The Making and Meaning of ESG

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Abstract

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

This Article makes three contributions. First, it provides a history of the term ESG that was coined without precise definition in a collaboration between the United Nations and major players in the financial industry to pursue wide-ranging goals. Second, it identifies and examines the main usages of the term ESG that have developed since its origins. Third, it offers an analytical critique of the term ESG and its consequences. It argues that the combination of E, S, and G into one term has provided a highly flexible moniker that can vary widely by context, evolve over time, and collectively appeal to a broad range of investors and stakeholders. These features both help to account for its success, but also its challenges such as the difficulty of empirically showing a causal relationship between ESG and financial performance, a proliferation of ratings that can seem at odds with understood purposes of the term ESG or enable "sustainability arbitrage," and tradeoffs between issues such as carbon emissions and labor interests that cannot be reconciled on their own terms. These challenges give fodder to critics who assert that ESG engenders confusion, unrealistic expectations, and greenwashing that could inhibit corporate accountability or crowd out other solutions to pressing environmental and social issues. These critiques are not necessarily fatal, but are intertwined with the characteristic flexibility and unfixed definition of ESG that was present from the beginning, and ultimately shed light on obstacles for the future of the ESG movement and regulatory reform.

Keywords: environmental, social, governance, ESG, sustainability, corporate social responsibility, corporate purpose, stakeholderism, stakeholder capitalism, corporate citizenship, socially responsible investment, SRI, impact investing, corporate governance, corporate law, securities regulation, SEC, climate disclosure, board diversity, human capital management

JEL Classifications: G20, G28, G30, G34, K20, L21

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The Making and Meaning of ESG

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UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

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* Professor of Law, University of Pennsylvania Carey Law School; ECGI Research Member. For valuable comments and discussions, thanks to Doug Chia, Paul Dickinson, Jared Ellias, Kornelia Fabisik, Jill Fisch, Elisabeth de Fontenay, George Georgiev, Virginia Harper Ho, Scott Hirst, Ann Lipton, Erik Lidman, Dorothy Lund, Amelia Miazad, James Nelson, Mariana Pargendler, David Pitt-Watson, Adriana Robertson, Anne Tucker, Ellen Quigley, David Wood, the participants of the Women in Law and Finance Workshop at The Wharton School, the Corporation in Society Workshop at Utrecht University, and the 2022 ECGI Global Corporate Governance Colloquium at Oxford University.

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INTRODUCTION

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

ESG as an acronym for "environmental, social, governance" is a common denominator of the discourse using the term, but a deeper examination reveals that little beyond that understanding is fixed. The word that follows the famous refrain of "environmental, social, governance" shapeshifts from "criteria" to "factors," "standards," "strategies," "risks," "issues," "activity," or even "goals." Does ESG refer to "three criteria to evaluate a company's sustainability performance"?[3] Is it a "set of standards for a company's operations that socially conscious investors use to screen potential investments"?[4] Does it "put . . . money to work with companies that strive to make the world a better place"?[5] Or perhaps more broadly is it a new term or synonym for "corporate social responsibility" (CSR) or its cousin "sustainability"? Could the answer be that ESG simultaneously refers to all of the above?

As usage of the term ESG runs the gamut, trillions of dollars flow into ESG-labeled investment products, companies are implementing ESG strategies, and regulators are designing ESG policies. ESG investment currently represents an astounding one third of all professionally managed assets.[6] Views about the performance implications from ESG and the usefulness of ESG evaluations grow increasingly polarized – for some, ESG is seen to have enormous influence on corporate and investor behavior, for others it has none,[7] or worse it is marketing or greenwashing that misleads investors or stakeholders, inhibits corporate accountability, or displaces other concepts and proposed solutions for

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[1] George Serafeim, *ESG: Hyperboles and Reality*, Harvard Business School Research Paper Series Working Paper 22-031 (Dec. 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3966695; *see also* Robert G. Eccles & Svetlana Klimenko, *The Investor Revolution*, HARV. BUS. REV. (May-June 2019), https://hbr.org/2019/05/the-investor-revolution (finding that "ESG was almost universally top of mind" in a study of 70 senior executives at 43 global institutional investing firms, including the world's largest asset managers (BlackRock, Vanguard, and State Street), influential pension funds (California Public Employees' Retirement System (CalPERS) and California State Teachers' Retirement System (CalSTRS), and notable government funds (Japan, Sweden, and the Netherlands)).

[2] Serafeim, *supra* note 1. A Google Trend chart shows the ESG term had relatively little worldwide attention from 2004 to 2016 when it began to gradually rise and then explode by 2019. Google Trends, ESG, https://trends.google.com/trends/explore?date=all&q=esg.

[3] Alyce Lomax, *What is ESG Investing & What Are ESG Stocks?*, THE MOTLEY FOOL (May 2, 2022), https://www.fool.com/investing/stock-market/types-of-stocks/esg-investing/.

[4] Environmental, Social, Governance (ESG) Criteria, INVESTOPEDIA (Feb. 23, 2022), https://www.investopedia.com/terms/e/environmental-social-and-governance-esg-criteria.asp.

[5] E. Napoletano & Benjamin Curry, *Environmental, Social And Governance: What is ESG Investing?*, FORBES (Feb. 24, 2022), https://www.forbes.com/advisor/investing/esg-investing/.

[6] Andrew A. King & Kenneth P. Pucker, *ESG and Alpha: Sales or Substance?*, INSTITUTIONAL INVESTOR (Feb. 25, 2022), https://www.institutionalinvestor.com/article/b1wxqznltqnyzj/ESG-and-Alpha-Sales-or-Substance.

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

societal problems.[8] Popular use of the term ESG has even seemed to take on some of these normative views or culture-laden notions that transcend technical ideas of investment screens, financial materiality, reporting, or the like. In common parlance, one regularly hears things such as "startups need ESG,"[9] buying a certain asset class is "not very ESG"[10] or that companies can "be" or "not be" ESG.[11] More colorfully, tech billionaire Elon Musk has exclaimed: "I am increasingly convinced that corporate ESG is the Devil Incarnate."[12]

As varied language and notions around ESG proliferate, this Article endeavors to provide an in-depth examination of the term itself and its implications. Although commonly used, few know where the term comes from, who coined it, and what it was originally aimed to mean and achieve. The first contribution of the Article is thus to provide a history of the term ESG that has been missing from the debate and scholarly literature.[13]

Further, as the term spreads from its origins and takes on diverse meanings, the potential arises for confusion, unrealistic expectations, and co-optation to serve different

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

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

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

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

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

[13] *See* Part I *infra*. Scholarly literature to date has not focused on the history of ESG and how it was originally conceived. Recent articles on U.S. and international corporate governance systems have notably included brief descriptions of coinage of the term through United Nations initiatives. *See* Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563 (2021) (providing an account of the "complex governance system in the United States composed of law, institutions, and culture that orients corporate decisionmaking toward shareholders"); Mariana Pargendler, *The Rise of International Corporate Law*, 98 WASH. U. L. REV. 1765 (2021) (arguing that "international corporate law" is a solution to "interjurisdictional externalities" and "political capture by domestic interest groups").

goals. More simply, participants in the debate about ESG might simply talk past each other as they use the term to refer to different concepts.[14] Indeed, the rise of ESG has coincided with a renaissance in thinking about corporate purpose and growing interest in sustainability and stakeholder capitalism, adding to the mix of concepts and terminology in contemporary debates.[15] In a survey of institutional investors, three-quarters of respondents said there is a lack of clarity around ESG terminology.[16] The second contribution of the Article is thus to identify and examine the main usages for the term ESG that have developed over time.

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

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

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[14] *See, e.g.*, Robert G. Eccles, *A Tutorial on ESG Investing In The Oil And Gas Industry for Mr. Pence And His Friends*, FORBES (July 26, 2022), https://www.forbes.com/sites/bobeccles/2022/07/26/a-tutorial-on-esg-investing-in-the-oil-and-gas-industry-for-mr-pence-and-his-friends/?sh=604deda58a7b (noting that ESG opponents could "simply see this term as meaning something different" than ESG advocates); *see also* King & Pucker, *supra* note 6 ("ESG investing is not precisely defined.").

[15] For a sampling of literature on corporate purpose, sustainability, and stakeholder capitalism, see RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD (Elizabeth Pollman & Robert B. Thompson eds., 2021); THE CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY (Beate Sjåfjell & Christopher M. Bruner eds., 2020); COLIN MAYER, PROSPERITY (2018); ALEX EDMANS, GROW THE PIE: CREATING PROFIT FOR INVESTORS AND VALUE FOR SOCIETY (2020); REBECCA HENDERSON, REIMAGINING CAPITALISM IN A WORLD ON FIRE (2020); GEORGE SERAFEIM, PURPOSE + PROFIT: HOW BUSINESS CAN LIFT UP THE WORLD (2022); Doug Sundheim & Kate Starr, *Making Stakeholder Capitalism a Reality*, HARV. BUS. REVIEW (Jan. 22, 2020), https://hbr.org/2020/01/making-stakeholder-capitalism-a-reality; Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *Stakeholder Capitalism in the Time of COVID*, YALE J. ON REGUL. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4026803.

[16] Swasti Gupta-Mukherjee, *Climate Action Is Too Big for ESG Mandates*, STAN. SOCIAL INNOVATION REV. (Sept. 29, 2020), https://ssir.org/articles/entry/climate_action_is_too_big_for_esg_mandates.

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

Such critiques are not fatal, but this Article shows they will continue to plague the ESG movement as they are intertwined with the characteristic flexibility and unfixed definition of the term ESG that goes back to its origins. A host of consequences follow from these enduring critiques, ranging from stoking an ESG backlash that imperils corporate and investor initiatives to adding significant obstacles for regulators engaged in ESG-related rulemaking such as the Securities and Exchange Commission's climate disclosure proposal.[17] The history and development of ESG illuminates the fragile alliances and wide-ranging motivations of global players that helped to create a big tent for the term to get mainstream buy-in, as well as its precarious path forward.

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

I. THE CREATION AND DIFFUSION OF ESG

The consideration of corporate governance and corporations' relationships with stakeholders, communities, the environment, and society writ large has a long history. Corporations and their role in society and purpose have been the subject of perpetual debate, going back to early corporations.[18] Over the past century, from the famous debate

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

[18] For an exploration of the history of corporate purpose through the purpose clause of charters from the Middle Ages to the twenty-first century, see Elizabeth Pollman, *The History and Revival of the Corporate Purpose Clause*, 99 TEX. L. REV. 1423 (2021). For a sampling of contemporary literature adding to the rich history of "corporate purpose" debate, *see, e.g.*, Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 94 (2020) (arguing against "the flaws and dangers" of "stakeholder governance"); Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1310, 1310 (2021) (arguing that corporate purpose serves an "instrumental function" to "facilitate the goals of corporate participants"); Edward Rock, *For Whom Is the Corporation Managed in 2020?: The Debate over Corporate Purpose*, 76 BUS. L. 363, 364-67 (2021) (summarizing the contemporary corporate purpose debate including statements and proposals from academics, business leaders, and politicians); Leo E. Strine, Jr., *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy: A Reply to Professor Rock*, 76 BUS. L. 397, 400 (2021) (arguing that the American corporate governance system "needs an overhaul to fit a 21st century economy"); COLIN MAYER, PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD 6 (2019) (discussing corporate purpose in terms of fulfilling business objectives rather than maximizing profits and noting related social and moral values in corporate purpose); The British Academy, *The Future of the Corporation: Principles for Purposeful Business* (Nov. 2019), https:// www.thebritishacademy.ac.uk/publications/future-of-the-corporation-principles-for-

between Professors Adolf Berle and Merrick Dodd,[19] to the coining of the term "corporate social responsibility" in the mid-twentieth century,[20] and the rise of "corporate governance" and its linkage with shareholder primacy,[21] the discourse and engagement with various questions related to the societal role of corporations, the duties of corporate directors, and externalities and impacts on stakeholders have taken many twists and turns.

This Part aims its focus at providing an original descriptive account of the specific history of the term ESG and its diffusion in the early twenty-first century. Although the United Nations (UN) does not typically feature in contemporary discussions of ESG, it played a critical role in bringing about the term and mobilizing its spread.[22] The story begins with this international organization and its eventual connection and responsiveness to senior executives of global financial institutions, followed by a host of related initiatives and efforts that helped to spread the term until it reached rapid uptake in mainstream discourse.

