Energy Efficiency Incentives Are Distributed Across Income Groups*, 40 ENERGY J. 171, 173 (2019) (noting that new, energy-efficient appliances "are more likely to be owned by higher-income households"); Arik Levinson, *Energy Efficiency Standards Are More Regressive than Energy Taxes: Theory and Evidence*, 6 J. ASS'N ENV'T & RES. ECONOMISTS S7, S10 (2019) ("[L]ower-income households purchase less efficient appliances and vehicles . . . .").

132. *See* LAUREN ROSS, ARIEL DREHOBL & BRIAN STICKLES, AM. COUNCIL FOR AN ENERGY-EFFICIENT ECON., THE HIGH COST OF ENERGY IN RURAL AMERICA: HOUSEHOLD ENERGY BURDENS AND OPPORTUNITIES FOR ENERGY EFFICIENCY 6 (2018), https://aceee.org/sites/default/files/publications/researchreports/u1806.pdf (on file with the BYU Law Review) (citing a study by the U.S. Energy Information Administration).

133. *See* Fremstad & Paul, *supra* note 15, at 90 (estimating that a $50 per ton of CO_2 carbon tax would raise the price of gasoline by about $0.50 per gallon).

134. Isabel V. Sawhill, *How Higher Gas Prices Hurt Less Affluent Consumers and the Economy*, BROOKINGS (Mar. 6, 2012), https://www.brookings.edu/articles/how-higher-gas-prices-hurt-less-affluent-consumers-and-the-economy (on file with the BYU Law Review).

135. *See* Lucas W. Davis & Christopher R. Knittel, *Are Fuel Economy Standards Regressive?*, 6 J. ASS'N ENV'T & RES. ECONOMISTS S37, S38 (2019).

136. *See* Andrew Chamberlain, *Who Pays for Climate Policy? New Estimates of the Household Burden and Economic Impact of a U.S. Cap-and-Trade System* 18 (Tax Found., Working Paper No. 6, 2009), https://taxfoundation.org/research/all/federal/who-pays-climate-policy-new-estimates-household-burden-and-economic-impact-us-cap-and-trade-system (on file with the BYU Law Review).

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costs will force low-income households, unable to afford air travel, to drive longer distances.[137]

c. Goods. Elevated energy and transportation costs heighten the cost of doing business and indirectly increase the prices of all goods.[138] Higher food prices are particularly harmful for low-income households, as they allocate a significant proportion of their budgets to food.[139] Many other necessities such as clothing and plastics are produced using petroleum, a carbon-intensive material, so their prices will rise even more than the price of food if a carbon tax is enacted.[140] And in contrast with higher-income consumers who may decide to switch to lower-cost, generic products, the poor are already relying on the lowest-cost goods. These consumers would have no cheaper alternatives as the goods they consume become more expensive.

d. Employment. If a carbon tax is enacted, the fossil fuel sector will shrink, resulting in the termination of many workers and leading to extremely geographically concentrated unemployment.[141] Major job losses would occur in the coal-mining state of West Virginia—one of the nation's poorest states[142]—followed by Kentucky, Wyoming, and Pennsylvania.[143] The comparative economic immobility of

137. This is because electric or clean energy airplanes capable of replacing large passenger planes remain at least a decade away, due to challenges in designing batteries that can support such substantial aircraft and the lack of technological advancements from companies like Boeing. *See* Jennifer Korn, *Alice, The First All-Electric Passenger Airplane, Prepares to Fly*, CNN (Jan. 31, 2022, at 22:14 ET), https://www.cnn.com/2022/01/31/tech/alice-eviation-test-flight/index.html (on file with the BYU Law Review).

138. *See* Chamberlain, *supra* note 136, at 3.

139. *See* William A. Pizer & Steven Sexton, *The Distributional Impacts of Energy Taxes*, 13 REV. ENV'T ECON. & POL'Y 104, 106 (2019).

140. *See* Michael Waggoner, *Why and How to Tax Carbon*, 20 COLO. J. INT'L L. & POL'Y 1, 16 (2008).

141. *See* Hanson, *supra* note 26, at 13–14 fig. 4 (reporting concentrated employment and job losses in energy-intensive commuting zones).

142. *See 2018 Median Household Income in the United States*, U.S. CENSUS BUREAU (Sep. 26, 2019), https://www.census.gov/library/visualizations/interactive/2018-median-household-income.html (on file with the BYU Law Review).

143. *See* Gilbert E. Metcalf, *On the Economics of a Carbon Tax for the Unites States*, BROOKINGS PAPERS ON ECON. ACTIVITY 405, 444 (2019).

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low-income individuals will further complicate their ability to adapt to such employment disruptions.[144]

2. *Government Redistribution and Rebates*

The regressive effects of a carbon tax are clearly important, but they are only part of the story. A carbon tax generates substantial revenue. If just eleven percent of the revenue raised by a modest carbon tax is redistributed through a rebate to individuals in the bottom two quartiles of the income distribution, the regressive effect of the tax on these individuals would be eliminated.[145] Transferring more than that would leave the poor better off overall.

This so-called revenue-recycling feature of a carbon tax is understandably important for lawmakers concerned with the distributional consequences of green policies. It is also crucial for garnering public support. Survey data indicates that public backing fluctuates considerably depending on the proposed allocation of carbon tax revenue. In the U.S., support for a carbon tax ranges from a low of 29% if the revenue is used to reduce corporate taxes or for unspecified purposes, to 46% if the revenue is allocated to cash transfers or rebates for the poorest individuals.[146]

144. *See* Raskolnikov, *supra* note 23, at 1628.

145. *See* Mathur & Morris, *supra* note 32, at 329. There are other reasons why a carbon tax is not as regressive as is often assumed. First, a carbon tax is much less regressive, if at all, if its burden is measured as a share of annual consumption rather than annual income. *See* Cronin, Fullerton & Sexton, *supra* note 129, at S175-76; Mathur & Morris, *supra* note 32, at 329; Gilbert E. Metcalf, *The Distributional Impacts of U.S. Energy Policy*, 129 ENERGY POL'Y 926, 928 (2019). Economists argue that annual consumption is a better proxy for lifetime income than annual income is. Second, several U.S. transfer programs are indexed to inflation. If carbon tax increases energy prices and the overall price level rises as a result (which it would), government payments to low-income individuals under these programs will increase as well. *See* Cronin, Fullerton & Sexton, *supra* note 129, at S174; Metcalf, *supra*. Third, a carbon tax is likely to reduce returns to capital more than returns to wages. Because capital owners are mostly high-income individuals, they will suffer as a result. *See* Metcalf, *supra* at 926. On the other hand, pioneering research of a major European Union carbon pricing scheme recently found that carbon pricing is *more* regressive than the models predicted due to indirect, general-equilibrium effects of changes in demand that the models generally ignored. *See* Känzig, *supra* note 13, at 3–5.

146. *See* Antoine Dechezleprêtre, Adrien Fabre, Tobias Kruse, Bluebery Planterose, Ana Sanchez Chico & Stefanie Stantcheva, *Fighting Climate Change: International Attitudes Toward Climate Policies* 22 (Nat'l Bureau of Econ. Rsch., Working Paper No. 30265, 2022), https://www.nber.org/papers/w30265. Revenue use with the highest support—subsidies for low-carbon technologies or funding of green infrastructure—garner support of 56%–58% of respondents. *Id.* at 19–22.

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Needless to say, the possibility of carbon rebates is not the same as their reality. As we discuss later, concerns about lack of such rebates or similar compensating adjustments doomed several major legislative efforts to enact a carbon tax.[147] But practical challenges in implementation do not negate the crucial fact: a carbon tax is a money machine which can be easily structured to compensate the poor, the near-poor, and the lower-middle-class as well.

3. Private Redistribution

Let us now compare a carbon tax to its ESG analogue—an internal carbon fee voluntarily adopted by a private firm. An imposition of the carbon tax means that a firm has a new expense tied to its energy use, with the money going to the federal government. An imposition of an internal carbon fee also means that a firm has a new expense tied to its energy use, with the money typically going to the purchase of carbon offsets and energy-saving equipment.[148] Either way, energy use becomes costlier to the firm. Either way, the firm will raise prices. If the actual carbon tax leads to higher energy prices that disproportionately harm the poor, there is no reason to think that a private carbon fee would have a different distributional effect. The direct effects of a carbon tax and a private carbon fee are both regressive.

Is it possible for a private firm to prevent these regressive effects by redistributing resources without government involvement? We do not think so. Consider, for instance, a major oil company that adopts a carbon fee and raises gas prices as a result. Conscious of the regressive impact associated with its new policy, the company aims to ensure that poor families are not negatively affected by the increased cost of gasoline. Can this be done?

The first challenge facing the company would be determining the portion of the higher price attributable to its new carbon pricing

147. *See infra* text accompanying notes 248–249.

148. For instance, Microsoft channels these fees into their carbon fee fund, which is then used to purchase carbon offsets, renewable energy certificates, and green internal improvements such as solar panels and energy-efficient light bulbs. Overall, Microsoft's internal carbon "tax" means that the company commits a portion of its retained earnings to acquire carbon offsets and similar investment while allocating the related costs in climate-friendly manner. *See* DiCAPRIO, *supra* note 127, at 20–22.

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policy, which we'll call the "ESG fee."[149] Next, the company would need to find a way to ensure that this fee does not burden low-income families. However, it is difficult to design feasible methods by which a company—which may not even directly sell to consumers—could accomplish this goal. One hurdle is verifying customer income. Another obstacle is establishing a mechanism, such as rebates or discounts, to shield low-income consumers from the ESG fee's impact.

A further challenge would involve allocating the costs of these discounts or rebates among the remaining customers, inevitably raising their prices even more. Implementing such a pricing policy would be costly. Moreover, customers facing the ESG fee would not be pleased with this arrangement. In the absence of government regulation, competing oil companies might opt not to adopt similar adjustments, seeking to attract upper-middle and high-income consumers by distributing ESG costs evenly across their customer base.[150] No company would be able to bear the financial burden of its climate policies if most of its (remaining) customers are exempt from paying for them.

It is important to note that this analysis does not even account for the second-order effects of increased fuel prices. Suppose an oil company sells fuel to Walmart for transporting its goods. On one hand, the majority of low-income households shop at Walmart.[151] On the other hand, the Walmart heirs, the Waltons, have a net worth of approximately $212 billion.[152] Should the company selling gasoline to Walmart discount it on the grounds that most of Walmart's customers would have qualified for a fuel

149. Note that this "ESG fee" is different from the internal "carbon fee." The "carbon fee" is used to price carbon within the firm. The ESG fee is the price increase for consumers. The two might be the same only if what economists call "passthrough" is 100%.

150. We assume that all firms would adopt similar strategies to curb emissions (for example, an internal carbon fee). Yet their strategies for passing on the increase in price to customer might differ.

151. *See* Jacqueline Renfrow, *Amazon Discounts Prime for Customers on Government Assistance*, FIERCERETAIL (June 8, 2017, at 14:50 GT), https://plus.lexis.com/api/permalink/3bf8895d-590d-47fe-ba8b-0d142c0fe1f6/?context=1530671 (on file with the BYU Law Review) (reporting that 60% of households making less than $25,000 a year shop at Walmart).

152. Devon Pendleton, *World's Richest Family Loses $19 Billion on Walmart's Biggest One-Day Wipeout Since 1987*, FORTUNE (May 18, 2022, at 5:40 ET), https://fortune.com/2022/05/18/world-richest-family-walton-loses-19-billion-walmart-biggest-one-day-wipeout-since-1987 (on file with the BYU Law Review).

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waiver/rebate? Or would this merely put more money into the Waltons' pockets?

But perhaps the oil company could address the problem from another angle. What if, instead of waiving the ESG fee for low-income customers, the company imposes a uniform ESG fee and simultaneously raises salaries for its low-income workers? Obviously, if it alone pursues this strategy, the overlap between the two groups would be too small to view the salary increase as adequate compensation for the new fee. But if all (or at least most) firms follow the company's lead, would that not solve the problem?