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

Since its founding in 1945, the UN has catalyzed and sponsored a number of initiatives relating to the world economy, development, the environment, human rights, and related issues affecting business and markets. Scholars and experts have recounted the changing tone of engagement between the UN and the business community over the decades. According to John Ruggie, "[h]istorically, UN entities have expressed varying degrees of ambivalence about the market generally and globalization in particular."[23] Earlier in its history, "[t]he UN saw itself as the champion of social justice and distributive policies and viewed the global economic system as more of an impediment than a solution to these ends."[24] Other scholars have explained that "[b]eginning in the 1950s, the UN was prompted to keep its distance from the corporate sector by the Cold War

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purposefulbusiness (examining the case for reforming business "around its purposes, trustworthiness, values and culture" and solving the problems of "people and planet").

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

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

[21] *See* Lund & Pollman, *supra* note 13, at 2569-78 (tracing coinage of the term "corporate governance" alongside the widespread adoption of shareholder primacy and the shareholder wealth maximization norm).

[22] *See* Pargendler, *supra* note 13, at 1794 ("UN initiatives not only coined the concept of ESG, but also critically mobilized support for the spread and influence of ESG factors around the globe, in addition to the dissemination of a business and human rights agenda more broadly.").

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

[24] *Id.*

environment and the need to display a relative impartiality toward market economy and planned economy advocates alike."[25] An "antibusiness prejudice,"[26] or even "animosity," pervaded "the UN paradigm until the end of the Cold War."[27]

One notable reflection of this oppositional relationship with the private sector was the New International Economic Order (NIEO), a UN effort launched by a coalition of developing countries known as the G-77 that aimed at "structural reform and global redistribution" to aid the "global south."[28] A controversial aspect of the NIEO's platform in the 1970s and early 1980s involved an attempt to regulate transnational corporations.[29] During this time, the "UN systematically defended the notion that the transnationals, left to themselves, would further enlarge the gap between developed and developing countries."[30] And for many years, a Commission on Transnational Corporations, created after the declaration of the NIEO, pursued the drafting and adoption of a Code of Conduct for transnational corporations[31]—an effort that faced significant opposition as anti-business, especially from the United States, and was eventually phased out in 1992 when negotiations were formally suspended.[32] By around this time, various other initiatives were underway that shifted focus, such as the UN-sponsored Brundtland Report on the environment and development, published in 1987 that coined the term "sustainability."[33] The UN Commission (now Council) on Human Rights also increased in prominence and became more active in examining how the UN might influence multinational corporations.[34]

Most notably, however, it was in the 1990s that the UN opened up to the corporate sector, described as "a change of 180 degrees."[35] It was in this phase that Kofi Annan, then-Secretary General of the UN, lay the groundwork for the initiative that created the term ESG. Following a meeting with leaders of the International Chamber of

[25] Jean-Phillipe Thérien & Vincent Pouliot, *The Global Compact: Shifting the Politics of International Development?*, 12 GLOBAL GOV. 55, 57 (2006).
[26] SYDNEY SAMUEL DELL, THE UNITED NATIONS AND INTERNATIONAL BUSINESS ix (1990).
[27] Thérien & Pouliot, *supra* note 25.
[28] *Id.* at 57-58 (discussing how "developing countries entered the organization en masse" in the 1960s and "the rise of the North-South conflict led the UN to make the regulation of the private sector, and of transnational corporations in particular, one of its top development priorities for over a generation"); *see also* Jennifer Bair, *Corporations at the United Nations: Echoes of the New International Economic Order?*, 6 HUMANITY 159, (2015) (discussing the NIEO).
[29] Bair, *supra* note 28, at 159; Ruggie, *supra* note 23, at 303-04.
[30] Thérien & Pouliot, *supra* note 25, at 57-58.
[31] Bair, *supra* note 28, at 159.
[32] *Id.* at 160; *see also* Pargendler, *supra* note 13, at 1795.
[33] REPORT OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT: OUR COMMON FUTURE (1987), https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf. An earlier event, the 1972 UN Conference on the Human Environment "brought the industrialized and developing nations together to delineate the 'rights' of the human family to a healthy and productive environment." *Id.* For an analysis of eight different conceptual frameworks of the term sustainability that have arisen since it was coined in the 1980s, see Aliette K. Frank, *What is the Story with Sustainability? A Narrative Analysis of Diverse and Contested Understandings*, 7 J. ENV'T STUD. & SCI. 310 (2017).
[34] Bair, *supra* note 28, at 160.
[35] Thérien & Pouliot, *supra* note 25, at 58-59 (quoting Gerd C. A. Junne, *International Organizations in a Period of Globalization: New (Problems) of Legitimacy*, *in* THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS (Jean-Marc Couicaud & Veijo Heiskanen eds., 2001)).

Commerce in 1998, Annan acknowledged: "There is great potential for the goals of the United Nations—promoting peace and development—and the goals of business—creating wealth and prosperity—to be mutually supportive."[36] The UN began to set up a host of public-private partnerships during this new period, reflecting a shift toward understanding business as part of the solution for advancing its goals.[37]

The key moment of this shift on the path to ESG was a speech at the Davos World Economic Forum in 1999 in which Kofi Annan proposed a "Global Compact," directly urging business leaders to join the UN in promoting principles that would provide a foundation for a sustainable global economy. The explosive surge in globalization at the end of the twentieth century was accompanied by gaps in global rule making on labor standards, human rights, and environmental protection—in turn feeding fears that a backlash against globalization might grow.[38] Annan explained:

> Globalization is a fact of life. But I believe we have underestimated its fragility. The problem is this. The spread of markets outpaces the ability of societies and their political systems to adjust to them, let alone to guide the course they take. History teaches us that such an imbalance between the economic, social and political realms can never be sustained for very long. The industrialized countries learned that lesson in their bitter and costly encounter with the Great Depression. In order to restore social harmony and political stability, they adopted social safety nets and other measures, designed to limit economic volatility and compensate the victims of market failures. Our challenge today is to devise a similar compact on the global scale, to underpin the new global economy.[39]

Furthermore, he noted that until people around the world have confidence that certain minimum standards and security will prevail, "the global economy will be fragile and vulnerable—vulnerable to backlash from all of the 'isms' of our post-cold-war world: protectionism, populism, nationalism, ethnic chauvinism, fanaticism and terrorism."[40] He thus called on firms and business associations "to embrace, support and enact a set of core values in the areas of human rights, labour standards, and environmental practices."[41] In return, he offered assistance from the UN in "incorporating these agreed values and principles into [] mission statements and corporate practices" and facilitating a dialogue with other social groups.[42] Further, he noted that various interest groups were exerting "enormous pressure" for "restrictions on trade and investment," but he preferred to

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[36] United Nations, Cooperation Between United Nations and Business, press release SG/2043, Feb. 9, 1998.
[37] Thérien & Pouliot, *supra* note 25, at 59; Ruggie, *supra* note 23, at 304-05.
[38] Ruggie, *supra* note 23, at 309-10.
[39] Press Release, UN-Secretary-General, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to the World Economic Forum in Davos (Feb. 1., 1999), https://www.un.org/press/en/1999/19990201.sgsm6881.html.
[40] *Id.*
[41] *Id.*
[42] *Id.*

pursue the UN's "proclaimed standards" through the voluntary Global Compact that was "mutually supportive" of the UN and business.[43]

The Global Compact became operational in 2000, supported by various UN agencies and transnational nongovernmental organizations, with nine (now ten) principles on human rights, labor, environment, and anti-corruption.[44] Although the Compact attracted critique for its nonbinding structure and embrace of corporate trade and investment, participation "increased constantly," and became "more and more diverse in terms of geography and economic sectors."[45] Within just a couple years, approximately 1,000 firms were signatories to the Compact.[46] Building on these efforts, in 2003, the UN increased its focus on environmental matters by convening the first Institutional Investor Summit on Climate Risk, which led to the creation of the Investor Network on Climate Risk—"a politically active group of seventy investors representing seven trillion [dollars] in assets."[47]

Subsequently, senior executives of financial institutions and other companies that were signatories to the Global Compact "repeatedly expressed to the then U.N. Secretary General and to the Global Compact" the need for further efforts.[48] In response, in January 2004, Kofi Annan "wrote to the CEOs of 55 of the world's leading financing institutions inviting them to join in a [new] initiative," under the auspices of the Global Compact, titled "Who Cares Wins."[49] Out of this initiative came a report using the new term "ESG" and recommendations for different actors "on how to better integrate environmental, social and corporate governance issues in asset management, securities brokerage services and associated research functions."[50]

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[43] *Id.*

[44] Ruggie, *supra* note 23, at 310-13; *see also* UN Global Compact, Our Mission, https://www.unglobalcompact.org/what-is-gc/mission.

[45] Thérien & Pouliot, *supra* note 25, at 62-69.

[46] *Id.* at 67.

[47] Pargendler, *supra* note 13, at 1795-96.

[48] THE GLOBAL COMPACT, WHO CARES WINS: CONNECTING FINANCIAL MARKETS TO A CHANGING WORLD vii (2004) [hereinafter WHO CARES WINS] [listed as 2005 in some sources, e.g., https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/publications/publications_report_whocareswins__wci__1319579355342]. A list of then-recent initiatives by institutional investors on ESG issues in the report included: "climate change, corporate governance, issues relating to the pharmaceutical industry, the disclosure of payments to governments and the management of corruption and bribery cases." *Id.* at 21; *see also id.* (Exhibits 14-17).

[49] *Id.* at vii.

[50] *Id.* (executive summary). Around this time, the United Nations Environment Programme Finance Initiative (UNEP FI) Asset Management Working Group, a group of asset managers and pension funds led by Paul Clements-Hunt, Ken Maguire, and Yuki Yasui, had also been exploring "Social, Environmental and Governance issues in the context of capital market analysis." Paul Clements-Hunt, *The Evolution of ESG*, MEDIUM (Feb. 3, 2020), https://medium.com/artificial-heart/the-evolution-of-esg-4bd984657eb0; *see also* Elliot Wilson, *The United Nations Free-Thinkers Who Coined the Term 'ESG' and Changed the World*, EUROMONEY (Oct. 1, 2021), https://www.euromoney.com/article/294dqz2h1pqywgbyh3zls/esg/the-united-nations-free-thinkers-who-coined-the-term-esg-and-changed-the-world. In 2004, the Asset Management Working Group commissioned studies by brokerage house analysts on the materiality of ESG issues to equity pricing. *See* UNEP FI, THE MATERIALITY OF SOCIAL, ENVIRONMENTAL AND CORPORATE GOVERNANCE ISSUES TO EQUITY PRICING: 11 SECTOR STUDIES (2004), https://www.unepfi.org/publications/investment-publications/the-materiality-of-social-environmental-and-corporate-governance-issues-to-equity-pricing/. It found "agreement that environmental, social and

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

Of the fifty-five invited, eighteen financial institutions from nine countries with total assets under management of over 6 trillion US dollars participated at the outset in the joint initiative with the UN, and with financial sponsorship from the Swiss Government.[51] The endorsing financial institutions included some of the world's largest banks including Goldman Sachs, Morgan Stanley, UBS, Credit Suisse Group, Deutsche Bank, HSBC, Banco do Brasil, BNP Paribas, as well as insurance companies such as Aviva, and investment advisors such as Innovest.[52]

For the goals of "stronger and more resilient financial markets," "sustainable development," "improved trust in financial institutions," and "awareness of mutual understanding of involved stakeholders," the report from the first convening of the joint initiative argued, above all, for a "better inclusion of environmental, social and corporate governance (ESG) factors in investment decisions."[53] In the view of the initiative participants, such ESG integration will "ultimately support the implementation of the Global Compact principles throughout the business world"[54]—reflecting the mutually supportive collaboration by the financial industry and the UN that were at the heart of the initiative.

On the financial industry side of this equation, the report further noted that "investment markets have a clear self-interest in contributing to better management of environmental and social impacts in a way that contributes to the sustainable development of global society."[55] A section of the report labeled "investment rationale" noted that studies confirmed "the business case" for "good management of ESG issues contribut[ing] to shareholder value creation."[56] It explained that "[c]ompanies with better ESG performance can increase shareholder value by better managing risks related to emerging ESG issues, by anticipating regulatory changes or consumer trends, and by accessing new markets or reducing costs" and "hav[ing] a strong impact on reputation and brands."[57] Companies should not focus on single issues, but instead the "entire range of ESG issues relevant to their business."[58]

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corporate governance issues affect long-term shareholder value" and "[i]n some cases those effects may be profound." *Id.* at 4. A number of UNEP FI members also participated in the Who Cares Wins Initiative and, as discussed below, UNEP FI played an important role in helping to catalyze the spread of ESG at a critical early juncture.

51 WHO CARES WINS, *supra* note 48, at executive summary. Two additional organizations, Mitsui Sumitomo Insurance and China Minsheng Bank, later joined as endorsing institutions of the Who Cares Wins Initiative. CONFERENCE REPORT, INVESTING FOR LONG-TERM VALUE: INTEGRATING ENVIRONMENTAL, SOCIAL AND GOVERNANCE VALUE DRIVERS IN ASSET MANAGEMENT AND FINANCIAL RESEARCH (2005), https://www.ifc.org/wps/wcm/connect/9d9bb80d-625d-49d5-baad-8e46a0445b12/WhoCaresWins_2005ConferenceReport.pdf?MOD=AJPERES&CVID=jkD172p.

52 WHO CARES WINS, *supra* note 48 (endorsing institutions). Ivo Knoepfel has been credited as the author of the report. *See* Georg Kell, *The Remarkable Rise of ESG*, FORBES (July 11, 2018), https://www.forbes.com/sites/georgkell/2018/07/11/the-remarkable-rise-of-esg/?sh=1019d6f51695.

53 WHO CARES WINS, *supra* note 48, at 3.

54 *Id.* at vii.

55 *Id.*

56 *Id.* at 9.

57 *Id.*

58 *Id.*

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

> Throughout this report we have refrained from using terms such as sustainability, corporate citizenship, etc., in order to avoid misunderstandings deriving from different interpretations of these terms. We have preferred to spell out the environmental, social and governance issues which are the topic of this report.[59]

Correspondingly, the report includes a list of examples for each E, S, and G, such as climate change and related risks, human rights, and management of corruption and bribery issues. It also notes that "ESG issues relevant to investment decisions differ across regions and sections."[60] With the benefit of hindsight, contemporary readers might indeed note that certain issues are missing on the list of examples that have become a prominent focus of ESG efforts in some regions in recent years such as human capital management and board diversity.[61]

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

> Sound corporate governance and risk management systems are crucial pre-requisites to successfully implementing policies and measures to address environmental and social challenges. This is why we have chosen to use the term "environmental, social and governance issues" throughout this report, as a way of highlighting the fact that these three areas are closely interlinked.[62]

By way of example, the report noted that "better transparency and disclosure" and "linking executive compensation to longer-term drivers of shareholder value and improving accountability" can play a key role in implementing many recommendations.[63] It cited then-recent findings and recommendations released by the Conference Board Commission on Public Trust and Private Enterprise, laying out "best practice suggestions" on executive compensation, corporate governance, and audit and accounting issues, in the wake of 2001-2002 corporate scandals such as at Enron,

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[59] *Id.* at 1-2.
[60] *Id.* at 6.
[61] The report lists example issues such as "[w]orkplace health and safety", "human rights", and "board structure and accountability," but not human capital management and disclosure or board and workforce diversity. *See id.* at 6. For a discussion of human capital management, and the wide range of issues it encompasses beyond workplace health and safety, and its context in the ESG movement, see George S. Georgiev, *The Human Capital Management Movement in U.S. Corporate Law*, 95 TULANE L. REV. 639 (2021). For a discussion of various rules and initiatives on board diversity, and the ESG movement's inclusion of diversity, equity, and inclusiveness, see Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV. 1 (2022).
[62] WHO CARES WINS, *supra* note 48, at 2.
[63] *Id.*

WorldCom, and other companies.[64] With this framing, in the view of the initiative participants, G was not an anachronistic appendage or dissimilar concept, but rather a vital and connected set of issues and means of execution for relevant E and S issues.

Similarly, the report emphasized the possibility of mainstreaming the integration of ESG issues into "normal research and fund management functions."[65] It even provided a graphic illustrating "[o]ne (of many) possible organisational paths leading from mainstream [], to first generation screening []; to partial ESG integration in different asset classes []; to full ESG integration in research and portfolio management processes."[66] Notably, this language suggested an evolutionary process for investing practices toward more holistic analysis and presented a contrast to the Socially Responsible Investment (SRI) movement,[67] which had been around for decades and was based on ethical and moral criteria, using mostly negative screens.[68] Sprinkled throughout the report were quotes from executives of large companies, financial institutions, and asset managers emphasizing the theme of alignment of ESG issues with risk-adjusted financial performance and shareholder value,[69] and how consideration of these issues "should be part of every financial analyst's normal work."[70]

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

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

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64 *Id.* (citing CONFERENCE BOARD COMMISSION ON PUBLIC TRUST AND PRIVATE ENTERPRISE: FINDINGS AND RECOMMENDATIONS (2004)).
65 *Id.* at 38.
66 *Id.* at 39 (Figure 7).
67 Marina Welker & David Wood, *Shareholder Activism and Alienation*, 52 CURRENT ANTHROPOLOGY (2011), https://www.journals.uchicago.edu/doi/full/10.1086/656796 (tracing the history of the SRI movement).
68 *See, e.g.*, John H. Langbein & Richard A. Posner, *Social Investing and the Law of Trusts*, 79 MICH. L. REV. 72 (1980); Maria O'Brien Hylton, *Socially Responsible Investing: Doing Good Versus Doing Well In An Inefficient Market*, 42 AM. U. L. REV. 1 (1992); George Djurasovic, *The Regulation of Socially Responsible Mutual Funds*, 22 J. CORP. L. 257, 261-62 (1997); Benjamin J. Richardson, *Fiduciary Relationships for Socially Responsible Investing: A Multinational Perspective*, 48 AM. BUS. L.J. 597 (2011). For an exploration of the contrasts of SRI and ESG, see Blaine Townsend, *From SRI to ESG: The Origins of Socially Responsible and Sustainable Investing*, 1 J. IMPACT & ESG INVESTING 1 (2020); Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing By a Trustee*, 72 STAN. L. REV. 381 (2020).
69 *See* WHO CARES WINS, *supra* note 48, at 1, 3, 4, 9, 21.
70 *Id.* at 21, 27.

This language conceptually tied the report's framing of the term ESG to issues relevant to investment value, as articulated in "the investment rationale," but made clear that it was not constricting itself to traditional or narrow notions of materiality.[71]

The report concluded by stating the initiative participants' intentions for outreach to start a process "to further deepen, specify and implement the recommendations outlined in th[e] report."[72] This included plans to approach accounting standard-setting bodies (FASB, IASB, etc.), professional and self-regulatory organizations (AIMR, EFFAS, NYSE, NASDAQ, FAS, etc.), and investor relations associations (NIRI, DIRK, etc.).[73] Further, the participants planned to approach their own clients to assess their interest and needs for ESG-related research and investment services, and to engage platforms like the UNEP Finance Initiative, The Conference Board, and the World Economic Forum to start dialogue with investors, companies, regulators, stock exchanges, accountants, consultants, and NGOs.[74]

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

An acronym that might have been viewed as nothing more than a defined term in a technocratic report has instead seen a "meteoric rise."[75] The strategic framing of putting E, S, and G together was not inherently sticky; it was amplified through a number of UN initiatives and institutional support that helped to spread the term through the global investment community to investors and stakeholders around the world. While the term ESG was mentioned in fewer than 1% of earnings call in the years immediately following the *Who Cares Wins* report, by 2021 it was mentioned in nearly one-fifth of earnings calls and a survey found that 72% of institutional investors implemented ESG factors.[76]

One of the early boosts to using the ESG frame came immediately on the heels of the *Who Cares Wins* report. The United Nations Environment Programme Finance Initiative (UNEP FI) Asset Management Working Group, composed of thirteen asset managers and pension funds, commissioned the international law firm Freshfields Bruckhaus Deringer to produce a study analyzing whether integration of ESG issues into investment policy was voluntarily permitted, legally required, or hampered by law and

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[71] Subsequent discussions, particularly in Europe, have recognized the concept of "double materiality" to describe "how corporate information can be important both for its implications about a firm's financial value, and about a firm's impact on the world at large." *See* Henry Engler, *"Double Materiality": New Legal Concept Likely to Play in Debate Over SEC's Climate Plan*, THOMSON REUTERS (Apr. 12, 2022), https://www.thomsonreuters.com/en-us/posts/investigation-fraud-and-risk/sec-double-materiality-climate/.
[72] *See* WHO CARES WINS, *supra* note 48, at 40.
[73] *Id.*
[74] *Id.*
[75] *See* McKinsey Quarterly, *Five Ways that ESG Creates Value*, Nov. 14, 2019, https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/five-ways-that-esg-creates-value.
[76] Debbie Carlson, *Mentions of 'ESG' and Sustainability are Being Made on Thousands of Corporate Earnings Calls*, MARKETWATCH (July 19, 2021), https://www.marketwatch.com/story/mentions-of-esg-and-sustainability-are-being-made-on-thousands-of-corporate-earnings-calls-11626712848.

regulation.[77] The issue of fiduciary duty was a particularly thorny potential obstacle to spreading ESG. For years, many observers interpreted the law in jurisdictions around the world, including the United States, as requiring portfolio managers and other trustees to solely pursue profit maximization in investment practice and decision-making.[78] Under the "sole interest rule" of trust fiduciary law, a trustee must consider only the interest of the beneficiary, and consideration of the trustee's own sense of ethics or an attempt to obtain collateral benefits for third parties could be seen as a violation of the duty of loyalty.[79] The integration of ESG issues into investments by portfolio managers and other trustees was thus "vastly ambiguous and often resisted based on a belief that taking account of such issues was legally prevented."[80]

The Freshfields report concluded that "the links between ESG factors and financial performance are increasingly being recognised" and so "integrating ESG considerations in an investment analysis… is clearly permissible and is arguably *required* in all jurisdictions."[81] The report came to be regarded as "[t]he single most effective document for promoting the integration of environmental, social, governance (ESG) issues into institutional investment."[82] It did not end all debate about fiduciary duties,[83] but, crucially, it provided institutional investors with a go-to resource to cite for legal analysis from a highly-respected global firm that supported taking action on ESG integration consistent with their fiduciary duties.

The following year, the UNEP FI and the UN Global Compact launched the Principles for Responsible Investment (PRI)—again, a group of leading institutions jointly engaged with the UN to push forward the larger project of understanding the investment implications of ESG.[84] Under the PRI, institutional investor signatories can voluntarily commit to supporting and implementing six core principles that channel their power toward promoting the disclosure of ESG issues by portfolio companies and the

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[77] UNEP Finance Initiative, *A Legal Framework for the Integration of Environmental, Social and Governance Issues Into Institutional Investment* (foreward-p.1), Oct. 2005, https://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf. UNEP FI

[78] Fiduciary 21, Fiduciary Duty In the 21st Century, https://www.fiduciaryduty21.org/about.html; Schanzenbach & Sitkoff, *supra* note 68, at 381.

[79] Schanzenbach & Sitkoff, *supra* note 68, at 381.

[80] Fiduciary 21, *supra* note 78.

[81] *Id.* at 13 (emphasis added).

[82] UN ENV'T PROGRAMME FIN. INITIATIVE, FIDUCIARY RESPONSIBILITY: LEGAL AND PRACTICAL ASPECTS OF INTEGRATING ENVIRONMENTAL, SOCIAL AND GOVERNANCE ISSUES INTO INSTITUTIONAL INVESTMENT 13 (2009); *see also* Joakim Sandberg, *Socially Responsible Investment and Fiduciary Duty: Putting the Freshfields Report into Perspective*, 101 J. BUS. ETHICS 143, 144 (2011) (describing the influence of the Freshfields report).

[83] Schanzenbach & Sitkoff, *supra* note 68, at 385-92 (distinguishing between ESG pursued for a direct benefit of risk-adjusted return versus for collateral benefits to third parties or for moral and ethical reasons, and discussing continued "confusion" and disagreement about fiduciary duties and ESG investing).