The answer, of course, is that this solution is both unrealistic and woefully incomplete. It is unrealistic because it would require coordination on a large scale among virtually all employers (including small businesses and the federal and state governments). It is incomplete because there are numerous low-income individuals who would receive no benefit from such targeted pay raises. Students, retirees, disabled individuals, those on public assistance, and the unemployed collectively represent millions of people who would suffer from higher gas prices without any offsetting benefit. The private sector simply cannot raise the incomes of these individuals; only Congress has the power to do so.

Moreover, if all (or most) gasoline-selling firms (or, better yet, non-green-energy producers) agree to impose the same ESG fee on the same consumers, they would commit a flagrant violation of U.S. antitrust laws. These firms would have entered into an agreement to raise consumer prices—a cartel exposing its organizers to treble damages and criminal liability.[153] Of course, Congress could consider amending antitrust laws to accommodate coordinated, ESG-related price hikes, but this is both unlikely and undesirable.[154]

153. Indeed, as part of the anti-ESG backlash, institutional investors have been attacked for violating antitrust laws. *See infra* Part III.D.

154. Should lawmakers introduce an "ESG Exception" to antitrust rules, allowing companies to agree on the uniform practices crucial for effectively advancing distributional or environmental goals? The Chair of the FTC recently stressed that there is no "ESG exception" to antitrust laws. Lina Khan, *ESG Won't Stop the FTC: Our Job is to Prevent Illegal Mergers, Not to Make the World a Better Place*, WALL ST. J. (Dec. 22, 2022, at 17:10 ET), https://www.wsj.com/articles/esg-wont-stop-the-ftc-competition-merger-lina-khan-social-economic-promises-court-11671637135 (on file with the BYU Law Review) ("The antitrust laws don't permit [the FTC] to turn a blind eye to an illegal deal just because the parties commit to some unrelated social benefit."). Interestingly, the European Union recently took a step in this direction and adopted a more lenient approach to 'sustainability

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In the end, private firms would not be able to offset the costs that their carbon-tax-like ESG policies would impose on the poor. And without an offset to these unintended regressive effects, an ESG-motivated private carbon "tax" would exacerbate inequality far more than an actual one.

B. Cap-and-trade

A tradeable emissions allowance scheme, also known as cap-and-trade, is a close relative of a carbon tax. Both are methods of pricing emissions, and both make it costlier to use greenhouse-gas-producing fuels. With a carbon tax, the government sets the price of carbon through the tax rate and lets the market determine the quantity of carbon released into the atmosphere based on how much companies are willing to pay. A cap-and-trade system does the reverse: the government determines the quantity of allowed emissions and then sells a limited number of permits that enable the holders to emit as much as their permits allow. Companies can then buy and sell these permits as needed, letting the market determine the permit price. The United States introduced trading of sulfur dioxide permits in 1990, and the European Union enacted

agreements' between competitors. Kenza Bryan, *EU Relaxes Antitrust Guidelines on Green Initiatives*, FIN. TIMES (June 2, 2023), https://www.ft.com/content/97fbacfa-cc95-47ac-874e-75cb79ec6c7d (on file with the BYU Law Review). For a discussion of this change, see Jurgita Malinauskaite, *Competition Law and Sustainability: EU and National Perspectives*, 13 J. EUR. COMPETITION L. & PRAC. 336 (2022).

We find these legislative reforms undesirable. Firms' efforts to equitably allocate the "ESG fee" among their customers are closely intertwined with the pricing of their products or services. An effective "ESG exception" should therefore permit competitors to coordinate their pricing strategies, creating significant concerns about potential abuse. *See also* Maarten Pieter Schinkel, *On Distributive Justice by Antitrust: The Robin Hood Cartel*, 18 J. COMPETITION L. & ECON. 584 (2022) (developing a model showing that permitting competitors to jointly set prices to achieve distributional aims is not desirable). Even the new EU guidelines take a stricter approach when it comes to actions impacting prices or product quality. *See* Maurits Dolmans & Wanjie Lin, *EU Adopts Antitrust Guidelines for Sustainability Agreements*, CLEARY ANTITRUST WATCH (June 5, 2023), https://www.clearyantitrustwatch.com/2023/06/eu-adopts-antitrust-guidelines-for-sustainability-agreements (on file with the BYU Law Review) (noting arrangements that affect price or reduce product quality will qualify for the new safe harbor only if "the combined market share of [the companies involved] does not exceed 20%"). And in any case, if Congress can be persuaded to engage in a legislative effort of this kind, it might as well enact a carbon tax or otherwise complete the job it started with the IRA: legislate to combat global warming and legislate to protect low- and middle-income households from bearing a disproportionate cost of environmental reforms.

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a carbon emissions trading system in 2005.[155] Regional carbon trading markets also exist in the U.S. on both coasts.[156]

The cap-and-trade regime has the same efficiency advantages and distributional properties as a carbon tax. This is because the two regimes are functionally equivalent.[157] While revenue under a carbon tax comes from the tax itself, revenue from cap-and-trade comes from the sale of permits.[158] The acceptable amount of carbon emissions across the economy may be controlled either by adjusting the carbon tax rate or the number of outstanding permits.[159] Given these similarities, there is no reason to believe that the distributional consequences of a cap-and-trade regime would differ from those of a carbon tax.

While private, firm-level emissions trading schemes are rare,[160] they do exist, and more firms may adopt them in the future.[161] A private cap-and-trade system would distribute permits among a firm's business units and then allow their trading. Any revenue collected from in-house sales of emission allowances could be invested as the firm sees fit but would likely be put towards other environmental initiatives. For instance, British Petroleum deposited the revenue collected from its internal allowance "sales" into a special fund. This fund was used, in part, to finance

155. Don Fullerton & Erich Muehlegger, *Who Bears the Economic Burdens of Environmental Regulations?*, 13 REV. ENV'T ECON. & POL'Y 62, 65 (2019).

156. Severin Borenstein & Ryan Kellogg, *Carbon Pricing, Clean Electricity Standards, and Clean Electricity Subsidies on the Path to Zero Emissions* 6 (Nat'l Bureau of Econ. Rsch., Working Paper No. 30263, 2022), https://www.nber.org/papers/w30263 (on file with the BYU Law Review). For a review of seven major emissions trading regimes, including all mentioned in the text, see Richard Schmalensee & Robert N. Stavins, *Lessons Learned from Three Decades of Experience with Cap and Trade*, 11 REV. ENV'T ECON. & POL'Y 59 (2017).

157. *See* Weisbach, *supra* note 33, at 117 (calling the two regimes "duals").

158. *Id.* at 135.

159. *Id.* at 115, 117.

160. For a description of a short-lived in-house emissions trading regime at British Petroleum, *see* Light, *supra* note 127, at 31–33. Another example of such regime is the one implemented by Royal Dutch Shell. *See id.* at 30 n.122.

161. A World Bank study reports that some companies "establish internal trading, allowing different departments to trade allowances in a similar fashion to an ETS [emissions trading system]." WORLD BANK, STATE AND TRENDS OF CARBON PRICING 2021, at 56 (2021), https://openknowledge.worldbank.org/bitstream/handle/10986/35620/9781464817281 (on file with the BYU Law Review). However, the study does not specify the companies or the countries in which they operate.

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emission-reducing investments that the company normally would not consider viable.[162]

An internal allowance trading introduces a new cost tied to a firm's energy consumption, just as an internal carbon fee does. Both cost increases will result in higher energy prices. So internal allowance trading schemes would be regressive for the same reasons that internal carbon fees are. And both ESG carbon-pricing strategies would differ from their government analogues in that both would raise no revenue that may be used to offset their regressive effects.

C. Command-and-Control Regulation

For all its advantages, carbon pricing has not succeeded in the United States thus far. Instead, at least before the passage of the IRA in 2022, the federal government's primary approach to environmental protection has been command-and-control regulation,[163] with performance standards being particularly common.[164]

While carbon taxes and cap-and-trade systems impose an explicit price on emissions, a performance standard either limits emissions outright[165] or targets emissions intensity, that is, the ratio of emissions to output.[166] Perhaps the best-known ratio standard is a set of corporate average fuel economy (CAFE) standards enacted in 1975 and significantly revised in 2011.[167] These standards aim to improve the fuel economy of cars by regulating the number of miles

162. Light, *supra* note 127, at 37. For example, typical company investment guidelines might require a project to provide a return on investment above a certain threshold or within a certain time frame. If sustainable projects do not meet these requirements, they will not receive funding. However, the special fund could be used for just these sorts of investments.

163. Fullerton & Muehlegger, *supra* note 155, at 62, 65.

164. An alternative form of command-and-control regulation is a technology mandate, such as a requirement to install a particular equipment or to use a particular production process. Lawrence H. Goulder & Ian W.H. Parry, *Instrument Choice in Environmental Policy*, 2 REV. ENV'T ECON. & POL'Y 152, 157 (2008). For examples, see Sarah E. Light & Eric W. Orts, *Parallels in Public and Private Environmental Governance*, 5 MICH. J. ENV'T & ADMIN. L. 1, 24–25 (2015).

165. Light & Orts, *supra* note 164, at 25.

166. Borenstein & Kellogg, *supra* note 156, at 6; Fullerton & Muehlegger, *supra* note 155, at 65.

167. *See* Arik Levinson, *Energy Efficiency Standards Are More Regressive Than Energy Taxes: Theory and Evidence*, 6 J. ASS'N ENV'T & RES. ECONOMISTS S7, S23–25 (2019); Davis & Knittel, *supra* note 19, at S40.

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a car travels on a gallon of fuel. If a car emits more than the standard allows, the manufacturer incurs a penalty. If a car surpasses the standard, the manufacturer may increase the production of CAFE-compliant vehicles and benefit from an improved ratio of emissions to output. Consequently, CAFE standards create an implicit tax on fuel-inefficient cars while subsidizing those that are fuel-efficient.[168] The result is that fuel-inefficient cars are sold at higher prices than they would be in a market without CAFE standards, and efficient cars are sold at lower prices.

The distributional consequences of ratio standards such as these are not as well studied as those of carbon prices.[169] However, everything we know so far suggests that these standards disproportionately burden the poor. For instance, one recent study found that CAFE standards are regressive because they penalize those who buy used vehicles more than those who buy new ones, and high-income households purchase more new cars than low-income households do.[170] This conclusion confirms earlier findings[171] and is also corroborated by a separate study using a different empirical strategy.[172]

Energy efficiency requirements for appliances are also regressive.[173] For instance, one study found that, as a consequence of California's minimum energy efficiency standards for new houses, low-income households ended up buying smaller homes with fewer bedrooms, resulting in lower overall home values. By contrast, high-income households encountered no such issues and, in fact, saw their home values go up.[174]

168. Davis & Knittel, *supra* note 19, at S46.

169. *See id.* at S39; Fullerton & Muehlegger, *supra* note 155, at 62; Metcalf, *supra* note 145, at 928.

170. *See* Davis & Knittel, *supra* note 19, at S38, S59 (concluding that CAFE is more regressive than most versions of a carbon tax).

171. Mark R. Jacobsen, *Evaluating US Fuel Economy Standards in a Model with Producer and Household Heterogeneity*, 5 AM. ECON. J.: ECON. POL'Y 148, 148 (2013).

172. Levinson, *supra* note 131, at S7, S28. Not only are CAFE standards regressive, but their resulting costs are large. Gilbert Metcalf pointed out that "the Obama Administration 2012 fuel economy standards for MY 2017–2025 light-duty vehicles would raise the aggregate cost of new cars and light trucks between $15 and 30 billion annually in the latter years of the new standard." Gilbert E. Metcalf, *The Distributional Impacts of U.S. Energy Policy*, 129 ENERGY POL'Y 926, 928 (2019) (citation omitted).

173. Levinson, *supra* note 131, at S9, S33.

174. Chris Bruegge, Tatyana Deryugina & Erica Myers, *The Distributional Effects of Building Energy Codes*, 6 J. ASS'N ENV'T & RES. ECONOMISTS S95, S99 (2019). The authors also

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Emissions intensity is not always targeted with ratio standards. An alternative approach pursued in the 1990 Clean Air Act Amendments (CAAA) was to require firms operating in highly polluted areas to adopt technologies that achieve the lowest possible level of pollution.[175] One study of CAAA's impact on employment and wages[176] found that plants subject to the newly stringent CAAA regulation incurred significantly higher operating costs[177] and laid off 10–15% of their workers.[178] Predictably, the laid-off workers experienced substantial wage losses—120–150% of their pre-CAAA annual wages.[179]

As with carbon taxes and cap-and-trade, private company measures are analogous to government command-and-control regulation. For instance, consider automakers pursuing ESG initiatives in earnest[180] by lowering the prices of electric and hybrid cars and raising prices on gas-guzzlers, just as CAFE standards do in practice. While existing CAFE standards function as an implicit tax and subsidy regime, these self-imposed restrictions would effectively function as an explicit tax/subsidy combination. And since CAFE standards are regressive, any equivalent price changes will also be regressive, regardless of the fact that they are voluntarily imposed by the automaker.

The analysis is exactly the same when it comes to housing.[181] If the building industry adopts self-imposed energy-efficiency

find that "lower-income households . . . obtain the largest monetary savings from building energy codes . . . ." *Id.* However, these savings arise because builders reduce square footage of lower-price homes.

175. W. Reed Walker, *The Transitional Costs of Sectoral Reallocation: Evidence from the Clean Air Act and the Workforce*, 128 Q.J. ECON. 1787, 1792 (2013). In contrast, firms operating in less polluted areas were only required to use "best available control technology." *Id.*

176. *Id.*

177. Total operating costs of these plants were 17% higher relative to similar plants in attainment areas. *Id.* at 1793.

178. *Id.* at 1807.

179. *Id.* at 1817. An earlier study of the 1970 and 1977 Clean Air Act Amendments also found potentially large job losses. *See* Michael Greenstone, *The Impacts of Environmental Regulations on Industrial Activity: Evidence from the 1970 and 1977 Clean Air Act Amendments and the Census of Manufacturers*, 110 J. POL. ECON. 1175, 1175–76 (2002) (estimating the upper bound of total job losses at 590,000 jobs).

180. *See* CLIMATE ACTION 100+, 2020 PROGRESS REPORT 1, 7, 24, 32, 70, 79, 80 (2020). Ford Motor Company, for example, committed to reduce its emissions in response to the efforts from Climate Action 100+. *See id.* at 8.

181. *See* Levinson, *supra* note 131, at S35.

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standards, there is no reason to believe that the effects will differ from the regressive effects observed in California.[182] Similarly, if polluting plants voluntarily incur costs analogous to those under the CAAA, the effects on wages and employment will be comparable. Any way you look at it, poor households will bear the disproportionate costs of ESG-driven climate policies.

In fact, low-income Americans likely already bear these costs. Numerous firms have voluntarily adopted both performance and technology standards that aim to reduce greenhouse gas emissions, utilize more renewable energy, transition away from petroleum-based packaging, and so on.[183] While there are some instances where efforts to make a firm's production process more climate-friendly lead to cost savings that could potentially be passed on to workers,[184] this may be due to "low-hanging fruit" or easily achievable initiatives in the realm of environmentally conscious measures. Once this low-hanging fruit is picked, there is no doubt that ambitious and widespread net-zero commitments by private industry will necessitate self-regulation that adds to, rather than subtracts from, firms' costs.

There is at least one form of command-and-control regulation that may not be regressive. The California Public Utilities Commission seeks to make its electricity prices "just"; the New York Department of Public Service to make them "affordable"; and lawmakers in Ohio and Wisconsin to make them "fair."[185] These vague constraints imposed on utilities by regulators aim to redistribute from high-income to low-income consumers through adjustments to the cost of electricity, producing variations in prices based on income. However, at least one study found that these efforts fail to achieve their goals.[186] It is even less likely that a similar approach would succeed in private markets, with firms voluntarily adopting "fair" or "just" pricing of their products.[187]

182. *See* Bruegge, Deryugina & Myers, *supra* note 174.

183. Light & Orts, *supra* note 164, at 26–27.

184. *See* VANDENBERGH & GILLIGAN, *supra* note 128, at 189, 197–98 (describing examples of Nortel and PepsiCo's subsidiary Walkers).

185. Arik Levinson & Emilson Silva, *The Electric Gini: Income Redistribution through Energy Prices*, 14 AM. ECON. J.: ECON POL'Y 341, 342 (2022).

186. *Id.* at 341.

187. We note that both Amazon and Walmart now discount their annual memberships for customers receiving government assistance. Melissa Repko, *Walmart Cuts Price of*

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D. Government Subsidies

When the government does not command or tax, it cajoles. Green subsidies have long been a significant part of the U.S. government's response to climate change,[188] and they became even more prominent with the enactment of the IRA in 2022.[189]

Many green subsidies are administered through the tax code.[190] For example, the 2019 budget proposal to Congress listed $8.4 billion in energy-related tax preferences.[191] One of the two largest incentive classes was business-related: production and investment tax credits for renewable energy. The other was aimed at individuals: credits for energy efficiency improvements to residential real estate.[192] The IRA dramatically increased these types of green tax incentives and shifted them heavily toward business-level (rather than individual) tax subsidies.[193]

The distributional consequences of clean energy tax expenditures have not been studied extensively.[194] Recent research suggests that individual-level tax credits—those for home weatherization, solar panel installations, and hybrid and electric vehicle purchases—are not only regressive but are more regressive

Walmart+ for Households that Receive Food Stamps, Other Government Aid, CNBC (July 20, 2023, at 8:15 ET), https://www.cnbc.com/2023/07/20/walmart-cuts-price-of-walmart-for-recipients-of-food-stamps-other-aid.html (on file with the BYU Law Review) (reporting the new Walmart discount and noting that Amazon has had a similar program since 2017). Notably, these discounts are as far as either company is willing to go. Moreover, these discounts may have more to do with inducing low-income individuals to shop on the two competing platforms than with truly reducing their overall cost of shopping.

188. Borenstein & Kellogg, *supra* note 156, at 7–9.

189. *See* BUILDING A CLEAN ENERGY ECONOMY: A GUIDEBOOK TO THE INFLATION REDUCTION ACT'S INVESTMENTS IN CLEAN ENERGY AND CLIMATE ACTION 48–49, THE WHITE HOUSE (Dec. 2022), https://www.whitehouse.gov/wp-content/uploads/2022/12/Inflation-Reduction-Act-Guidebook.pdf (on file with the BYU Law Review) [hereinafter, IRA Guidebook].

190. *See* Borenstein & Kellogg, *supra* note 156, at 14; Jacobsen, *supra* note 131, at 172. In addition to tax credits, energy incentives take the form of manufacturer or retail rebates and utility rebates. *See id.*

191. Metcalf, *supra* note 172, at 927.

192. *Id.*

193. *See* CONG. BUDGET OFF., ESTIMATED BUDGETARY EFFECTS OF PUBLIC LAW 117-169, TO PROVIDE FOR RECONCILIATION PURSUANT TO TITLE II OF S. CON. RES. 14 11–13 (2022), https://www.cbo.gov/system/files/2022-09/PL117-169_9-7-22.pdf (on file with the BYU Law Review).

194. Severin Borenstein & Lucas W. Davis, *The Distributional Effects of US Clean Energy Tax Credits*, 30 TAX POL'Y & ECON. 191, 192 (2016); Jacobsen, *supra* note 131, at 174.

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than a carbon tax,[195] in large part because those who earn too little to owe any tax cannot claim the credit.[196] Distributional effects of business-level tax credits depend on adjustments to the government budget made to accommodate the loss in tax revenue that would have been collected without these credits.[197] Identifying these adjustments is an impossible task, which is why no estimates of the distributional consequences of business-level green incentives appears to exist.

Recent research offers some encouraging results on employment trends in the solar and wind sectors. These sectors benefitted from federal tax subsidies before the IRA and will continue to benefit following the law's passage.[198] One working paper reports that wind and solar jobs pay around twenty-one percent more than the average for otherwise similar jobs, with an even higher pay premium in jobs that do not require much formal education.[199] Additionally, these jobs are often concentrated in the same areas as the fossil fuel industry.[200] One can only hope that these findings are accurate. If they are, the IRA's tax incentives have the potential to bring significant benefits for less-educated Americans, especially those suffering from job losses in the fossil fuel industry.

We see no viable way to replicate public law, IRA-type incentives in the private-sector ESG framework—particularly not at the scale necessary to create analogous benefits. There are a few examples of private firms allocating funds to internal green projects they would not have otherwise funded. These include a small fund set up by British Petroleum during its short-lived internal emissions trading experiment,[201] and a similar fund created by

195. Borenstein & Davis, *supra* note 194, at 191–92.

196. That is, the credits are not refundable. Non-refundability is a design choice, and it could be changed. But making credits refundable is difficult in practice. For example, clean vehicle credits continue to be non-refundable under the IRA. *See* IRA GUIDEBOOK, *supra* note 189.

197. *See* Borenstein & Kellogg, *supra* note 156, at 37.

198. *See* IRA GUIDEBOOK, *supra* note 189, at 9.

199. E. Mark Curtis & Ioana Marinescu, *Green Energy Jobs in the US: What Are They, and Where Are They?* 1, 16 (Nat'l Bureau of Econ. Rsch., Working Paper No. 30332, 2022), https://www.nber.org/papers/w30332 (on file with the BYU Law Review).

200. *Id.* at 9–10.

201. *See* Light, *supra* note 127, at 37 (describing a $50 million fund created by BP).

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Microsoft with some of the proceeds of its internal carbon fee.[202] Apple helped provide their suppliers with two gigawatts of renewable energy in 2015.[203] A year later, Apple built a new solar power plant in Arizona to balance an increase in emissions from building a manufacturing plant.[204] For now, these isolated examples are dwarfed by the 850 companies that already report using internal carbon prices, and many more that are planning to do so.[205]

But even if firms were to start allocating a meaningful share of their retained earnings to building solar, wind, geothermal, or even nuclear power plants, and purchasing renewable energy for their suppliers (presumably without charging them market rates for that energy), this would obviously increase firms' operating expenses. As a result, based on the studies discussed above, such initiatives would have significant regressive effects.

E. Procurement

We conclude our discussion of the distributional effects of ESG by mentioning procurement, another climate policy that exists both in public and private form. The Federal government is a major economic player, and it has used its purchasing power to induce its vendors to become greener.[206] The IRA is poised to strengthen this trend.[207]

The most well-known—but by no means the only—parallel effort on the private side is Walmart's Project Gigaton.[208] The company aims to reduce carbon dioxide emissions in its supply chain by one billion metric tons (one gigaton) by 2030 by pressuring its suppliers to adopt greener practices.[209] Walmart is not alone. Suppliers must comply with environmentally conscious standards

202. *See id.* at 45 (describing the Plowback Fund).

203. VANDENBERGH & GILLIGAN, *supra* note 128, at 4.

204. *Id.*

205. Light & Skinner, *supra* note 18, at 1906–11.

206. *See* Light & Orts, *supra* note 164, at 46–50.

207. *See* IRA GUIDEBOOK, *supra* note 189, at 119–28.

208. Other large companies pursuing similar strategies include IBM, Home Depot, Citigroup, 3M, and General Mills, among others. VANDENBERGH & GILLIGAN, *supra* note 128, at 200; Light & Orts, *supra* note 164, at 49 n.222.