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

integration of ESG issues in investment analysis, ownership policies, and within the investment industry itself.[85]

By this time, efforts at standard setting for "impact" or "sustainability" reporting started to evolve as well. The Global Reporting Initiative (GRI), which had launched its guidelines in 2000, the same year as the UN Global Compact, had initially focused on environmental conduct principles following public outcry over the Exxon Valdez oil spill.[86] By the mid-2000s, "demand for GRI reporting and uptake from organizations steadily grew," and the guidelines were expanded and GRI opened up offices around the world.[87] Most critically, it broadened its focus from environmental conduct principles to ESG issues, and eventually transitioned from providing guidelines to global standards for reporting.[88]

The *Who Cares Wins* initiative, which originally coined the term ESG, also continued its efforts through 2008 in "a series of closed-door/invitation-only events for investment professionals, providing a platform for asset managers and investment researchers to engage with institutional asset owners, companies and other private and public actors on ESG issues."[89] Each event in the series looked in-depth at "a particular element of ESG mainstreaming," from the interface between investors and companies to the role of ESG in emerging markets investment.[90] A much larger universe of institutions had participated in initiative events by this time—from new bank participants such as Citigroup to companies like Nestlé and Royal Dutch Shell, and a wide array of non-profit organizations.[91]

The initiative culminated in a final report that identified impediments to wider uptake of ESG by the financial industry and offered a set of recommendations for each of the key market actors in the system.[92] It noted that "progress has not been uniform": "corporate governance is the concept that most easily captures mainstream minds" and

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[85] PRI, What Are the Principles for Responsible Investment?, https://www.unpri.org/about-us/what-are-the-principles-for-responsible-investment; *see also* Virginia E. Harper Ho, *'Enlightened Shareholder Value': Corporate Governance Beyond the Shareholder-Stakeholder Divide*, 36 J. CORP. L. 59, 81-82 (2010) (discussing the primary goals of the PRI and the six principles). These efforts expanded in subsequent years. For example, the PRI and UNEP FI launched a joint initiative that led to a 2019 report declaring that fiduciary duties requires investors to incorporate ESG issues into investment analysis and decisions, and a Global Statement on Investor Obligations and Duties with over one hundred signatories from fifty countries. UN ENV'T PROGRAMME FIN. INITIATIVE & PRINCIPLES FOR RESPONSIBLE INV., FIDUCIARY DUTY IN THE 21ST CENTURY: FINAL REPORT 8, 52 (2019).
[86] GRI, Mission & History, https://www.globalreporting.org/about-gri/mission-history/.
[87] *Id.*
[88] *Id.*
[89] Int'l Fin. Corp., Who Cares Wins, 2004-2008: Issue Brief at 2 [hereinafter IFC Issue Brief].
[90] THE GLOBAL COMPACT, OUTCOMES OF THE WHO CARES WINS INITIATIVE 2004-2008: FUTURE PROOF? EMBEDDING ENVIRONMENTAL, SOCIAL AND GOVERNANCE ISSUES IN INVESTMENT MARKETS (2008) [hereinafter WCW FUTURE PROOF?], https://documents1.worldbank.org/curated/en/476811468158704493/pdf/476600WP0Futur10Box338858B01PUBLIC1.pdf.
[91] *Id.* at 43-44. The global financial crisis was underway in 2008, at the conclusion of the Who Cares Wins initiative, and participants viewed it as having "reinforced the necessity for the financial industry to more diligently manage their risks, including those related to [ESG] issues." *Id.* at 3.
[92] IFC Issue Brief, *supra* note 89, at 2.

the understanding and integration of financially-material environmental issues had also "advanced greatly."[93] The quality and amount of coverage of social/stakeholder issues, employee relations and human capital, and business ethics had lagged.[94] It was "understandable that change has sometimes been slow" because ESG "is about doing traditional investments better" and so it is "necessarily long term and adds value at the margin."[95] With "the learning phase [] drawing to a close" and "a springboard for scaling up ESG integration" in place, however, it ultimately observed that the majority of industry professionals that had participated in the initiative "believe that the investment system is well on track for ESG issues becoming mainstream."[96] Indeed, in less than a decade the groundwork had been set for the term ESG to reach ubiquity in subsequent years.

Notably, to arrive at this point, a fragile alliance had to come together under a big tent to create and focus attention on the new term of ESG. Although not explicitly spelled out in reports, the history reflects a wide array of interests being negotiated through this time, starting with the vision of some true believers in environmental and social progress who catalyzed the international investment community and financial industry to become a driving force for uptake.[97] The E in ESG held out promise for making progress on environmental issues for financial institutions and institutional investors, particularly in Europe, that had been working on climate initiatives and engagement on "sustainability" dating back to the 1980s and the UN-commissioned Brundtland Report. Incorporating S into ESG was particularly important for labor-affiliated pension funds, and reflected various principles that the UN had championed through its work on the Global Compact and earlier efforts focused on developing economies. The G was already widely embraced by mainstream players and conventional notions of law and finance,[98] and thereby provided legitimacy or cover for attempts at making progress on environmental and social issues.[99]

Coining ESG and framing it as a new concept for mainstream investing practices gave it the potential for success beyond that achieved by earlier efforts under the guise of "ethical investing" or SRI, which had largely used negative screening of "bad" firms and could be "depicted as rabidly ideological,"[100] or CSR that had often taken the limited form

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93 WCW FUTURE PROOF?, *supra* note 90, at 16.
94 *See id.* at 24 (charting significantly different amounts and quality of coverage of ESG issues, with GHG emissions and other environmental issues and risks far ahead of social/stakeholder issues, employee relations and human capital, and business ethics).
95 *Id.* at 17.
96 *Id.* at 16.
97 *See, e.g.*, Wilson, *supra* note 50 (describing how key thinkers at the United Nations who believed in the importance of sustainability and environmental and social issues strategized on how to engage asset and pension fund managers and "build a bridge between . . . freewheeling capital markets, and . . . the corset-tight area of multilaterals, with its love of hierarchy and procedure").
98 *See, e.g.*, Lund & Pollman, *supra* note 13, at 2575-78 (describing "the reign of shareholder primacy and good governance"); Mariana Pargendler, *The Corporate Governance Obsession*, 42 J. CORP. L. 359 (2016) (arguing that corporate governance is "politically palatable" as "a midway solution between markets and government" that "appeals to progressives as a path for social and economic change in the face of political resistance to state intervention, while pleasing conservative forces as an acceptable concession to deflect greater governmental intrusion in private affairs").
99 *See* Clements-Hunt, *supra* note 50 (noting that governance "dominate[d] the business world" and was "familiar" to the business and investment community).
100 Wilson, *supra* note 50.

of corporate philanthropy. However, navigating these varied interests and packaging ESG for the mainstream also involved a compromise or shift in approach for the previous generation of advocates — ESG was crafted in the language of conventional finance as aligning with long-term risk adjusted value, envisioning that at some point values and value would converge, but without fully working out the details at the time.

Later accounts from key participants described a purposeful attempt to "shift the conversation away from personal ethics and toward material issues" that could engage asset and pension fund managers, and capital market players generally, in language that the investment and financial industry understood.[101] The very ordering of the letters E, S, and G reflects this strategic positioning and fragile alliance – one account noted: "S was the real problem, the outlier the investment chain felt most uncomfortable with and, possibly, with a whiff of socialism about it [that] could open the Pandora's box of labour rights and even human rights issues."[102] The solution was to "stick S in the middle" to "protect it" from "lobbyists uncomfortable with anything which challenged the Milton Friedman doctrine" and then "weld environment upfront and live with G at the end."[103] Even with this solution, in the early years after the term ESG was coined, cultural clashes between "more capitalist Anglo-Saxon investors" and European fund managers emerged and had to be navigated to launch initiatives such as the Principles for Responsible Investment.[104]

These varied efforts and strategies eventually paid off in terms of mainstreaming ESG. After significant groundwork laid by a wide array of actors, the "Big Three" asset managers – BlackRock, Vanguard, and State Street – started to speak in the language of ESG and offer ESG funds. By 2017, Larry Fink, the chairperson and CEO of BlackRock, the world's largest asset manager, said in his annual letter to CEOs that BlackRock looks to ESG factors for "essential insights into management effectiveness and thus a company's long-term prospects."[105] In subsequent years, he emphasized the importance of ESG and tied the term to other buzzwords such as "sustainability," "corporate purpose," and "stakeholders," while conveying the notion that "purposeful companies, with better environmental, social, and governance (ESG) profiles, have outperformed their peers," and "broad-market ESG indexes are outperforming their counterparts."[106]

Furthermore, the Big Three have not only spoken the language of ESG in their public outreach, but also in their direct engagement with portfolio companies and crafting of voting policies on topics spanning ESG disclosure, carbon emissions, and board

[101] *Id.*
[102] Clements-Hunt, *supra* note 50.
[103] *Id.*; *see also* Michael Baxter, *Can Judges Save the World? The Troubled History of ESG and the Fiduciary Duty*, GRC WORLD FORUMS (Apr. 19, 2022), https://www.grcworldforums.com/can-judges-save-the-world-the-troubled-history-of-esg-and-the-fiduciary-duty/4930.article (quoting Paul Clements-Hunt that "'S' was put in the middle to 'stop it from falling off the side'").
[104] Wilson, *supra* note 50.
[105] BlackRock, Larry Fink's 2017 Letter to CEOs, https://www.blackrock.com/corporate/investor-relations/2017-larry-fink-ceo-letter.
[106] BlackRock, Larry Fink's 2021 Letter to CEOs, https://www.blackrock.com/corporate/investor-relations/2021-larry-fink-ceo-letter.

diversity.[107] Scholars and commentators have expressed concern over the rising power held in the hands of these large asset managers, and have explained their advocacy on ESG issues with theories ranging from client demand to marketing to millennials.[108] Regardless of motivation, ESG notably exploded in popular usage as the world's largest asset managers tied significant portions of their own business models to the label and adopted voting policies related to ESG disclosures and issues.[109] Corporate governance battles such as shareholder proposals on environmental and social policy, and ESG-related shareholder activism, also sharply rose in recent years.[110] As ESG-related investing has soared into the trillions of dollars, the emergence of niche investment funds touting contrarian "anti-ESG" strategies reflects a sign of the new times and just how mainstream the term has become over the past two decades.[111]

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[107] Dorothy S. Lund, *Asset Managers as Regulators*, USC Law Legal Studies Paper No. 22-12 (June 21, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3975847 (forthcoming U. PA. L. REV.).

[108] *See, e.g.,* John C. Coates, IV, *The Future of Corporate Governance Part I: The Problem of Twelve*, 1, 5–6 (Harv. Pub. L. Working Paper No. 19-07, Sept. 20, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3247337 (raising concern about the concentration of power in the hands of a small number of large asset managers that lack democratic legitimacy and electoral accountability); Zohar Goshen & Doron Levit, *Common Ownership and the Decline of the American Worker*, Columbia Law & Econ. Working Paper No. 653, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3832069 (forthcoming DUKE L.J.) (arguing that the concentration of ownership in large institutional investors exacerbates income inequality by shifting wealth from labor to capital); Lund, *supra* note 107 (arguing that large asset managers have acted as "private regulators" by establishing standards and mandates on various ESG issues in response to client demand); Jeff Schwartz, *Public Mutual Funds*, *in* CAMBRIDGE HANDBOOK ON INVESTOR PROTECTION, Arthur Laby ed., forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3821388 (arguing that large asset managers engage in stewardship "just enough to ward off public opprobrium and potential regulation"); Michal Barzuza, Quinn Curtis & David Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 So. Cal. L. Rev. 1243 (2020) (describing ESG activism by the Big Three and arguing that "index funds are locked in a fierce contest to win the … assets of the millennial generation, who place a significant premium on social issues in their economic lives").

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

[110] *See, e.g.*, The Conference Board, 2022 Proxy Season Preview and Shareholder Voting Trends: Environmental & Social Proposals in General, https://www.conference-board.org/publications/pdf/index.cfm?brandingURL=environmental-and-social-proposals-in-general-brief-1; Kai H.E. Liekefett et al., *Shareholder Activism and ESG: What Comes Next, and How to Prepare*, HARV. L. SCH. FORUM ON CORP. GOV. (May 29, 2021), https://corpgov.law.harvard.edu/2021/05/29/shareholder-activism-and-esg-what-comes-next-and-how-to-prepare/.