209. Light & Skinner, *supra* note 18, at 1899–1900.

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imposed by over half of the largest corporations across eight different industries.[210]

We were unable to find any research on the costs and effects of green supply chain management, whether public or private. As always, the question is "who pays?" When Walmart demands energy savings from its suppliers to fulfill its aspirations under Project Gigaton, is Walmart also covering the extra costs these suppliers incur to meet Walmart's demands? Or is Walmart taking advantage of its enormous market power and squeezing as much profit as it can from its suppliers? And whether it is Walmart incurring extra costs or its suppliers, whose pockets does the money ultimately come from—shareholders, workers, customers, suppliers, or all of them to some degree? While the answer is unknown, one thing is certain: market realities will determine the answer, not the worldview of the firm's CEO. In contrast, the federal government may choose to fund its green procurement plans in a way that is as progressive as Congress and the President decide it should be.

* * *

If ESG-driven climate policies ever attain the scale comparable to government regulation, ESG may have a significant positive impact on the environment, but these benefits will be coupled with a significant increase in inequality. ESG-driven policies can mimic various forms of government regulation. But since every form of regulation that we discuss here has regressive distributional effects, it is highly likely that ESG policies will also be regressive. And private firms, unlike public actors, will find it nearly impossible to compensate low-income individuals for the ESG costs these individuals will disproportionately bear. Without an alternative compensatory mechanism, ESG will inflict severe hardship on the poor.

III. DISTRIBUTIONAL ADJUSTMENTS: ESG VS. LEGISLATION

In the previous Part, we expressed doubts about the private sector's *ability* to accompany ESG-driven climate policies with distributional adjustments. In this Part, we argue that even if some mechanisms existed to address ESG's regressive effects, both asset

210. VANDENBERGH & GILLIGAN, *supra* note 128, at 213.

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managers and public company boards lack the *incentive* to consider the interests of low- and middle-income families or displaced workers who would be disproportionately affected by ESG-driven climate policies. Moreover, the lack of incentives to counter ESG regressivity is just as severe on the government side. While the odds that Congress will offset the regressive effects of its own climate policy are low, the chances that Congress would offset the regressive effects of ESG are even lower.[211]

The disproportionate burden that ESG will place on vulnerable Americans is a problem not only for those who object to an even greater inequality in American society, but also for those who rely on the ESG movement to reduce emissions. If there ever was a hope that ESG can push firms to decarbonize while bypassing the formidable political obstacles that bedevil the legislative process, that hope is no more. As powerful backlash against ESG vividly demonstrates, the challenge of dealing with distributional consequences of decarbonization cannot be assumed away.

A. ESG-Driven Policymaking

As we explained in section I.B, ESG-driven climate policy has typically begun with the Big Three and other asset managers exerting pressure on their portfolio companies to adopt policies, such as net-zero commitments, to reduce emissions. However, asset managers lack incentives to exert similar pressure to induce portfolio companies to make offsetting distributional adjustments. And corporate boards lack incentives to adopt such adjustments on their own.

1. Asset Managers

Scholars offer competing explanations for asset managers' focus on ESG and their pressure on portfolio companies to pursue green objectives.[212] Recent political winds have led some asset managers to reduce their support for ESG measures, though the

211. To be clear, we do not argue that leaving environmental policy only in government hands is certain to eliminate the regressive effects of new environmental laws. Indeed, it has been argued that Congress has an exceptionally poor track record of ameliorating regressive effects of its major enactments. *See* Raskolnikov, *supra* note 23.

212. For a review of these theories, *see* Goshen & Hamdani, *supra* note 114.

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winds may shift again in the future.[213] In any case, even if all explanations offered in the literature remain true, asset managers lack incentives to address the impact of climate policies on the poor.

One theory posits that large asset managers, and especially the Big Three, are "universal owners" who hold shares in virtually all public companies. To maximize the value of their holdings, these asset managers must prevent polluting firms from externalizing costs of environmental degradation onto other companies in their portfolio.[214] However, the concern about pollution-externalizing firms offers the Big Three no compelling reason to encourage portfolio companies to protect the poor. Even if one assumes that green policies increase the value of universal owners' entire portfolio, the fact that these policies disproportionately impact low- and middle-income households is unlikely to have any effect on the value of portfolio companies.

A different version of this theory suggests that universal owners advocate climate policies because they aim to reduce the systemic risk that climate change poses to their portfolios.[215] In itself, however, the fact that low- and middle-income households disproportionately suffer from ESG-driven climate measures does not present a systemic risk to universal owners' holdings. The regressive effects of these policies do not jeopardize the stability of the U.S. financial system and its securities markets, as these households are not significant participants in either domain. To entertain a more remote possibility, it is true that if a substantial number of low- and middle-income households are severely affected by climate policies, the threat of a popular uprising or other forms of social unrest could create a systemic risk to universal owners' portfolios.[216] However, such a scenario seems too unlikely, at least for now, to motivate asset managers to take serious action

213. *See infra* Section III.F.

214. Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1 (2020).

215. John C. Coffee, Jr., *The Future of Disclosure: ESG, Common Ownership, and Systematic Risk*, COL. BUS. L. REV. 602, 634–41 (2021); Jeffrey N. Gordon, *Systematic Stewardship*, 47 J. CORP. LAW 627 (2022).

216. Jeff Gordon lists social stability as one of the systematic risks that might affect universal owners. *Id.* at 655.

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to accompany climate policies with measures to mitigate their regressive effects.[217]

Another explanation attributes asset managers' ESG efforts to their marketing needs. Asset managers like Vanguard compete to attract investors, including millennial savers and pension plans, who increasingly care about ESG goals.[218] Low- and middle-income households, however, are not significant owners of corporate stock, whether directly or indirectly (through asset managers). While 62% of U.S. adults have some sort of stock market investment, only 28% of those making less than $50,000 have any sort of stock ownership, compared to 87% of those making $100,000 or more.[219] Thus, even if low- and middle-income investors preferred to invest their savings only with asset managers that insist on preventing the regressive effects of ESG, failure to address these effects would not have a meaningful impact on asset managers' ability to attract investors.

In principle, the potential regressivity of ESG could affect asset managers' ability to attract clients who do have money to invest. Millennials or other investors who favor green investments may prefer asset managers who not only commit to ESG policies but care about protecting the poor as well. However, this development seems highly improbable. Regressive effects of ESG are poorly understood and challenging to establish. Thus, a groundswell of public opinion demanding that ESG efforts be accompanied by measures ameliorating the regressive effects of these efforts is unlikely. Furthermore, a company that tries to implement such measures will be hard-pressed to explain why its distributional efforts do not lower investors' returns. All these difficulties make it improbable that investors would choose asset managers based on their stance concerning public companies' adoption of distributional adjustments.

217. *See* Zohar Goshen & Doron Levit, *Agents of Inequality: Common Ownership and the Decline of the American Worker*, 72 DUKE L.J. 1 (2022) (arguing that the rise of stock ownership by large asset managers is to blame for the stagnation in workers' wages).

218. Michal Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243, 1244 (2020); Lund, *supra* note 101.

219. Jeffrey M. Jones, *What Percentage of Americans Own Stock?*, GALLUP (May 5, 2025), https://news.gallup.com/poll/266807/percentage-americans-owns-stock.aspx (on file with the BYU Law Review).

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Our analysis is consistent with the realities of asset managers' climate activism. Asset managers typically publish guidelines outlining their engagement priorities and expectations from portfolio companies on issues of corporate governance and climate policies.[220] For example, Climate Action 100+ states that it actively engages with companies to encourage them to establish ambitious targets for reducing emissions, enhance their climate-related disclosures, and strengthen their governance mechanisms related to climate-related risks and opportunities. These objectives, which Climate Action 100+ collectively refers to as the "Three Asks," do not incorporate the requirement for measures countering ESG regressivity.[221]

In summary, regardless of the explanation for asset managers' focus on ESG and their pressure on portfolio companies to pursue green objectives, these managers lack incentives to address the impact of climate policies on low- and middle-income households.

2. Public Companies and their Directors

Directors of publicly traded companies are typically driven by the desire to enhance their firm's value and secure reelection to the board. The pressure from asset managers to adopt climate policies incentivizes boards to seek cost-effective ways to reduce emissions and implement other climate policies. However, as long as asset managers do not require them to do so, directors lack incentives to make their companies implement costly measures solely to mitigate the regressive effects of ESG-driven reforms.[222]

Spending resources to bring about distributional adjustments on top of spending to adopt costly ESG measures is unlikely to attract much interest from corporate boards. Directors' fiduciary duties principally require them to act in the best interests of the company and its shareholders.[223] Granted, boards may have some leeway to consider the interests of other stakeholders. Even if they

220. Asaf Eckstein, *The Rise of Corporate Guidelines in the United States, 2005-2021: Theory and Evidence*, 98 IND. L.J. 921, 921 (2023).

221. *See The Three Goals*, CLIMATE ACTION 100+, https://www.climateaction100.org/the-three-goals (last visited Mar. 12, 2026) (on file with the BYU Law Review).

222. *See* Welton, *supra* note 10, at 226 (arguing that "integrating equity considerations is not even *possible* in the atomized world of net-zero pledges" by the private sector).

223. *See* Kahan & Rock, *supra* note 22.

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do, directors' fiduciary duties principally require them to act in the best interests of the stakeholders of their own company, not remote strangers, regardless of the effects of company policy on such people.[224] Nor will a failure to respond to ESG's regressivity jeopardize directors' chances of keeping their board seats. After all, the poor have little, if any, representation among public company shareholders.[225]

Not only are the poor unrepresented in board elections, but they also lack other channels to pressure corporate boards. Board deliberations are not open to the public, and there is no transparency regarding the policies that boards consider.[226] It is difficult for low-income individuals—or their advocates—to organize an effective campaign based on mere suspicions. To complicate matters even further, the kaleidoscope of ESG-driven climate policies makes them difficult to track and assess. The result is a diffusion of responsibility. Even companies themselves are unlikely to be able to quantify their regressive contributions because each company would be responsible for just a small piece of the overall harm. Directors have no reason to worry that the victims of these harms would threaten the security of the board seats or the company profits.

While boards may not be motivated to consider low-income Americans generally, what about their own employees? As we explained above, decarbonization could lead to the loss of low-paying jobs in industries such as coal mining and fuel extraction.[227] Directors of public companies in these sectors would need to weigh

224. *See id.*; Roberto Tallarita, *The Limits of Portfolio Primacy*, 76 VAND. L. REV. 511, 558, 563–65 (2023).

225. In theory, large asset managers could adopt guidelines requiring that public companies not only adopt measures to reduce emissions but also accompany these measures with distributional adjustments. Yet, as we explained above, asset managers currently lack incentives to pressure portfolio companies to address distributional concerns, and the private sector is incapable of accompanying environmental policies with distributional offsets.

226. Asset managers disclose their stewardship priorities and proxy voting guidelines. *See* Eckstein, *supra* note 220. In contrast, asset managers do not disclose specific engagements with portfolio companies. *See* Giovanni Strampelli, *Knocking at the Boardroom Door: A Transatlantic Overview of Director-Institutional Investor Engagement in Law and Practice*, 12 VA. L. & BUS. REV. 187, 187 (2018).

227. *See supra* text accompanying notes 14–17.

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the expected job losses and employee discontent against the pressure to decarbonize.[228]

Is it reasonable to expect directors to protect workers affected by a company's ESG policies? In some countries, employees are entitled to board representation,[229] likely ensuring workers are taken into consideration when the company forms ESG policies. Although this is not the case in the United States, corporate law provides a legal basis for directors to consider the interests of company employees.[230] However, companies affected by ESG policies, such as coal producers, might find themselves in a weakened position, resulting in limited resources to address their employees' needs. Additionally, historical experience indicates that boards are unlikely to prioritize employees' interests if it might come at the expense of short-term returns, particularly under pressure from large asset managers.[231] And even if corporate leaders were to take action to alleviate the regressive effects of ESG-driven climate policies on their employees, these localized, company-specific measures would likely be insufficient to counteract the broader regressive impact of ESG on low-income Americans as a whole.

B. Public Policymaking

Having concluded that the private sector lacks both the incentives and the ability to address ESG regressivity, we now turn to the public sector. The congressional record of dealing with distributional issues is surely underwhelming. These issues are contentious, and they have played a role in torpedoing environmental legislation on more than a few occasions. Nonetheless, incentives to address distributional concerns are

228. The ESG literature has noted the tension between the 'E' and the 'S'. *See* 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*, 15 J. WORLD ENERGY L. & BUS. 1, 4 (2022).

229. *See, e.g.*, Grant M. Hayden & Matthew T. Bodie, *Codetermination in Theory and Practice*, 73 FLA. L. REV. 321, 331 (2021).

230. *See, e.g.*, Leo E. Strine, Jr. & Kirby M. Smith, *Toward Fair Gainsharing and a Quality Workplace for Employees: How a Reconceived Compensation Committee Might Help Make Corporations More Responsible Employers and Restore Faith in American Capitalism*, 76 BUS. LAW. 31 (2020).

231. *See* Goshen & Levit, *supra* note 217 (making the argument).

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clearly better on the public side than on the private side. And sometimes these incentives do translate into successful action.

Public policymaking is much more open than corporate decision-making. Unlike the hidden deliberative process of corporate boards, the legislative process is relatively transparent: voters can learn about items on the agenda and convey their concerns to their representatives. Advocacy or special interest groups specialize in tracking proposed legislation and analyzing its impact on various constituencies. And the Freedom of Information Act helps advocates to learn about government decisions even if they do not rise to the level of legislation.

Given high stakes and easy access to information, interest groups actively influence climate policymaking. These groups increasingly include not only the fossil fuel industry,[232] but also climate activists and advocates for low- and middle-income households and workers displaced in the transition to a low-carbon economy.[233] These advocates recognize which policies to target and may even have proposed legislation fulfilling their objectives ready to be introduced by sympathetic lawmakers. Moreover, these advocates influence public opinion, adding pressure on politicians to address distributional concerns.[234] Finally, even without interest group pressure, politicians are aware that they would be held

232. As we explained above, lobbying and misinformation campaigns by this industry are often viewed as a leading reason for the U.S. failure to adopt climate legislation in the past. *See supra* Section I.B.

233. *See, e.g.*, Andrew Marantz, *The Youth Movement Tring to Revolutionize Climate Politics*, NEW YORKER (Feb. 28, 2022), https://www.newyorker.com/magazine/2022/03/07/the-youth-movement-trying-to-revolutionize-climate-politics (on file with the BYU Law Review) ("During the Presidential primary, Sunrise activists bird-dogged the Democratic candidates, repeatedly insisting that they come out in favor of a Green New Deal; in the end, twenty of the twenty-six candidates supported it."); Jeremy Brecher, *Only a Just Transition Can End This Anti-Worker Race to the Bottom*, COMMON DREAMS (Oct. 5, 2023), https://www.commondreams.org/opinion/just-transition-for-uaw-autoworkers (on file with the BYU Law Review) (highlighting responsiveness of the Biden administration to United Auto Worker demands to ensure a just transition for auto workers).

234. *See* Dylan Bugden, *Does Climate Protest Work? Partisanship, Protest, and Sentiment Pools*, 6 SOCIUS 1, 10 (2020) ("[C]limate protesters can shift public opinion, turn bystanders into movement participants, and put pressure on policy makers . . . ." (citations omitted)); Marantz, *supra* note 233 (describing how Sunrise activists ensured "the Green New Deal [was] the subject of thousands of news articles, opinion columns, and TV segments").

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accountable for the rise in energy prices associated with environmental legislation and its effect on different constituents.[235]

In the best-case scenario, politicians who anticipate that climate legislation will overburden the poor would support climate legislation and also ensure that it is accompanied by distributional adjustments. Recent examples illustrate this approach. President Obama's Clean Energy Savings for All Americans sought to provide job training for workers affected by the transition to a low-carbon economy.[236] In their call for a "Green New Deal," Representative Alexandria Ocasio-Cortez and Senator Ed Markey demanded that net-zero strategies be accompanied by social protection measures, such as community ownership of resources, a federal jobs guarantee, and high-quality health care for all Americans.[237] The final version of the IRA that emerged from tense negotiations between the Biden administration and Senator Joe Manchin reflects the same approach. While the IRA became the most significant federal law addressing climate change ever passed,[238] the bill also takes measures to ensure it does not exacerbate inequality. The IRA contains multiple provisions designed to assist individuals whose lives would be especially disrupted by the shift to renewable energy induced by the law itself. These provisions include permanent funding for the Black Lung Disability Trust Fund,[239] tax credits for carbon capture that could allow some power plants to continue operating with lower emissions, and tax incentives for renewable energy manufacturers

235. *See* Samantha Gross, *Politicians Need to Square with the American People on Gasoline Prices*, BROOKINGS (Apr. 20, 2022), https://www.brookings.edu/articles/politicians-need-to-square-with-the-american-people-on-gasoline-prices (on file with the BYU Law Review) (noting that "[h]igh gasoline prices anger Americans like those for no other product" leading both parties to attempt to shift blame for these costs).

236. *See* THE WHITE HOUSE OFF. OF THE PRESS SEC'Y, *supra* note 68.

237. H.R. Res. 109, 116th Cong. (2019). *See also* Welton, *supra* note 10, at 211 ("[M]any activists, politicians, and academics have come to view the [decarbonization] challenge as an opportunity to dramatically reorient the relationship between infrastructure and social structure in the United States.").

238. *See* Samantha Gross, *The Climate Bill's Oil and Gas Provisions Are a Worthwhile Tradeoff*, BROOKINGS (Aug. 4, 2022), https://www.brookings.edu/blog/planetpolicy/2022/08/04/the-climate-bills-oil-and-gas-provisions-are-a-worthwhile-tradeoff (on file with the BYU Law Review).

239. The Fund is a program which helps redistribute money to the coal mine operators often affected by this disease. *See id.*

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to build their factories in mine towns.[240] Senator Manchin also reportedly bargained for extending tax credit for electric vehicles to used cars—a measure intended to help low- and middle-income families who are more likely to buy these cars.[241]

But the best-case scenario is by no means assured. Senator Manchin blocked a 2021 carbon tax proposal over concern that it might leave Democrats open to charges of increasing taxes on a middle class already beleaguered by inflation and high energy prices.[242] Manchin also initially blocked Biden's ambitious Build Back Better Act even though it would have directed government resources to disadvantaged communities disproportionately affected by pollution.[243] Distributional concerns played a role in the defeat of a 2016 proposal to impose a carbon tax in Washington State as well. Environmental justice groups believed that at least some of the proposed tax revenues should be used to aid communities that had been negatively affected by pollution and climate change.[244] Their objections were joined by those of fuel companies and workers employed in polluting industries.[245]

240. *See* Brad Plumer & Lisa Friedman, *Democrats Got a Climate Bill. Joe Manchin Got Drilling, and More*, N.Y. TIMES (July 30, 2022), https://www.nytimes.com/2022/07/30/climate/manchin-climate-deal.html (on file with the BYU Law Review).

241. *See* Andrew J. Hawkins, *EV Tax Credits Are Back—and Bigger—in New Senate Climate Bill*, VERGE (July 28, 2022, at 9:23 MT), https://www.theverge.com/2022/7/28/23282156/ev-tax-credit-used-vehicle-senate-deal-schumer-manchin (on file with the BYU Law Review).

242. *See id.*

243. *See* Coral Davenport & Luke Broadwater, *Democrats Weigh Carbon Tax After Manchin Rejects Key Climate Provision*, N.Y. TIMES (Oct. 16, 2021), https://www.nytimes.com/2021/10/16/climate/democrats-carbon-tax-climate.html (on file with the BYU Law Review).

244. *See* David Roberts, *The Left vs. a Carbon Tax*, VOX (Nov. 8, 2016, at 9:00 MT), https://www.vox.com/2016/10/18/13012394/i732-carbon-tax-washington (on file with the BYU Law Review). Proponents of the carbon tax argued that using its revenues to reduce sales taxes and fund the working families tax rebates would be most effective in protecting low-income communities. *Id.* Opponents argued that the revenues should be reinvested to incentivize green manufacturing and the retention of displaced workers. *Id.*

245. *See* Richard L. Revesz, *Regulation and Distribution*, 93 N.Y.U. L. REV. 1489, 1494–95 (2018) (discussing how the alliance of environmental justice activists and industry derailed Washington State's attempt to impose a carbon tax). A 2018 attempt failed as well. The fossil fuel industry argued that it would lead to an increase in energy prices. Environmental activists argued that it was not sufficiently ambitious. *See* Eillie Anzilotti, *A Groundbreaking Carbon Tax Lost at the Ballot—Again*, FAST CO. (Nov. 9, 2018), https://www.fastcompany.com/90264251/why-cant-washington-state-pass-a-carbon-tax (on file with the BYU Law Review).

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The United States government is not unique in its struggles to balance efforts to save the planet with concerns about its vulnerable citizens. In 2018, France attempted to implement a carbon tax that would have increased the price of fossil fuels. The tax was met with widespread protests and demonstrations, with many people arguing that it would disproportionately impact low-income families who rely on cars for transportation.[246] The government ultimately backed down. In 2014, Australia repealed its controversial carbon tax that was blamed for negatively affecting coal company workers and consumers.[247]

While the politics of opposition to environmental reform are complicated,[248] the rhetoric is not. Whether or not opponents of climate legislation genuinely care about the anticipated burden on the poor, they seize every opportunity to highlight the increased energy prices and job losses associated with such legislation.[249] Opponents of President Obama's Clean Power Plan, for example, invoked the plight of coal miners.[250] In 2023, the House passed the GOP-sponsored Lower Energy Costs Act, which aims to undo many of President Biden's climate policies. As the title suggests, supporters of the bill argued that it would make energy cheaper

246. Carlos Bejar-Garcia, *France's Yellow Vest Movement and the Global Debate on Climate Change*, HARV. INT'L REV. (Apr. 27, 2020), https://hir.harvard.edu/frances-yellow-vest-movement-and-the-global-debate-on-climate-change (on file with the BYU Law Review) ("At its core, the Yellow Vest Movement was a way for the lower-class to protest unfair climate policies that targeted the lower-class while leaving the upper-class largely unaffected."); Daniel Driscoll, *Populism and Carbon Tax Justice: The Yellow Vest Movement in France*, 70 SOC. PROBS. 143, 155-157 (2023).

247. *See* Lenore Taylor, *Australia Kills Off Carbon Tax*, GUARDIAN (July 16, 2014, at 21:51 ET), https://www.theguardian.com/environment/2014/jul/17/australia-kills-off-carbon-tax (on file with the BYU Law Review).

248. Note the odd alignment of interests opposing the Washington State carbon tax just discussed. The obvious lesson is that aligning the interests of coal industry workers with those of environmental activists may be crucial for building coalitions that would push for climate legislation. *See* Geoff Evans & Liam Phelan, *Transition to a Post-Carbon Society: Linking Environmental Justice and Just Transition Discourses*, 99 ENERGY POL'Y 329, 331 (2016).

249. *See, e.g.*, Hal Bernton, *Washington State Voters Reject Carbon-Fee Initiative*, SEATTLE TIMES (Nov. 6, 2018, at 20:34 MT), https://www.seattletimes.com/seattle-news/politics/voters-rejecting-carbon-fee-in-first-day-returns (on file with the BYU Law Review) (reporting that opponents, "largely bankrolled by the oil industry," celebrated the defeat of Washington's 2018 carbon tax proposal as a "clear victory for working families, consumers, small businesses and family farmers").

250. *See* Revesz, *supra* note 245, at 1496–97 ("[T]he sustained invocation of the plight of coal miners provided the impetus for making opposition to the Clean Power Plan, a centerpiece of President Obama's environmental accomplishments . . . .").