[111] *See, e.g.*, Saijel Kishan & Bloomberg, *'It's a Whirligig': ESG Pioneer Expects Shakeout for Funds Hyped by 'Fairy Dust'*, FORTUNE (Mar. 20, 2022), https://fortune.com/2022/03/20/whirligig-esg-pioneer-expects-shakeout-for-funds-hyped-by-fairy-dust-russia-paul-clements-hunt-hairobi-blended-capital-group/ (noting "ESG has ballooned into an industry embraced by the giants of Wall Street and Europe's financial hubs" and as a "global market adds up to about $40 trillion of assets"); Jeff Benjamin, *Anti-woke Strategies Emerge as Flip Side of ESG*, INVESTMENTNEWS (Dec. 22, 2021), https://www.investmentnews.com/anti-woke-strategies-emerge-as-flipside-of-esg-215345 (discussing the launch of the "BAD ETF" offering exposure to the gambling, alcohol and pharmaceutical industries in response to the "proliferation of ESG funds flooding the market, despite a general lack of clarity"); Liam Denning, *The Tricky Politics of Anti-ESG Investing*, WASH. POST (May 19, 2022), https://www.washingtonpost.com/business/energy/the-tricky-politics-of-anti-esg-investing/2022/05/19/a3100d84-d763-11ec-be17-286164974c54_story.html (discussing the launch of Strive Asset Management with an "anti-ESG thesis").

II. THE EVOLVING AND VARIED USAGES OF ESG

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

This Part examines several common ways in which the term ESG has been given meaning to date, starting from the primary sense in which the term ESG was used, as factors for integrating in investment analysis, and exploring evolving usage such as ESG as a means of risk management, as a synonym for CSR or sustainability, or as a preference or activity. Additional variations and usages are undoubtedly possible and consensus on the meaning of ESG does not currently exist.[112] Scholars have previously observed that ESG lacks a "common theorization"— an agreement or shared beliefs establishing a common discourse on a term or concept.[113] Without such a common theorization, convergence on things such as ESG ratings is less likely.[114] A host of other implications arise from the strategic choice to combine E, S, and G in one term, and from the varying usages that have developed, which this Article takes up in subsequent discussion.

A. ESG as Factors for Investment Analysis

The *Who Cares Wins* report did not provide a singular definition of ESG beyond the acronym—but it repeatedly referred to being "a joint effort of financial institutions" to "develop guidelines and recommendations on how to better integrate environmental, social and governance issues in asset management, securities brokerage services and associated research functions."[115] Indeed, this language featured as a subtitle on the cover of the report.[116] As noted above, the report also listed example issues that fall under each

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

[113] *See* Aaron K. Chatterji, Rodolphe Durand, David I. Levine & Samuel Touboul, *Do Ratings of Firms Converge? Implications for Managers, Investors and Strategy Researchers*, 37 *Strat. Mgmt. J.* 1597 (2016); Robert G. Eccles & Judith C. Stroehle, *Exploring Social Origins in the Construction of ESG Measures* (July 12, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3212685.

[114] Eccles & Stroehle, *supra* note 113, at 8. Whether different raters measure the same construct in a similar way—what is known as "commensurability"—would also contribute to a greater likelihood of convergence on ratings. *See id.*

[115] WHO CARES WINS, *supra* note 48, at vii.

[116] *Id.* (cover), i.

E, S, and G, and focused on "issues which have or could have a material impact on investment value," while noting that it took a broad view of materiality and saw the G as interlinked with the E and S.[117] Although the report sometimes referred to broader goals such as "contribut[ing] to the sustainable development of global society," invoking language in the spirit of the UN Global Compact, it heavily emphasized the "business case" justification and alignment with long-term value for shareholders.[118] On the whole, the picture that emerges from the report is that ESG refers to "information," "issues," "factors," or "criteria" that should be integrated into "normal" and "mainstream" investment analysis.[119] The report did not explain in any detail how such integration should be done.

The term ESG has been, and is, often still used in this vein as a way of referring to a set of issues that should be integrated into investment analysis.[120] As a tool, ESG is often broken into component parts of E, S, and G, and explained by reference to underlying content that would be relevant to investor decision-making. In this framing, ESG is not synonymous with ethical investing, but rather viewed as integral to mainstream investment strategy.[121]

To take S as an example, as one scholar explained, "In the context of responsible investment, the S is meant to better evaluate how well positioned a company is for the long term, the reputational value it or its products gain from goodwill, the stability and long-term efficiency of its workforce, potential costs of labour conflicts, the political risk of conflicts with communities, the legal and reputational risks that it runs from potential problems with its supply chain employment practices or community protests, and so on."[122] Notably, there are a variety of ways in which the idea of stakeholders, social issues, and society may enter into ESG investment practice. Social information, for instance, might be integrated into valuation, into investment mandates such as exclusionary screens, or into standards of practice or principles that corporations are meant to adopt or against which their behavior will be measured.[123] A variety of frameworks for evaluating

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[117] *Id.* at 2, 6.
[118] *See id.* at 3, 9-10.
[119] *See id.* passim.
[120] *See, e.g.,* Ron Lieber, *The Rush to E.S.G., With or Without Elon Musk*, N.Y. TIMES (June 18, 2022), https://www.nytimes.com/2022/06/18/your-money/esg-investing-stocks-elon-musk.html (quoting Domini Impact Investments' founder defining ESG as "a more robust set of material data points from which an investment adviser can make a decision").
[121] *See* Kishan & Bloomberg, *supra* note 111 (describing view that "ESG is often wrongly conflated with ethical investing" and instead "the strategy involves measuring investment risks tied to issues such as climate change, human-rights violations in supply chains and poor corporate governance" and "by addressing those challenges, there are opportunities to make money"); Stuart Kirk, *ESG Must Be Split In Two*, FIN. TIMES (Sept. 2, 2022), https://www.ft.com/content/4d5ab95e-177e-42d6-a52f-572cdbc2eff2 (explaining that "portfolio managers, analysts and data companies have understood ESG investing for years" as "taking [ESG] issues into account when trying to assess the potential for risk-adjusted returns of an asset" and this is "very different" from "'ethical' or 'green' or 'sustainable' assets").
[122] David Wood, *What Do We Mean by the S in ESG? Society as a Stakeholder in Responsible Investment* 553, *in* THE ROUTLEDGE HANDBOOK OF RESPONSIBLE INVESTMENT (Tessa Hebb, James P. Hawley, Andreas G. F. Hoepner, Agnes L. Neher, David Wood eds., 2015).
[123] *Id.* at 556-59.

and engaging corporations on social issues have developed, closely linked to ESG as a tool for investment or vehicle for investor-corporate dialogue.[124]

B. ESG as Risk Management

The broad scope of potential issues that could come under the words "environmental, social and governance," the wide-ranging and potentially diverging incentives of the UN and the financial industry, and the lack of specificity in definition by the *Who Cares Wins* initiative, opened up the possibility of the term ESG taking on a variety of meanings. By 2008, the year in which the initiative concluded, a survey of over 300 fund managers, of whom only 23% self-identified as "socially responsible investors," found that over 70% viewed ESG as a tool to identify investment opportunities as well as to manage risk.[125]

For many mainstream investors and asset managers, the key justification for incorporating ESG factors into investment analysis relates to their potential impact on portfolio-level risk-adjusted returns and the relationship between ESG factors and risk management at the company level.[126] Although not unqualified, a large body of research has found correlations between corporate financial and ESG performance, and some evidence of financial materiality of ESG factors to portfolio risk-adjusted returns.[127]

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[124] *Id.* at 560.

[125] Harper Ho, *supra* note 85, at 88 (citing Danyelle Guyett, *ESG Ratings of Fund Managers—a Step Closer Towards the Mainstreaming of ESG Integration*, MERCER (July 4, 2008)).

[126] Virginia Harper Ho, *Sustainable Investment & Asset Management: From Resistance to Retooling* (Mar. 23, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4064317; *see also* Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk*, 41 J. CORP. L. 647, 647 (2016) (discussing "the exercise of shareholder power to promote firm management, mitigation, and disclosure of risk, including nonfinancial environmental, social, and governance (ESG) risks"). On ESG and systematic risk, see John C. Coffee, *The Future of Disclosure: ESG, Common Ownership, and Systematic Risk* (Eur. Corp. Governance Inst., Working Paper No. 541, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3678197; Jeffrey N. Gordon, *Systemic Stewardship*, J. CORP. L. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782814.

[127] *See* SERAFEIM, *supra* note 15, at 50-51 (describing study of 2,300 hundred companies that were improving performance on material ESG issues and finding they outperformed their competitors by more than 3% annually); Ulrich Atz, Zongyuan (Zoe) Liu, Christopher C. Bruno & Tracy Van Holt, *Does Sustainability Generate Better Financial Performance? Review, Meta-analysis, and Propositions*, 8-9, 20-22 (2021), https://ssrn.com/abstract=3708495 (surveying 1,141 primary peer-reviewed papers and 27 meta-reviews published between 2015 and 2020 and finding evidence of a positive association between sustainability and financial performance at the firm level and risk-mitigating effects at the portfolio level); Gunnar Friede et al., *ESG and Financial Performance: Aggregated Evidence From More Than 2,000 Empirical Studies*, 5 J. SUSTAINABLE FIN. & INV. 210, 220-21, 225-26 (2015) (aggregating nearly 2,200 studies and concluding that the majority found positive correlations between corporate financial and ESG performance but portfolio-level studies had more mixed results); Tensie Whelan, Ulrich Atz, Tracy Van Holt & Casey Clark, *ESG and Financial Performance: Uncovering the Relationship by Aggregating Evidence from 1,000 Plus Studies Between 2015-2020*, NYU Stern Center for Sustainable Business Working Paper (Feb. 2021), https://www.stern.nyu.edu/experience-stern/about/departments-centers-initiatives/centers-of-research/center-sustainable-business/research/research-initiatives/esg-and-financial-performance (examining the relationship between ESG and financial performance in more than 1,000 research papers from 2015-2020 and finding a positive relationship for 58% of the "corporate" studies focused on operational metrics and 33% positive performance for investment studies typically focused on risk-adjusted attributes); *cf.* Jan-Carl Plagge & Douglas M. Grim, *Have Investors Paid a Performance Price? Examining the Behavior of ESG Equity Funds*, 46 J. PORTFOLIO MGMT. 123 (Feb. 2020) (finding that "return and risk differences of ESG funds can be

Based on interviews and roundtable discussions with over three hundred participants, including the largest asset managers, investment banks, pension funds, proxy advisors, hedge funds, leading investors and sustainability advocates, Stavros Gadinis and Amelia Miazad found that "companies are using ESG on the ground" to help "identify and manage social risks to their business."[128] According to their findings, "ESG has evolved into a separate corporate function, whose mission is to monitor and manage the risks facing the company due to environmental and social impact."[129]

Unlike internal controls and accounting which operate under an externally-driven, rules-based framework, "ESG represents an attempt by companies to self-regulate their conduct."[130] Thus, in this understanding of ESG, "[t]he values that ESG promotes do not originate from an abstract moralistic philosophy of 'doing the right thing,' nor are they dictated by a central standard setter . . . [r]ather, they arise following a wide-ranging consultation with stakeholders, who are better positioned to take notice of potentially catastrophic company operations."[131] In an era in which bad public relations or corporate scandals could have devastating effects on a company's operations and brand value, engaging stakeholders such as consumers and employees through "ESG practices" can provide useful information to manage key relationships and mitigate risk.[132] Instead of simply being a tool for evaluating a broader set of investment factors, ESG has taken on meaning as a set of practices for proactive risk management, whether at the firm or portfolio level.

C. ESG as Corporate Social Responsibility or Sustainability

A different interpretation or meaning ascribed to ESG in contemporary parlance is a belief that it represents "a step towards a better world" that is tied to beneficial long-term social outcomes.[133] In short, ESG gets equated, or conceptually combined, with CSR. A variation of this equates ESG with a different term—sustainability.

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significant but appear to be mainly driven by fund-specific criteria rather than by a homogeneous ESG factor"); Schanzenbach & Sitkoff, *supra* note 68, at 454 (noting "there is theory and evidence in support of risk-return ESG" but "this support is far from uniform, is often contextual, and in all events is subject to change, especially as markets adjust to the growing use of ESG factors").

128 Gadinis & Miazad, *supra* note 112, at 1410.

129 *Id.* at 1415.

130 *Id.*

131 *Id.* at 1426; *see also* Wood, *supra* note 122, at 562 (explaining that ESG, and particularly S, plays a role as "a lens with which to view corporate value, by identifying places where corporations or investments improve their financial performance through more effective management of human relations with employees, communities, or other stakeholders").