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for low- and middle-income families by easing restrictions on domestic energy production.[251] President Trump recently invoked the same reasons to justify his reversal of President Biden's climate policies.[252] Other examples of this strategy in action are easy to find.[253]

Arguments about lost jobs and high gas prices resonate with voters and their representatives. Researchers increasingly believe that the impact on energy prices and displaced workers is one of the barriers to enacting green reforms.[254] Studies find that rural and other vehicle-dependent communities are more likely to object to a

251. *See House Passes Sprawling GOP Energy Bill Aimed at Reversing Biden Climate Policies*, CBS NEWS (Mar. 30, 2023, at 11:43 ET), https://www.cbsnews.com/news/house-republican-energy-bill-hr-1-lower-energy-costs-act (on file with the BYU Law Review).

252. *See* Aimee Picchi, *Trump Ordered the U.S. Government to Lower Prices for Americans. Can He Deliver?*, CBS NEWS (Jan. 22, 2025, at 8:38 ET), https://www.cbsnews.com/news/trump-inflation-executive-orders-cost-of-living (on file with the BYU Law Review) (noting Trump's reliance on a study arguing that fuel emission rules are forecast to increase the cost of vehicles by $6,000).

253. *See* Revesz, *supra* note 245, at 1495 ("[T]he plight of workers in polluting industries has been a rallying cry for the antiregulatory right . . . ."); *see also* Natasha Bulowski, *A 'Grassroots' Group Ran Facebook Ads Against the Oil and Gas Emissions Cap. Canada's Most Powerful Oil Lobby Paid for Them*, NAT'L OBSERVER (Sep. 19, 2022), https://www.nationalobserver.com/2022/09/19/news/grassroots-group-ran-facebook-ads-against-emissions-cap-oil-lobby-paid (on file with the BYU Law Review) (reporting that an oil lobby group in Canada paid for Facebook ads warning that imposing emission caps would harm workers in Canada).

254. Timothy Puko & Ted Mann, *Oil Trade Group Drafts Carbon-Tax Proposal That Could Raise Prices at the Pump*, WALL ST. J. (Apr. 21, 2022, at 16:41 ET), https://www.wsj.com/articles/oil-trade-group-drafts-carbon-tax-proposal-that-could-raise-prices-at-the-pump-11650546647?page=1 (on file with the BYU Law Review) ("[S]ome Democrats who once supported a carbon tax now oppose it, on grounds that the costs are passed on to consumers, including many who can't afford it."). In some cases, objections on distributional can be accompanied by objections by industry. *See* Revesz, *supra* note 245, at 1498 ("[R]egardless of the final outcomes, one must reckon with the force of the distributional-based opposition to [environmental] programs."); INTERNATIONAL MONETARY FUND, FISCAL POLICIES FOR PARIS CLIMATE STRATEGIES—FROM PRINCIPLE TO PRACTICE 13 (2019) ("[T]he political difficulty of carbon pricing, due to its first-order impact on energy prices, underscores the need for accompanying measures to address sensitivities and understanding of the trade-offs with other (possibly more acceptable) instruments."); Davide Furceri, Michael Ganslmeier & Jonathan D. Ostry, *Are Climate Change Policies Politically Costly?* 7 (Int'l Monetary Fund Working Paper No. WP/20/156, 2021) (explaining that "the regressive nature of [climate protection measures] in many countries heighten inequality concerns" that impede climate legislation); Anders Fremstad, Matto Mildenberger, Mark Paul & Isabelle Stadelmann-Steffen, *The Role of Rebates in Public Support for Carbon Taxes*, 17 ENV'T RSCH. LETTERS 1, 2 (2022) ("[T]he potential regressivity of carbon pricing in high-income countries may create challenges for developing political support coalitions.").

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carbon tax given its effect on energy prices.[255] But studies also find that those most likely to be affected by fuel taxes support them if these taxes are accompanied by redistribution to low-income households or by other measures to support those likely to be disproportionally affected.[256] Thus, objections to climate legislation can be addressed through accompanying redistributive measures.

To be clear, we do not argue that concerns about regressive effects are the sole reason for the failure to adopt climate legislation. Nor do we argue that all future climate legislation will be accompanied by distributional adjustments. Our point is simply that distributional concerns are a major consideration in any legislative push for a greener planet.

C. ESG for Climate, Congress for Redistribution?

We showed that compared to the private sector, legislators possess better mechanisms and incentives to shield economically disadvantaged populations from the regressive effects of climate policies. The ESG route, in contrast, enables the private sector to reduce emissions without encountering opposition—based on these regressive effects—that impedes Congress from enacting climate legislation. Perhaps the way forward is a new "division of labor" between Congress and corporate America. Private firms will take the lead in implementing climate policies, while Congress will legislate to ensure that economically disadvantaged populations are not disproportionately burdened by ESG reforms.

Unfortunately, we believe that this division of labor is entirely unrealistic given politicians' incentives, the challenge of measuring ESG's regressive effects, and the lack of fiscal sources for funding distributional measures. First, while Congress is more likely than the corporate sector to incorporate distributional concerns into climate policy, resolving disagreements over distributional

255. *See* Malcolm Fairbrother, *Public Opinion About Climate Policies: A Review and Call for More Studies of What People Want*, 1 PLOS CLIMATE 1, 7 (2022).

256. *See* Sverker C. Jagers, Johan Martinsson & Simon Matti, *The Impact of Compensatory Measures on Public Support for Carbon Taxation: An Experimental Study in Sweden*, 19 CLIMATE POL'Y 147, 149–50 (2019); Michaël Tatham & Yvette Peters, *Fueling Opposition? Yellow Vests, Urban Elites, and Fuel Taxation*, 30 J. EUR. PUB. POL'Y 574, 575 (2023); *see also* David Wheeler, *Confronting the American Divide on Carbon Emissions Regulation*, at 4 (Ctr. for Glob. Dev., Working Paper No. 232, 2010) (explaining the U.S. impasse on climate legislation by the failure to devise arrangements for "Green" states to compensate "Brown" ones).

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questions is challenging, and Congress has a long history of failing to accompany *its own* legislation with distributional adjustments.[257] Congress is even less likely to mitigate the regressive effects of ESG policies that it had no role in enacting. After all, while politicians would be blamed for failing to address the regressive consequences of their own policies, it is less likely that they would be held accountable for policies implemented by the private sector.

Second, assessing the distributional effects of ESG—the effects that would need to be offset through costly legislation—appears nearly impossible. Government agencies and think tanks have been performing distributional estimates for governmental policies for decades.[258] Nothing comparable is in place for ESG. Even if expert estimators turn their full attention to ESG, estimation would be all but impossible. Many companies already adopted—and may continue to adopt—a variety of different ESG policies. Details will vary and will not be easily obtainable from public sources. Whatever challenges government estimators face today (and there are many), these challenges pale by comparison to the all but insurmountable difficulties of evaluating the overall regressivity of ESG. And without plausible estimates, it will be very difficult to spur Congress into action.

The third obstacle is even more significant. To offset the distributional effects of ESG, Congress would need to find revenue to transfer to low-income households. But unlike a carbon tax or tradeable allowance sales, ESG will not raise any revenue for Congress to redistribute. In theory, Congress could tax companies that implement ESG policies and use the resulting funds for redistribution. This approach, however, is neither politically feasible nor practicable. The ESG movement often requires companies to sacrifice profits (at least in the short term) to protect the planet. Imposing a tax on the same companies would make the pursuit of ESG even costlier, discouraging these companies from dedicating resources to a green transition. So from the funding perspective, enacting a carbon tax with compensating revenue redistribution is much easier than passing a stand-alone

257. *See* Raskolnikov, *supra* note 23.

258. On the government side, the Treasury Department and the Joint Committee on Taxation perform distributional estimates. On the think tank side, the Tax Policy Center, the Penn-Wharton Model, and the Tax Foundation are among well-respected estimators.

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revenue-generating bill in order to offset the regressive effects of ESG, uncertain as they are. If Congress has enough momentum to do the latter, it may well have enough to enact the carbon tax itself.[259]

D. ESG No Matter What?

Can we be right and wrong at the same time? Can one accept each step in our analysis and still believe that ESG is worth pursuing in its current form? We see two possible reasons to take this view.

First, one may recognize that ESG will hurt the poor but believe that that harm will be temporary while the environmental benefits will last (hopefully) for eons. We do not share this view. It may well be true that eventually, the world will transition to a green economy, energy prices will fall, and the poor will benefit from this fall along with others, and even more. But "eventually" will mean decades. The increasingly unrealistic goal set in the Paris Agreement is for the world to go carbon-neutral by 2050.[260] It will almost certainly take much longer.[261] In the meantime, higher (perhaps much higher) energy prices, more expensive gasoline, pricier food and necessities, and significant job losses would make

259. If distributional adjustments through legislation are not in the cards, may Congress play a coordinating role? Perhaps, it could require companies that adopt ESG to implement distributional adjustments of some kind, and maybe even specify the kinds of adjustments. As discussed earlier, we doubt any such adjustments are feasible, but perhaps something may be done if Congress plays a coordinating role. Congressional coordination would allay the competitive pressures to cut costs by declining to adopt such adjustments. Yet coordination is only part of the problem. This approach would leave companies footing the bill for the costs associated with such programs, as well as no guidance on how to alleviate secondary price increases that ESG policies will likely cause. Congress-as-a-coordinator strategy would be unwieldly and inefficient. And just like an ESG tax, it would undermine the incentive to pursue ESG in the first place. Yet again, if Congress has enough motivation for such a drastic intervention in the operation of private business, enacting a carbon tax or other climate-protection legislation would seem like a much easier task.

260. *See* Fremstad & Paul, *supra* note 27, at 1, 3 (referring to the Paris Agreement target to "limit global temperature increases to 'well below 2 degrees,'" explaining that it would take eliminating carbon emissions by 2050 to limit the increase to 1.5 °C, and observing that "if countries continue on their current course the planet will likely warm by 3 °C to 4 °C by the end of the century").

261. According to one of the leading environmental economists, "putting a price on carbon to limit warming to 1.5 °C is simply 'not feasible.'" *Id.* at 3 (citing William Nordhaus, *Climate Change: The Ultimate Challenge for Economics*, 109 ECON. REV. 6, 1991–2014 (2019)).

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the lives of millions even harder than they already are.[262] What may be viewed as "transition" in policy briefings and economics models will feel as a very permanent plunge in the living standards for many people.[263] If this were the only path to saving the planet, we would have no choice. But we do have a choice. Congress can act, and it should.

Another argument in favor of ESG, its regressive effects notwithstanding, is that the poor will bear the brunt of negative consequences whether it fails or succeeds. The core belief underlying this view is that barriers to environmental legislation are insurmountable, so the choice is either ESG or nothing . . . and ESG is better than nothing. Although ESG measures will impose losses on poor Americans and neither the private sector nor Congress will alleviate these losses, the poor are the ones who suffer the most from air pollution, environmental degradation, and climate change today. If ESG initiatives fail, everyone—particularly low-income households—will face even greater costs due to global warming.

This view rests on two assumptions. First, corporate lobbying and interest groups will continue to prevent Congress from enacting meaningful legislation to combat global warming. Second, politics will not prevent private firms from advancing ESG reforms to achieve the same goal. Neither assumption is true. We address the first assumption here. The next section will address the second.

It is undoubtedly difficult for Congress to overcome the challenges posed by interest groups and the fossil fuel lobby. But it is not impossible to do so, as evidenced by the 2022 passage of the IRA. Granted, climate legislation looks unlikely in the aftermath of the 2024 presidential election. But the planet keeps getting warmer, and political winds will shift again just as they shifted before. The resulting policy uncertainty and instability would likely lead corporate leaders to prefer difficult-to-reverse federal legislation to

262. We recognize that job losses in some industries will be offset by job gains in other industries. But private firms are not positioned to assist workers in transitioning from shrinking sectors to expanding ones, given that many of the new jobs are in different places and require different skills than the displaced jobs.

263. For a warning that economists and policymakers should take transition losses much more seriously than they did in the past, see Hanson, *supra* note 26, at 1.

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on-again, off-again ESG initiatives.[264] Remarkably, the oil industry has turned from vigorously opposing to favoring of a carbon tax.[265] A recent decision by the European Union to enact a carbon border tax is a further inducement for the United States to start implementing carbon pricing.[266] As we argue below,[267] channeling the enormous resources focused on ESG toward encouraging Congress to build upon its recent legislative achievements would make future federal legislation even more likely.

E. Backlash

The second questionable assumption underlying an ESG-no-matter-what strategy is that politics will not prevent the private sector from implementing climate policies, regardless of their regressive effects. The issue of distribution, however, does not go away just because private companies are acting rather than government entities. As the recent backlash against ESG vividly demonstrates, opponents will seize every opportunity to remind voters—particularly middle- and low-income voters—of the job

264. A trade association representing the oil and gas industry has announced that it favors government's carbon pricing policy over the "patchwork of federal and state regulations and mandates that could ineffectively address the climate challenge . . . ." *See* AM. PETROLEUM INST., *supra* note 77, at 15; *see also* Ash Gillis, Michael Vandenbergh, Kaitlin Raimi, Alex Maki & Ken Wallston, *Convincing Conservatives: Private Sector Action Can Bolster Support for Climate Change Mitigation in the United States*, 73 ENERGY. RSCH. & SOC. SCI. 1, 1 (2021) ("[C]onservatives and moderates are more supportive of climate change mitigation when exposed to information about mitigating measures taken by the private sector.").

265. *See* Matt Egan, *America's Most Powerful Oil Lobby Is Changing Its Tune on a Carbon Tax*, CNN (Mar. 25, 2021, at 14:49 ET), https://www.cnn.com/2021/03/25/business/oil-lobby-carbon-pricing-api/index.html (on file with the BYU Law Review) (describing the newly adopted support of a carbon tax by American Petroleum Institute). Granted, this change of heart may be a public relations measure. If it is, our later emphasis on disclosure of lobbying expenditures is especially justified.

266. *See* Michael Copley, *How a European Law Might Get Companies Around the World to Cut Climate Pollution*, NAT'L PUB. RADIO (May 17, 2023, at 5:04 ET), https://www.npr.org/2023/05/17/1171238285/how-a-european-law-might-get-companies-around-the-world-to-cut-climate-pollution (on file with the BYU Law Review). Without a mechanism tracking carbon use by U.S. manufacturers—a mechanism that currently does not exist—U.S. importers into European Union will be forced to rely on the Union's presumptions of carbon use that are likely to overstate it. *See* Daniel Hoenig, *High CBAM Default Values Underscore the Need for U.S. Data*, BIPARTISAN POL'Y CTR. (Jan. 8, 2026), https://bipartisanpolicy.org/article/high-cbam-default-values-underscore-the-need-for-u-s-data (on file with the BYU Law Review). Developing carbon use accounting is a significant step in instituting carbon pricing.

267. *See infra* Section III.F.

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losses and increased energy costs that will follow ESG policies aimed at curbing carbon emissions. This development not only underscores the inseparable connection between regressive ESG policies and the political process but also threatens the foundations of the ESG movement itself.

No longer an obscure boardroom issue, ESG has entered mainstream culture wars.[268] Backlash against efforts by banks, insurers, and asset managers to mitigate climate change risks is growing among Republican politicians.[269] Senator Ted Cruz, for example, blamed Larry Fink, BlackRock CEO, for the rise in the cost of fuel. The *Washington Post*'s George Will observed recently that "when 'stakeholders' get corporations to sacrifice the goal of maximizing economic value to noneconomic, generally political goals[,]" then "the wealth of workers, and of current and future retirees, is diminished[.]"[270] The political backlash against ESG has turned into a multi-dimensional legal attack. In August 2022, for instance, nineteen attorneys general sent a letter to BlackRock, accusing the company of prioritizing "'activism' over [its] fiduciary duty to their state pension funds."[271] By the end of 2024, BlackRock was in full retreat.[272]

268. *See* David Gelles, *Another Culture War Front: Are Companies Too 'Woke' When It Comes to Climate?*, N.Y. TIMES (Sep. 19, 2022), https://www.nytimes.com/2022/09/19/climate/companies-conservatives-attack.html?searchResultPosition=4 (on file with the BYU Law Review).

269. Chris Flood, *Under-Fire US Fund Manager Pulls Controversial Sponsorship of Climate Sceptics*, FIN. TIMES (Sep. 20, 2022), https://www.ft.com/content/b4d1c0c5-b9e0-4df2-b7e0-c0f9f460fe7b (on file with the BYU Law Review).

270. *See* George F. Will, *Business Beware, 'Stakeholder' Capitalism Is Parasitic Progressivism*, WASH. POST (June 22, 2022), https://www.washingtonpost.com/opinions/2022/06/22/progressive-stakeholder-capitalism-esg-investing (on file with the BYU Law Review).

271. *See* Brooke Masters, *BlackRock Denies Republican Claims of Climate 'Activism'*, FIN. TIMES (Sep. 7, 2022), https://www.ft.com/content/a4af6919-b1cc-4c15-b17c-46186fddbd4c (on file with the BYU Law Review); Letter from Attorneys General to Laurence D. Fink, CEO, BlackRock Inc. (Aug. 4, 2022), https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/BlackRock%20Letter.pdf (on file with the BYU Law Review).

272. *See* Jack Pitcher, *BlackRock Withdraws from Climate Coalition, Backpedaling Again on ESG*, WALL ST. J. (Jan. 9, 2025, at 18:01 ET), https://www.wsj.com/business/blackrock-withdraws-from-climate-coalition-backpedaling-again-on-esg-0e9ad0f8 (on file with the BYU Law Review) (describing the history of BlackRock's backpedaling on its climate commitments).

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Many conservative leaning states have adopted what is termed "anti-ESG legislation."[273] The link between ESG and distributional concerns is evident in at least one type of such legislation: the so-called anti-boycotting laws that aim to prevent asset managers from boycotting specific industries.[274] These laws typically require state pension funds to divest from asset managers that boycott fossil fuel companies,[275] but they can apply to other state agencies and financial institutions. Texas, for example, has restricted JPMorgan Chase, Bank of America, and Goldman Sachs from participating in its municipal bond market under statutes that prohibit the state from contracting with firms that "'boycott' energy companies or 'discriminate' against the firearms industry."[276]

We do not take a position on whether the politicians driving the anti-ESG backlash genuinely harbor concerns about the impact of ESG on their low- and middle-income constituents or opportunistically invoke the struggles of these groups to get the public to support their opposition to climate legislation. Regardless of motive, the anti-ESG backlash demonstrates that the regressive effects of climate policies loom large even when it is the private sector that implements climate-friendly reforms. Attempts to bypass political challenges at the front end merely lead to confronting similar challenges at the back end.

Furthermore, it is important to recognize that not only will ESG harm the poor, but it carries in itself the seeds of its own downfall.

273. For a review of anti-ESG state legislation, see Leah Malone, Emily Holland & Carolyn Houston, *ESG Battlegrounds: How the States Are Shaping the Regulatory Landscape in the U.S.*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 11, 2023), https://corpgov.law.harvard.edu/2023/03/11/esg-battlegrounds-how-the-states-are-shaping-the-regulatory-landscape-in-the-u-s/#4 (on file with the BYU Law Review).

274. *See* Andrew Ross Sorkin, Vivian Giang, Stephen Gandel, Bernhard Warner, Michael J. de la Merced, Lauren Hirsch & Ephrat Livni, *DeSantis Claims Win in Campaign Against E.S.G.*, N.Y. TIMES (Aug. 24, 2022), https://www.nytimes.com/2022/08/24/business/dealbook/desantis-florida-esg-investing.html?searchResultPosition=8 (on file with the BYU Law Review).

275. *Id.*

276. Pete Schroeder, *How Republican-Led States Are Targeting Wall Street with 'Anti-Woke' Laws*, REUTERS (July 6, 2022, at 8:16 MT), https://www.reuters.com/world/us/how-republican-led-states-are-targeting-wall-street-with-anti-woke-laws-2022-07-06 (on file with the BYU Law Review). For a study that assesses the effect of these laws, see Shivaram Rajgopal, Anup Srivastava & Rong Zhao, *Economic Substance Behind Texas Political Anti-ESG Sanctions* (2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4386268 (on file with the BYU Law Review).

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The anti-ESG backlash could threaten the institutional foundations that underpin the strength of the ESG movement. Universal owners and other asset managers are fiduciaries responsible for managing savings for retirees and other savers. Thus, an important legal question is whether incorporating ESG considerations into investment decisions is consistent with asset managers' fiduciary duty to their clients.[277] Some anti-ESG statutes seek to provide a negative answer to this question by prohibiting the incorporation of ESG considerations into investment decisions.[278] Several states have collectively pulled $13.3 billion from BlackRock because BlackRock allegedly prioritizes ESG concerns over financial returns.[279]

Although these state laws mostly apply to state pension funds,[280] a more worrisome development for the ESG movement is the decision by Congress to nullify the Department of Labor's ("DOL") new rule concerning the consideration of ESG factors in corporate retirement plans.[281] This anti-ESG move led President Biden to issue his first veto to save the DOL's fiduciary duty rule.[282] Twenty-five states sued the DOL to enjoin the enforcement of this rule.[283]

277. *See* Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 389 (2020).

278. *See* David Berger, David H. Webber & Beth Young, *The Liability Trap: Why the ALEC Anti-ESG Bills Create a Legal Quagmire for Fiduciaries Connected with Public Pensions*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 27, 2023), https://corpgov.law.harvard.edu/2023/02/27/the-liability-trap-why-the-alec-anti-esg-bills-create-a-legal-quagmire-for-fiduciaries-connected-with-public-pensions (on file with the BYU Law Review).

279. *See* Will Schmitt, *US Investment Funds Pull $13.3bn from BlackRock in Anti-ESG Campaign*, FIN. TIMES (Mar. 23, 2024), https://www.ft.com/content/9306c8f2-530d-45ca-a830-4d26e5a90509 (on file with the BYU Law Review).

280. *See* Malone, Holland & Houston, *ESG Battlegrounds*, *supra* note 273 (noting that at least seven states have enacted laws "that seek to prohibit or discourage public entities from considering ESG factors when investing state resources").

281. *See* H.R.J. Res. 30, 118th Cong. (2023).

282. *See* Greg Iacurci, *Biden Used First Veto to Save A 401(K) Investment Rule. Here's What It Does*, CNBC (Mar. 21, 2023, at 14:23 ET), https://www.cnbc.com/2023/03/21/biden-veto-401k-rule-esg-investment-funds.html (on file with the BYU Law Review).

283. *See* Leah Malone, Erica Rozow & George M. Gerstein, *Biden's First Veto: Understanding the Implications of the DOL's ESG Rule*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 6, 2023), https://corpgov.law.harvard.edu/2023/04/06/bidens-first-veto-understanding-the-implications-of-the-dols-esg-rule (on file with the BYU Law Review).

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Another anti-ESG attack challenges one of the strategies that empower asset managers to influence their portfolio companies. As we explained earlier,[284] investor coalitions like Climate Action 100+ allow asset managers to leverage their power to exert pressure on companies to adopt climate policies. In November 2024, however, several states filed a lawsuit alleging that Blackrock, State Street, and Vanguard violated federal antitrust laws through climate activism that increased energy prices.[285] And in November 2022, several Republican members of Congress wrote to fifty-one national law firms warning that "Congress will increasingly use its oversight powers to scrutinize the institutionalized antitrust violations being committed in the name of ESG, and refer those violations to the FTC and the Department of Justice."[286] The antitrust challenge could create a chilling effect, especially for universal owners such as BlackRock and Vanguard, as their powerful position owning significant equity in virtually all U.S. public companies has already raised concerns about its anti-competitive effects.[287] Perhaps recognizing the seriousness of these and other concerns discussed here, large asset managers appear to be backing off their climate-related ESG commitments.[288]

284. *See supra* text accompanying notes 108–109.