132 *See* Gadinis & Miazad, *supra* note 112, at 1432-35; *see also* Gillian Tett, *ESG Exposed in a World of Changing Priorities*, FIN. TIMES (June 2, 2022), https://www.ft.com/content/6356cc05-93a5-4f56-9d18-85218bc8bb0c ("[T]he concept of ESG has moved from being a narrow area of activism – driven by people who want to change the world – to a sphere of risk management for corporate boards – where it is shaped by the knowledge that companies that ignore ESG issues can face reputational damage and the loss of customers, investors and employees."). For an argument against director oversight liability extending to ESG, see Stephen M. Bainbridge, *Don't Compound the Caremark Mistake by Extending it to ESG Oversight*, UCLA School of Law, Law-Econ Res. Paper No. 21-10 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3899528.

133 Wood, *supra* note 122, at 553.

For some, this usage may stem from a nuanced understanding or belief that broad social benefits may flow from using ESG as a tool for enhanced investment analysis. The preamble to the Principles for Responsible Investment itself draws this link, declaring, "We also recognize that applying these Principles may better align investors with broader objectives of society."[134] The original *Who Cares Wins* report also included language about broader social benefits—reflecting the UN's goals in the initiative and the values it aimed to serve through the Global Compact.[135] Thus, some usage of ESG reflects an understanding or belief that using it as a tool for enhanced investment analysis might create social benefits that non-ESG-related investing might not provide.[136] Although the use of ESG information in investment decision-making is not the same as pursuing broad social benefits, some view the two as inextricably linked and so language around ESG takes on the flavor of CSR discourse.

For example, Robert Eccles and co-author Judith Stroehle noted: "The terms 'sustainability', 'corporate social responsibility' (CSR) or environmental, social and governance' (ESG) have been used synonymously in the past, describing a firm's voluntary actions to manage environmental and social impact as well as positive contributions to society. [W]e believe that an organization's understanding of the former two can influence the latter."[137] In a similar vein, Lynn LoPucki suggested the following connection: "CSR is the abstract idea that corporations have a moral responsibility to voluntarily integrate environmental, social, and governance ('ESG') improvements into their business operations for the benefit of shareholders, other stakeholders, society as a whole, and the environment."[138] Stated differently, "CSR is adherence to the actual values of corporate stakeholders, and ESG is a set of measurements from which conclusions about CSR can be drawn."[139]

For others, they may simply think that ESG is a new synonym for CSR.[140] Some may have inferred this understanding from notions that the types of environmental and social issues that are often discussed under the term ESG are the same or similar as those of previous eras that were labeled CSR. For example, one scholar described ESG "as a subcategory of CSR and uses a metrics-driven format to measure a company's

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134 PRI, What Are the Principles for Responsible Investment?, https://www.unpri.org/about-us/what-are-the-principles-for-responsible-investment#:~:text=Signatories'%20commitment&text=We%20also%20recognise%20that%20applying,with%20broader%20objectives%20of%20society.

135 *See* WHO CARES WINS, *supra* note 48, at vii.

136 Wood, *supra* note 122, at 553.

137 Robert G. Eccles & Judith C. Stroehle, *Exploring Social Origins in the Construction of ESG Measures* (July 12, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3212685.

138 Lynn M. LoPucki, *Repurposing the Corporation Through Stakeholder Markets*, 55 UC DAVIS L. REV. 1445, 1447 (2021).

139 *Id.* at 1448. A common variation is to combine ESG and CSR, perhaps to straddle the various meanings and connotations. *See generally, e.g.*, Mark J. Roe, *Corporate Purpose and Corporate Competition*, 99 WASH U. L. REV. 223 (2021) (referring throughout to "CSR/ESG" and "ESG/CSR").

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

commitment to social responsibilities."[141] Others have observed, "the ESG movement sounds like older corporate social responsibility (CSR) movement—but with a new name."[142]

In this understanding of ESG as a synonym for CSR, it encompasses notions of moralistic or ethical value. It is a "normative (values-based) argument" to "inject social consciousness into both corporate and individual investment decisions."[143] Participants in the system that had been focused on values-driven activity imbued the term ESG with their views and in turn helped shape others' understanding of the values being promoted by ESG-related activity. For example, researchers have traced how the different "origins, philosophies, and 'purposes' of ESG" shaped the methods and data characteristics of two important ESG data vendors.[144] Whereas Innovest developed a financial value-oriented methodology, KLD by contrast took a values-driven approach.[145]

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

D. ESG as Ideological Preference

Finally, another characterization of ESG is that it represents "a preference or taste among some companies or investors."[146] In this common conceptualization, ESG is a means of "expressing a preference"[147]—like "voting" with one's money as a consumer or investor.[148]

141 Thomas Lee Hazen, *Social Issues in the Spotlight: The Increasing Need to Improve Publicly-Held Companies' CSR and ESG Disclosures*, 23 U. PA. J. BUS. L. 740, 745-46 (2021).
142 Nives Dolšak, Jennifer J. Griffin & Aseem Prakash, *Is ESG Simply the Old CSR Wine in a New Bottle?*, REG. REV. (Mar. 28, 2022), https://www.theregreview.org/2022/03/28/dolsak-griffin-prakash-is-esg-old-csr-wine-in-new-bottle/.
143 Larcker et al., *supra* note 11, at 2.
144 Robert G. Eccles, Linda-Eling Lee & Judith C. Stroehle, *The Social Origins of ESG? An Analysis of Innovest and KLD* (Aug. 20, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3318225.
145 *Id.*
146 Serafeim, *supra* note 1, at 14.
147 *See id.*
148 *See* Kell, *supra* note 52; *see also* Quinn Curtis, Jill Fisch & Adriana Z. Robertson, *Do ESG Mutual Funds Deliver on Their Promises?*, 120 MICH. L. REV. 393, 402 (2021) ("For some years, investing on the basis of ESG considerations was thought to be a preference predicated on ethical, political, religious, or other objectives rather than an investment strategy grounded in financial risk and return."); Schanzenbach & Sitkoff, *supra* note 68 (differentiating between ESG investing for moral or ethical reasons, which they call "collateral benefits ESG", and ESG investing for risk and return benefits, which they call "risk-return ESG").

As Georg Kell explained, "The rise of ESG investing can also be understood as a proxy for how markets and societies are changing and how concepts of valuation are adapting to these changes."[149] Corporations are challenged to adapt to changing consumer and investor preferences that "favor[] smarter, cleaner and healthier products and services," and "to leave behind the dogmas of the industrial era when pollution was free, labor was just a cost factor and scale and scope was the dominant strategy."[150]

In this spirit, investors and a wide range of stakeholders seek to align their activities with an expression of their values, whether political, ethical, or social, and ESG is a label vaguely signifying some level of attention to issues beyond the purely financial.[151] It is in this sense that one might hear that a company "is" or "is not" "very ESG" or that is possible to "do ESG."[152] And this usage contributes to some seeing ESG as "a virtue signal"[153] or even equating ESG with an ideological preference for "woke capitalism."[154]

In turn, this understanding of ESG as a preference has catalyzed a "backlash" as it is not seen as a neutral concept or activity but rather one that is value-laden and ideologically or politically tilted.[155] Former Vice President Mike Pence, for example,

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[149] Kell, *supra* note 52.

[150] *See id.* For an argument that "index funds have engaged in a pattern of competitive escalation in their policies on [ESG] issues" in response to preferences of millennials as investors, customers, and employees, see 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 (2020).

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

[152] *See supra* notes 8 & 9; *see also* Matt Levine, *Everyone Wants to Do ESG Now*, BLOOMBERG (Mar. 21, 2022), https://www.bloomberg.com/opinion/articles/2022-03-21/everyone-wants-to-do-esg-now.

[153] *See* Dolšak et al., *supra* note 142; *see also* Gadinis & Miazad, *supra* note 112, at 1415 (observing the "definitional ambiguousness [of ESG] has given rise to a common misperception of ESG as a random and ever-sprawling assortment of objectives, influenced by fads and trends rather than hard business logic.").

[154] *See* Andrew Ross Sorkin et al., Larry Fink Defends Stakeholder Capitalism, N.Y. Times (Jan. 18, 2022), https://www.nytimes.com/2022/01/18/business/dealbook/fink-blackrock-woke.html (discussing BlackRock CEO Larry Fink's rebuttal to claims that ESG is "bowing to anti-business interests" and that "stakeholder capitalism" is "woke"); Kenneth Rapoza, *How The 'Woke' Capitalists Can Save America*, FORBES (Apr. 5, 2020), https://www.forbes.com/sites/kenrapoza/2020/04/05/how-the-woke-capitalists-can-save-america/?sh=3ee8507271ed (noting that international investment fund managers and the World Economic Forum have made ESG "a talking point for a good 10 years now, largely in response to the old lefty, anti-neoliberal World Social Forum" and "[t]hey all talk about diversity, equality, justice"); Paul Polman, *Critics of 'Woke' Capitalism Are Wrong*, FIN. TIMES (Jan. 24, 2022), https://www.ft.com/content/34cf61c7-345d-4277-bf18-c1dbdd8a91fc (discussing "woke capitalism").

[155] *See* Trillions, *The ESG Backlash*, BLOOMBERG (May 11, 2022), https://www.bloomberg.com/news/audio/2022-05-11/the-esg-backlash-podcast (observing critical views that large asset managers have supported ESG and become too "woke" and formed an "ideological cartel"); Richard Morrison, *The ESG Backlash*, NAT'L REV. (Mar. 9, 2022), https://www.nationalreview.com/2022/03/the-esg-backlash/ (discussing how "[c]onservatives have come to see this collection of business trends" towards ESG as "yet another 'woke' assault on mainstream society" and have "growing opposition to ESG" that will cause it "to hit a wall of resistance"); Aron Cramer, *After a Backlash Summer, ESG Needs to Get Back in the Game*, FORTUNE (Sept. 20, 2021),

penned a scathing op-ed vehemently opposing ESG as "a pernicious strategy" that is "inherently political" and "allows the left to accomplish what it could never hope to achieve at the ballot box or through competition in the free market."[156] He championed the view that "the next Republican president and GOP Congress should work to end the use of ESG principles nationwide," and suggested that "government intervention" to stop "the ESG craze" is necessary for "the free market" to "be truly free."[157]

The irony of this latter statement is not lost on those with an understanding of the history of the term. As we have seen, it was in fact coined by an initiative including market actors such as the world's largest banks and participants in the financial industry who subsequently spread it through market activity and private initiatives, with investors choosing ESG-related investment vehicles and an industry growing up to serve client demands. ESG was pitched from its beginning as aligning with financial materiality and the pursuit of long-term value maximization in capital markets. Furthermore, corporations have long been sites of contestation for social and political issues and values, long before the term ESG was ever uttered.[158]

Nonetheless, as "different political views can infuse different meanings to the same view,"[159] ESG has notably entered a new phase of possible meanings as politicians tout it as a hot button issue or proxy for other values and beliefs. Battlelines appear sharply drawn by politics, from the rise of "[c]onservative or anti-ESG shareholder proposals"[160] to new "anti-ESG" funds.[161] Increasingly, headlines are filled with proposals to oust ESG or its proponents from the mainstream, such as by claiming the "ESG

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https://fortune.com/2021/09/20/esg-backlash-summer/ (observing "the backlash against the momentum driving widespread adoption of [ESG] policies became a thing").

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

[157] *Id.*

[158] *See, e.g.*, CORPORATIONS AND AMERICAN DEMOCRACY (Naomi R. Lamoreaux & William J. Novak eds., 2017) (exploring U.S. law and history from the founding to the present on the topic of corporations and their role in American democracy); Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673 (2015) (examining the two-hundred-year history of corporate constitutional rights including the extension of First Amendment rights to corporations); ADAM WINKLER, WE THE CORPORATIONS (2018) (chronicling the "civil rights movement" of corporations for rights under the U.S. Constitution).

[159] Eccles, *supra* note 14.

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

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

investing giants" are breaching their fiduciary duties or should be broken up.[162] State politicians and officials from so-called "red states" have attracted attention to the anti-ESG cause by banding together to oppose ESG disclosures,[163] banning state pension funds from screening for ESG risks,[164] probing ESG scores,[165] and limiting contracts with state entities to companies that do not "boycott" energy companies.[166] Such anti-ESG activities might come at a cost.[167] And in turn, these attacks on ESG are countered and parried, often by asserting value alignment reminiscent of the original *Who Cares Wins* report,[168] or the reality of externalities,[169] reflecting that whether ESG is ideological or political is itself up for debate.