285. *See* Jonathan Stempel & Carolina Mandl, *BlackRock, Vanguard, State Street Sued by Republican States over Climate Push*, REUTERS (Nov. 29, 2024, at 7:49 MT), https://www.reuters.com/legal/blackrock-state-street-vanguard-sued-by-republican-states-over-climate-accords-2024-11-27 (on file with the BYU Law Review).

286. *See* Rochelle Toplensky, *Antitrust Threats Cloud Business Cooperation on Climate Action*, WALL ST. J. (Jan. 4, 2023, at 13:30 ET), https://www.wsj.com/articles/antitrust-threats-cloud-business-cooperation-on-climate-action-11672857017 (on file with the BYU Law Review).

287. *See* Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1267, 1268 (2016); Edward B. Rock & Daniel L. Rubinfeld, *Antitrust for Institutional Investors*, 82 ANTITRUST L.J. 221, 229 (2018) (explaining that rising ownership concentration and common ownership heighten the risk of explicit coordination that may violate antitrust law, posing a serious and often overlooked threat to institutional investors).

288. *See* Simon Jessop & Ross Kerber, *JPMorgan, State Street Quit Climate Group, BlackRock Steps Back*, REUTERS (Feb. 15, 2024, at 16:07 MT), https://www.reuters.com/sustainability/sustainable-finance-reporting/jpmorgan-fund-arm-quits-climate-action-100-investor-group-2024-02-15 (on file with the BYU Law Review) (reporting that JPMorgan and State Street left Climate Action 100+); Attracta Mooney & Kenza Bryan, *'Chilling Effect' Spreads to European Asset Managers over Climate Even as Risks Rise*, FIN. TIMES (Jan. 20, 2025), https://www.ft.com/content/e2bc352b-aa8c-41fc-87b4-b61b676cfcbf (on file with the BYU Law Review) (investors pull back on public show of climate action while quietly assessing the risks associated with climate change); Pitcher, *supra* note 272.

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To summarize, concerns about the regressive effects of climate ESG measures play an important role in public policymaking. Ideally, these concerns would lead lawmakers to enact climate legislation accompanied by distributional adjustments. More often, disagreements over distribution hinder the adoption of climate policies. While the ESG route may have appeared to bypass concerns about distributional effects and pressures from interest groups, it is increasingly clear that this appearance is deceptive. The same political forces that stymie climate legislation through legislative measures have also prompted politicians to vehemently oppose ESG-driven climate reforms.

F. A Different Kind of ESG?

Let us assume that we convinced the reader that ESG is a poor policy because even if it benefits the environment, it will hurt the poor. Does this mean that the private sector has no role in averting the climate catastrophe? Of course not! If the ESG movement has revealed anything, it is that major asset managers are capable of exerting significant influence on corporate policymaking, and that major public companies increasingly view the climate crisis as something that these companies should address. If ESG in its current form is ruled out, what is the alternative?

There is no alternative to government action in tackling both global warming and economic inequality. Our goal should therefore be to push Congress to complete the job it started with the IRA: legislate to combat global warming and legislate to protect the poor from bearing a disproportionate cost of environmental reforms. Institutional investors could nudge this legislation forward by ensuring their portfolio companies' lobbying efforts are aligned with their pledges to protect the environment.

Today, we know remarkably little about corporate political spending. This lack of information stands in stark contrast with vociferous publicity about corporate ESG investments and commitments. The disconnect between the overabundance of information about one type of spending and the absence of information about the other is both a problem and an opportunity.

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Four years ago, Citi committed to spend $100 million over five years on climate technology projects.[289] Not to be outdone, JP Morgan Chase pledged to invest $200 million in carbon capture.[290] Oil companies are even bigger contributors. Shell committed to spend $100 million *each year* on carbon offsets and other climate-protection investments.[291] Even though it has now abandoned this ambitious plan, it already spent $95 million for these purposes just in 2021 and 2022.[292] Exxon, as another example, announced an investment of $400 million to further expand the carbon capture and storage facility that it already constructed for that purpose.[293] Plenty of similar examples of major corporations investing hundreds of millions of dollars pursuant to their ESG commitments are easy to find.[294]

In stark contrast, none of these companies—and none of their main industry organizations—have spent more than $12.5 million in 2022 to influence legislation of any kind, let alone to push through the enactment of a carbon tax (or a similar carbon pricing

289. *See* Stephanie Hyon, *Citi Joins Breakthrough Energy Catalyst as Anchor Partner to Accelerate the Clean Energy Transition with $100 Million Commitment*, BUS. WIRE (Nov. 2, 2021, at 12:00 ET), https://www.businesswire.com/news/home/20211102005994/en (on file with the BYU Law Review).

290. *See* Michelle Ma, *JPMorgan Pledges $200 Million to Suck Carbon from the Sky*, BLOOMBERG L. (May 24, 2023, at 11:45 MT), https://news.bloomberglaw.com/environment-and-energy/jpmorgan-spends-20-million-to-suck-carbon-fight-climate-change (on file with the BYU Law Review) (reporting on the bank's "$200 million commitment to pull carbon from the air").

291. *See* Alastair Marsh & Will Mathis, *Europe's Biggest Oil Company Quietly Shelves a Radical Plan to Shrink Its Carbon Footprint*, BLOOMBERG (Aug. 30, 2023, at 18:01 MT), https://www.bloomberg.com/news/features/2023-08-31/shell-silently-abandoned-its-100-million-a-year-plan-to-offset-co2-emissions#xj4y7vzkg (on file with the BYU Law Review).

292. *See id.*

293. *See* Carl Surran, *Exxon Plans $400M Expansion of Wyoming Carbon Capture Facility*, SEEKING ALPHA (Oct. 21, 2021, at 9:21 ET), https://seekingalpha.com/news/3756128-exxon-plans-400m-expansion-of-wyoming-carbon-capture-facility (on file with the BYU Law Review).

294. *See, e.g.*, Amrith Ramkumar, *Microsoft Will Use Carbon-Absorbing Rocks to Meet Climate Goals*, WALL ST. J. (Sep. 7, 2023, at 5:30 ET), https://www.wsj.com/us-news/climate-environment/microsoft-will-use-carbon-absorbing-rocks-to-meet-climate-goals-57ea802a (on file with the BYU Law Review) (describing Microsoft's $200 million commitment); *Apple Expands Innovative Restore Fund for Carbon Removal*, APPLE (Apr. 11, 2023), https://www.apple.com/newsroom/2023/04/apple-expands-innovative-restore-fund-for-carbon-removal (on file with the BYU Law Review) (describing Apple's $200 million commitment following its original investment of the same size).

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scheme).[295] In fact, Exxon happened to disclose its spending for this very purpose: $500,000 a year for two years.[296]

The lesson, it seems to us, is so obvious that it hardly needs elaboration. Asset managers should use their rising influence over public corporations to ensure that these companies' lobbying activities align with their climate policies. These companies spend hundreds of millions to reduce their carbon footprints, often expending enormous sums in ways that are increasingly recognized to be useless or even harmful to the environment.[297] Instead, institutional investors should channel their ESG resources toward ensuring that companies' lobbying efforts are aligned with their pledges to protect the environment and toward encouraging Congress to build upon its recent legislative achievements.

The idea that putting pressure on lawmakers may do much more to save the planet than buying carbon offsets is catching on. The number of climate-related lobbying proposals submitted by shareholders increased in 2023.[298] These proposals require companies to disclose whether their lobbying activities (either

295. *See Top Spenders 2022*, OPENSECRETS (2022) https://www.opensecrets.org/federal-lobbying/top-spenders?cycle=2022 (on file with the BYU Law Review) (listing 20 highest political lobbying organizations, with the last one on the list, Pfizer, spending about $12.5 million).

296. *See* Puko & Olson, *supra* note 37.

297. *See* Patrick Greenfield, *Carbon Credit Speculators Could Lose Billions as Offsets Deemed Worthless*, GUARDIAN (Aug. 24, 2023, at 14:00 ET), https://www.theguardian.com/environment/2023/aug/24/carbon-credit-speculators-could-lose-billions-as-offsets-deemed-worthless-aoe (on file with the BYU Law Review) (citing a "new study in the journal Science [that] has found that millions of forest carbon credits . . . are largely worthless and could make global heating worse if used for offsetting," and referring to a "new environmental fraud taskforce" created by U.S. regulators to investigate "fraud and misconduct in carbon markets"); Marsh & Mathis, *supra* note 291 (reporting that after investing $95 million "to build or invest in a portfolio of carbon projects," Shell discovered that the investments "generated few if any offsets[,]" adding yet another "damning indictment of offsets").

298. *See* Ronald O. Mueller, Elizabeth A. Ising & Thomas J. Kim, *Shareholder Proposal Developments During the 2023 Proxy Season*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 3, 2023), https://corpgov.law.harvard.edu/2023/08/03/shareholder-proposal-developments-during-the-2023-proxy-season (on file with the BYU Law Review) (noting that 25 climate-related proposals were submitted in 2023, compared to 14 proposals put forward in 2022).

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directly or through membership in trade associations) are consistent with their pledges to reduce emissions.[299]

The lobbying disclosure proposals are important. If a company spending hundreds of millions of dollars to counter global warming discloses its lobbying against legislation aimed at achieving the same goal, the company's board would find itself in a very uncomfortable spot. So forcing companies to disclose their lobbying expenditures—and allowing the public to compare them to corporate ESG-related spending and public rhetoric—is very likely to produce a significant new flow of corporate lobbying dollars in support of green reforms.

Yet it seems that large asset managers are not eager to support climate-related lobbying shareholder proposals, deeming them too prescriptive.[300] This position is mistaken and self-contradictory. If it is corporate lobbying that impedes the government from taking the necessary measures to protect the planet, the least asset managers can do is to use their clout to remove this impediment. This will pave the way toward government actions that will both address climate change and protect vulnerable populations from its adverse effects.[301]

299. *See* Lindsey Stewart, *Proxy-Voting Insights: Voting on Politics*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 2, 2023), https://corpgov.law.harvard.edu/2023/04/02/proxy-voting-insights-voting-on-politics (on file with the BYU Law Review).

300. *See id.* (stating that support for climate-related lobbying proposals fell from 2021 to 2022 given asset managers reluctance to support shareholder proposals deemed to be overly prescriptive).

301. Some asset managers have called on the investment community to accompany climate policies with measures to ensure "just transition." *See* Gina Gambetta, *Investors Pile in on Just Transition Engagement to Ensure Net Zero Strategies Don't Hurt Social Objectives*, RESPONSIBLE INV. (Mar. 17, 2022), https://www.responsible-investor.com/investors-pile-in-on-just-transition-engagement-to-ensure-net-zero-strategies-dont-hurt-social-objectives (on file with the BYU Law Review); Gina Gambetta, *Investor-Backed Just Transition Criteria Launched*, RESPONSIBLE INV. (May 24, 2023), https://www.responsible-investor.com/investor-backed-just-transition-criteria-launched (on file with the BYU Law Review) (reporting on an initiative to develop criteria that would assist fund managers to make investments that reduce emissions while improving socio-economic distribution and equity). Harnessing the private sector to reduce inequality is commendable, and some of these policies might provide limited benefits to some groups. But as we explained above, the private sector simply lacks the capacity to redistribute on a scale necessary to counteract the regressive consequences of climate policies. *See supra* Section II.A.

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CONCLUSION

There is little doubt that if ESG becomes significant enough to make a difference in slowing global warming, it will have substantial regressive effects. Private firms, acting alone, will not be able to offset these effects. Corporate boards and asset managers will have no incentives to search for and push through solutions that would protect the poor from the inequality generated by regressive private-sector ESG policies. Politicians, in contrast, do have just such incentives—whether they act on them or not. Leaving climate policy to be solved by ESG while turning to Congress for distributional adjustments is a strategy divorced from reality. In particular, this is a strategy that is less likely to succeed than pushing Congress to complete the job it started with the IRA: legislate to combat global warming and legislate to protect the poor from bearing a disproportionate cost of environmental reforms.

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