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

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

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

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

[166] Kate Aronoff, *The Deranged Demands of the "Anti-ESG" Movement*, NEW REPUBLIC (Aug. 29, 2022), https://newrepublic.com/article/167550/desantis-anti-esg-movement; Brooke Masters & Patrick Temple-West, *Companies Attack Texas Over 'Politicized' ESG Blacklist*, FIN. TIMES (Aug. 29, 2022), https://www.ft.com/content/8031aaad-efc6-4829-ac02-bd9c151974f4.

[167] *See, e.g.*, Daniel G. Garrett & Ivan T. Ivanov, *Gas, Guns, and Governments: Financial Costs of Anti-ESG Policies* (July 11, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4123366 (finding that state laws prohibiting municipalities from contracting with counterparties with certain ESG policies imposes significant financial cost).

[168] *See, e.g.*, BlackRock Response to Attorneys General of the States Listed as Signatories of the August 4, 2022 Letter, AXIOS (Sept. 8, 2022), https://www.axios.com/2022/09/08/blackrock-strikes-back-at-esg-critics ("We believe investors and companies that take a forward-looking position with respect to climate risk and its implications for the energy transition will generate better long-term financial outcomes."); *see also* SERAFEIM, supra note 15, at 135 (asserting that those who are not yet on board with ESG "will be left behind" as they have not kept up with "their peers and understanding why industry behavior has changed").

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

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

III. THE PROMISE AND PERILS OF THE ESG MONIKER

While ESG has become "pervasive,"[170] and taken on various meanings, the strategic choice to coin the term, putting together a wide variety of issues into one acronym, has received little focused examination. It is admittedly difficult to disentangle aspects of the conceptual and rhetorical construction of the term from underlying substantive debate of the merits of ESG that has ensued, and the notion of consequences flowing from such construction must necessarily be caveated in terms of causation that cannot be definitively ascribed. Nonetheless, as the term has now been in circulation for nearly two decades, it is possible to look back to gain insights into impacts of the choice to put E, S, and G into one term and better understand current regulatory challenges and potential paths for the future of ESG.

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

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

First, ESG was specifically designed to be globally applicable and customizable by context. As the *Who Cares Wins* report explained: "ESG issues relevant to investment decisions differ across regions and sections."[171] Instead of specifying what issues were intended to be integrated into investment analysis, this was left open beyond the words "environmental, social, and governance" and a short list of examples. One of the key examples of an ESG issue provided was the management of corruption and bribery—a topic that is particularly significant in some developing economies around the world and one of the pillars of the Global Compact, but is not front of mind in other geographic areas such as the United States, where board diversity is instead a top issue that has gained traction under the ESG acronym but did not appear on the original list.

Second, ESG was pitched at a highly generic level of phrasing and deliberately avoided words that were already loaded with connotations such as "responsibility,"

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[170] Larcker et al., *supra* note 11, at 1.
[171] *See supra* note 60.

"citizenship," or "sustainability." Instead, the phrase simply combined categories of broad topics, which allows not only for variance by region or context, as discussed above, but also an evolution over time in meaning. Specific sub-issues can change in importance or conceptualization and still fit under the umbrella of the term ESG. For instance, "climate change and related risks" was listed as an example under E, and it has been a primary focus in the ESG movement, and as other issues such as water risks and biodiversity come to be appreciated they can be integrated without change to the existing term.[172] Similarly, "workplace health and safety" was listed as an example under S, and as a broader array of issues related to workers came into focus and took on the label of "human capital management," this too could easily be fit within the existing umbrella of ESG.[173] Further, as ESG was not coined by regulators as a legal term of art, investors themselves could be the drivers of the evolution over time in their areas of focus.[174]

Third, and perhaps most importantly, ESG has served as a "big tent"[175] that collectively appeals to a broad range of investors and stakeholders, contributing to the ability of the concept to gain momentum in mainstream audiences. Whereas efforts under the label of CSR faced headwinds and were marginalized with the rise in shareholder primacy and wealth maximization in the late twentieth century, as researchers began to explore links to financial performance and build a "business case" it opened up a pathway for integration in the existing "corporate governance machine" of law, markets, and culture oriented towards shareholders.[176] The *Who Cares Wins* initiative explicitly framed ESG in terms of the business case for integrating issues into mainstream investment analysis, chose a term that was facially more neutral than other existing terms, interjected "governance" which had widespread buy-in from mainstream market actors, and emphasized the theme of aligning goals between those of the financial industry and the UN.[177] This allowed for understanding ESG as value enhancing, and thus threading the

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

[173] *See, e.g.*, Georgiev, *supra* note 61, at 639 (noting that human capital management has quickly rose in "prominence and uptake" and is "broadly fitting within the rubric of environmental, social, and governance (ESG) factors").

[174] *See* Wolf-Georg Ringe, *Investor-Led Sustainability in Corporate Governance* (Sept. 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3958960 (arguing that "ESG engagement has the potential to become a very powerful driver towards a more sustainability-oriented future" because "investor-led priorities would follow a more flexible and dynamic pattern rather than complying with inflexible pre-defined criteria"); *see also* Ann Lipton, *ESG Investing, or, If You Can't Beat 'Em, Join 'Em*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD (Elizabeth Pollman & Robert Thompson eds., 2021) (describing ESG as an "intervention" that "leans into, rather than resisting, shareholder power" and exploring "whether the investor class is the right constituency to craft social policy").

[175] *See* Amanda M. Rose, *A Response to Calls for SEC-Mandated ESG Disclosure*, 98 WASH. U. L. REV. 1821, 1825 (2021) ("The breadth of topics embraced by ESG, and the breadth of motivations spurring the ESG movement, has created a big tent that has undoubtedly served a purpose in terms of helping the various causes of those involved to gain momentum."); *see also* Curtis et al., *supra* note 148, at 401 (""ESG is a rough label for an amalgamation of voices, interest groups, and substantive concerns.").

[176] Lund & Pollman, *supra* note 13, at 2613.

[177] *Supra* notes 56 & 69.

needle of legal debates and creating a "business opportunity" for a wide range of institutional players such as asset managers, ratings agencies, accounting firms and the like.[178]

At the same time, "values-based investors who care about whether, and how, corporations address (at least certain) ESG topics due to religious or sociopolitical commitments"[179] also found the ESG term and concept attractive. As the discussion above examines, for many observers ESG indeed became associated with CSR in various ways ranging from a view of alignment of value and values to a more direct equating of the concepts that sees ESG as CSR in a new bottle. Creating a term that could present itself as neutral or value-enhancing, while at the same time welcoming proponents of previous "social"-related concepts, enabled a diverse group of investors and stakeholders to embrace activity under such a term.

B. The Combination Giving Rise to Challenges and Critiques

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

First, the characteristic flexibility that the term embodies by allowing for a variety of understandings of meaning, and a broad array of issues across space and time, has come with several potential downsides. An important challenge that has proven enduring in this regard is the difficulty of pinpointing empirically the relationship between ESG and economic performance. An enormous amount of research has focused on the question and come up short in providing a definitive conclusion. Although significant evidence exists of such a link, the studies often bundle ESG issues together or rely on ESG performance ratings that do so, and often leave unanswered which, if any, corporate policies or activities are actually related to financial performance and whether the relationship is causal.[180] We can understand this challenge, at least in part, as a function of the lack of clear definition of ESG and the fact that it is combining sometimes disparate and changing issues.[181] The mixed empirical evidence gives both proponents and critics of ESG something to point to in debates that continue to rage on.

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[178] *See* Lund & Pollman, *supra* note 13, at 2614-15; *see also* Rose, *supra* note 175, at 1823 ("ESG proponents also include members of an emerging corps of people and institutions who profit from the movement, including corporate sustainability officers, providers of ESG ratings and indices, accounting firms that offer ESG-related services, and managers of specialized ESG-investment vehicles."); Dana Brakman Reiser & Anne Tucker, *Buyer Beware: Variation and Opacity in ESG and ESG Index Funds*, 41 CARDOZO L. REV. 1921, 1992 (2020) (observing that "[r]ising interest in ESG investing has [] generated a huge market opportunity for the providers of ESG indices and metrics, who are [] capitalizing on this key moment").
[179] *See* Rose, *supra* note 175, at 1822-23.
[180] *See id.* at 1825-27; *see also* Atz et al., *supra* note 127.
[181] *See, e.g.*, Curtis et al., *supra* note 148, at 402 ("One challenge to analyzing the relationship between ESG and economic performance is the absence of a clear definition of ESG."). Meta analyses of ESG studies have likewise reported a range of results, and the approach has been criticized on the basis that "the different measures and methods used by scholars make it impossible to form a meaningful synthesis." King & Pucker, *supra* note 6.

Similarly, the flexibility and wide-ranging understandings of the term ESG contribute to a multitude of issues and approaches, with an ever-growing list of sub-topics to the three components and more than six hundred ESG ratings organizations and rankings worldwide, and substantial variation among ratings.[182] For some, this diversity is not problematic or it is viewed as a temporary situation as regulators around the world move to require disclosure of additional ESG-related information and companies provide more information on a voluntary basis. And, although proponents acknowledge there is room for improvement in ESG ratings, they counter that does not mean that they are useless.[183] But for others, the constant expansion of sub-topics fitting under the big tent of ESG contributes to a sense that the term is too nebulous or so capacious that it is ultimately meaningless or will collapse under its own weight.[184] Likewise, the multitude of ESG ratings is evidence to some observers that they are "inconsistent" and "subjective."[185] Moves to consolidate disparate ESG ratings systems could also prove problematic as it could lock in inadequate standards in areas such as S that have lagged in development and been more difficult to find alignment among investors in assessing and quantifying.[186] These concerns about ESG issues and ratings, together with other challenges, in turn feed a range of critiques.

One such related challenge is that because ESG was coined in a way that combines wide-ranging issues, companies with diverging performance on E, S, or G can receive ratings that seem at odds with understood purposes of the term ESG.[187] For example, electric vehicle manufacturer Tesla has been included in many ESG-labeled mutual funds and exchange-traded funds, but observers have pointed to potentially problematic S issues for the company, ranging from a string of racial and sexual discrimination lawsuits and employee reports of a "culture of racism," to supply chain concerns about the production of cobalt which may involve child labor and safety hazards.[188] Ironically, Elon Musk, the

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[182] *See* Curtis et al., *supra* note 148, at 403.

[183] *See* Serafeim, *supra* note 1, at 18. For example, a study found ESG ratings helpful in predicting future ESG related news. *Id.* (citing George Serafeim & Aaron Yoon, *Stock Price Reactions to ESG News: The Role of ESG Ratings and Disagreement*, REVIEW OF ACCOUNTING STUDIES (forthcoming)).

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

[185] *See* Rose, *supra* note 175, at 1827; *see also* Hester M. Peirce, Comm'r, SEC, Scarlet Letters: Remarks Before the American Enterprise Institute (June 18, 2019), https://www.sec.gov/news/speech/speech-peirce-061819 (observing substantial variation in ESG ratings and questioning the viability of accurate evaluation).

[186] *See, e.g.*, Michael Posner, *Does Tesla Deserve to Be Treated as an ESG Champion?*, ETHICAL SYSTEMS (Feb. 8, 2022), https://www.ethicalsystems.org/does-tesla-deserve-to-be-treated-as-an-esg-champion/. Although S is frequently pointed to as lagging, the first "ESG"-related disclosure requirement that the SEC implemented as such was notably for human capital management. *See* Georgiev, *supra* note 61.

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

[188] *See id.*; *Black Tesla Employees Describe a Culture of Racism*, L.A. TIMES (Mar. 25, 2022), https://www.latimes.com/business/story/2022-03-25/black-tesla-employees-fremont-plant-racism-

CEO of Tesla, has himself called out that "Exxon is rated top ten best in world for environment, social & governance (ESG) by S&P 500, while Tesla didn't make the list!"[189] He followed that "ESG is a scam. It has been weaponized by phony social justice warriors."[190] Although less hyperbolic, investors have similarly registered surprise when they realize that ESG funds they are invested in have large holdings in bank stocks instead of the wind and solar companies they are expecting.[191] Reporting by the *Wall Street Journal* "revealed that eight of the 10 biggest ESG funds in 2019 were invested in oil and gas companies."[192] After Russia invaded Ukraine, the U.S. media brought to light that a number of ESG funds hold stakes in Russian assets ranging from state-backed energy companies to government bonds.[193]

Not only do the ratings reflect a combination of wide-ranging issues that can create a mismatch with expectations for the ESG label, the ratings themselves may be unreliable and are not subject to standardized approaches, which also stems at least in part from the lack of a fixed definition of ESG and its components. The ratings reflect structural measurement and reporting problems arising from data that is incomplete, largely unaudited, and voluntarily disclosed.[194] One study of six top ESG ratings firms concluded that "ratings from different providers disagree substantially" and "the information that decision-makers receive from ESG rating agencies is relatively noisy."[195] Furthermore, as companies can choose to use different metrics and standards for reporting, as well as change their methodology from year to year, it is "nearly impossible" to compare companies on the basis of ESG performance.[196]

In addition, ratings firms might compute ESG ratings by measuring the degree to which a company's economic value is at risk due to ESG factors, or based on its management of issues such as pollutive behavior or regulatory risk, rather than its positive

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california-lawsuit; Dana Hull & Bloomberg, *Tesla Sued By More Women Alleging Sexual Harassment at Plant*, FORTUNE (Dec. 14, 2021), https://fortune.com/2021/12/14/tesla-sued-sexual-harassment-fremont-plant/.

189 @elonmusk, Twitter (May 18, 2022, 9:09 AM), https://twitter.com/elonmusk/status/1526958110023245829.

190 *Id.*

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

192 Kenneth P. Pucker, *Overselling Sustainability Reporting*, HARV. BUS. REV. (May-June 2021), https://hbr.org/2021/05/overselling-sustainability-reporting.

193 Kishan & Bloomberg, *supra* note 111.

194 Pucker, *supra* note 192; *see also* David F. Larcker, Lukasz Pomorski, Brian Tayan & Edward M. Watts, *ESG Ratings: A Compass Without Direction*, Rock Center for Corporate Governance Working Paper (Aug. 2, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4179647 (providing description of ESG ratings industry and discussing challenges with completeness of data, standardization, and consistency as well as conflicts of interest).

195 Florian Berg, Julian F. Kölbel & Roberto Rigobon, *Aggregate Confusion: The Divergence of ESG Ratings*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3438533 (forthcoming REV. FIN.); *see also* Rajna Gibson, Philipp Krueger & Peter Steffen Schmidt, *ESG Rating Disagreement and Stock Returns*, ECGI Fin. Working Paper No. 651/2020 (Aug. 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3433728 (studying the relationship between ESG rating disagreement and stock returns).

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

environmental and social impacts.[197] Conflicts of interest or other concerns might also be at play. One study showed that one of the leading vendors of ESG ratings gave higher scores to firms connected to it through institutional ownership than to other firms.[198] Another research paper has documented "widespread and repeated changes to the historical ESG scores" of one of the key ratings providers—suggesting there might be "data rewriting" that "plausibly originates from the rating vendor's incentive to retroactively strengthen the link between ESG scores and returns."[199] Unsurprisingly given this state of affairs, 26% of investment professionals surveyed by Amir Amel-Zadeh and George Serafeim indicate concerns with the reliability of ESG ratings, though 82% use ESG data in the investment process.[200] As Virginia Harper Ho has observed, "[t]he limitations of ESG ratings and data have led many asset managers to expend their own resources to analyze ESG information at added cost, which also has fiduciary implications."[201]

Furthermore, the challenge is not simply that there may be misimpressions of what ESG means or widely varying performances between the components of E, S, and G that can give rise to questionable ratings. Without an integrated approach to ESG factors, "sustainability arbitrage" is possible for both companies and investors.[202] Good performance on one issue, such as low-carbon product development, could be strategically used to mask another, such as poor labor practices.[203]

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

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

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

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

[201] Virginia Harper Ho, *Sustainable Investment & Asset Management: From Resistance to Retooling*, City University of Hong Kong School of Law Legal Studies Research Paper No. 2022-006 (Mar. 23, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4064317. Relying on private initiatives to standardize ESG investment practices and report "has also created costly fragmentation and slowed the development of a level playing field for all investors." *Id.*

[202] Alperen A. Gözlügöl, *The Clash of 'E' and 'S' of ESG: Just Transition on the Path to Net Zero and the Implications for Sustainable Corporate Governance and Finance*, SAFE Working Paper No. 325 (Feb. 6, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3962238.

[203] Nick Robins, Vanda Brunstig & David Wood, *Climate Change and the Just Transition: A Guide for Investor Action* (Dec. 2018), p. 18, https://cpl.hks.harvard.edu/files/cpl/files/jtguidanceforinvestors-1.pdf?m=1569856838; *see also* Hester Peirce, U.S. Securities and Exchange Commission Speech, *Chocolate-Covered Cicadas* (July 20, 2021), https://www.sec.gov/news/speech/peirce-chocolate-covered-cicadas-072021?utm_medium=email&utm_source=govdelivery (arguing that ESG encompasses "a great and growing number of unrelated (and incommensurable) items" that leads to a lack of "clear boundaries and internal cohesion").

In some instances, the challenge is not even a problematic rating or sustainability arbitrage, but instead inherent tensions between E and S that can arise due to business model or industry.[204] For example, "[a]dverse employment impacts are to be expected in companies in certain sectors such as energy and some regions that will have to execute an extensive transformation to reduce their GHG emissions and to ultimately stay on a path consistent with the net zero ambitions."[205] Environmental concerns and labor interests "are not always reconcilable" and divesting or decommissioning brown assets or transforming a business to new technology can lead to workers losing relevant skills, having lower wages, or getting laid off.[206] If labor has countervailing power it might be able to get concessions, but "it is also possible that balancing of different interests is too difficult and the process of net transition comes often to deadlock" or the company will not give due consideration to social impacts, which could deepen inequality.[207] The potential for stakeholder conflicts arising from this clash between E and S has led to arguments for a "just transition" that promotes swift climate action at the same time as mitigating adverse effects for workers such as with Coasean bargaining or reorganization and re-training programs.[208] To the extent that ESG investors fail to take up the just transition issue, it can add to doubts about whether these investors "walk the talk."[209]

Discourse on the just transition issue connects to an even deeper point – use of ESG factors for investment analysis and decision-making purposes alone may only achieve value alignment for investors with their portfolios, not social value creation. As scholars have highlighted, "[i]t is virtually impossible for a socially-motivated investor to affect the outputs or behavior of companies whose securities trade in public markets through buying and selling their shares in the secondary market."[210] By contrast, "impact investing" is a subset of socially-motivated investing that aims to influence a company's performance or activity.[211] Such outcome might be achieved by lowering the cost of capital to the company, thereby allowing it to engage in more socially valuable practices, or engaging in stewardship or activism of a sort that goes beyond simply considering ESG factors for investment purposes such as socially-screened ESG mutual funds.[212] At some point, tradeoffs with financial returns may come into play.[213]

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[204] Gözlügöl, *supra* note 202.
[205] *Id.* at 4.
[206] *Id.* at 4, 9.
[207] *Id.* at 17, 19-20.
[208] *Id.* at 1; Robins et al., *supra* note 203.
[209] Gözlügöl, *supra* note 202, at 27.
[210] Paul Brest, Ronald J. Gilson & Mark A. Wolfson, *How Investors Can (And Can't) Create Social Value*, 44 J. CORP. L. 205, 228 (2019).
[211] *Id.* at 228.
[212] *Id.* at 228-31; *see also* Lubos Pastor, Robert F. Stambaugh & Lucian A. Taylor, *Dissecting Green Returns*, Univ. of Chicago, Becker Friedman Inst. for Econ. Working Paper No. 2021-70 (June 15, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3869822 ("[O]ur findings imply that greener firms have lower costs of capital than their recent stock performance might suggest. This is good news for ESG investors, because one way they exert social impact is by decreasing green firms' cost of capital.").
[213] *See, e.g.*, Pastor et al., *supra* note 212, at 1, 31 (observing that "green stocks typically outperform brown when climate concerns increase" and noting "[g]reen assets delivered high returns in recent years" because of "unexpectedly strong increases in environmental concerns, not high expected returns" and predicting that future years will see "lower expected returns for green stocks than for broan, consistent with theory"); Pucker, *supra* note 192 (noting some impact investors are explicit about their willingness to tradeoff financial returns).

Existing usage of the term ESG investing includes a wide variety of strategies – some of which aim at impact whereas others are more likely to only attain values alignment at best. Commentators have observed, for example, that analysts typically group ESG investment strategies into five categories: "impact (seeking environmental or social outcomes and most often undertaken by private investors), thematic (focusing on a theme such as water scarcity or energy transition), engagement (direct communications between investors and companies), negative screen (excluding certain industries), or integration (considering ESG-related risks and opportunities)."[214]

None of these issues are necessarily fatal to the success of the ESG movement, but they can be understood at least in part as stemming from the choice to combine issues in one term that may be in tension with each other or lead to tradeoffs that were not addressed in the initial framing. Although the initiative participants espoused the view that the "entire range" of ESG issues relevant to a business should be considered by companies and integrated into investment analysis,[215] and suggested that this approach was aligned with long-term shareholder value,[216] they did not explain how to do so or what to do when an individual component or activity may not enhance value for shareholders. Quite understandably, much was left to be figured out after the initial coining of the term ESG and championing consideration of a broad set of issues. In hindsight, however, it can be appreciated that the choice of the ESG term came with consequences, such as that priorities were not set in advance as would have been the case had initiative participants instead focused their firepower on a particular issue such as climate change. Additionally, the very flexibility and broad approach embodied by the ESG acronym that contributed to its meteoric rise has also led to challenges that gave fodder to critics.

The critiques of ESG are wide-ranging, from assertions of confusion, unrealistic expectations, and greenwashing to notions that it is crowding out other solutions or inhibiting accountability.[217] As George Serafeim, a leading scholar of ESG has succinctly observed, "ESG has rapidly become a household name leading to both confusion about what it means and creating unrealistic expectations about its effects."[218]

Commentary and changing positions from regulators can contribute to these impressions of problems with the term ESG. For example, some U.S. securities regulators have expressed concern about the use of the ESG label in mutual fund advertising because of worry that the vagueness of the term and "amorphous" issues it encompasses can give investors misimpressions of what they are buying.[219] On the other hand, they warn that having the Securities and Exchange Commission (SEC) standardize the

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214 King & Pucker, *supra* note 6.
215 *See supra* note 58.
216 *See supra* notes 56 & 57.
217 *See, e.g.*, King & Pucker, *supra* note 6 ("Managers of ESG investments create false hope, oversell outperformance, and contribute to the delay of long-past-due regulatory action.").
218 Serafeim, *supra* note 1, at 1.
219 *See* Roisman, *supra* note 112; Pippa Stevens, *'Fooling Ourselves' to Focus on 'Amorphous' Social Investing Factors, Says SEC Commissioner Peirce*, CNBC (Dec. 17, 2019), https://www.cnbc.com/2019/12/17/sec-commissioner-hester-peirce-calls-for-oversight-of-esg-funds.html.

definition of ESG would limit investor choice and put the SEC in the position of being the arbiter of what constitutes an acceptable ESG strategy.[220] As one SEC commissioner observed, "One person's ecofriendly windmill is another person's bird killer."[221]

To take another example, in 2020, the U.S. Department of Labor (DOL) issued a rule that removed all references to ESG and required that ERISA plan fiduciaries focus only on pecuniary factors in investment decisions for beneficiaries. It explained that "by conflating unrelated environmental, social, and corporate governance factors into a single term, ESG invites a less than appropriately rigorous analytical approach" for corporate officers and directors to manage as part of the company's "business plan" and for qualified investment professionals to "treat as economic considerations" in evaluating investment.[222] After a change in presidential administration, however, the DOL reversed course and announced a proposed rule that would remove barriers to consideration of ESG factors in selecting investments and exercising shareholder rights.[223] The DOL's disparagement of combining E, S, and G, and varied positions with changing political administrations, ultimately contribute to perceptions that it is not clear whether consideration of ESG issues comes at the expense of financial returns and, moreover, that ESG is ideologically or politically tinged.

Such connotations and understandings could in turn fuel challenges to rulemaking that might otherwise help to address some of the existing problems, such as First Amendment challenges to new ESG-related disclosure rules proposed by the SEC.[224] In spring 2022, the agency proposed rule changes that aim to provide investors with "consistent, comparable, and decision-useful information" regarding the climate-related risks and greenhouse gas emissions of public companies.[225] The proposed rules are based in part on the voluntary framework published by the Task Force on Climate-related Financial Disclosures (TCFD) of the Financial Stability Board, an international body that makes recommendations for the global financial system.[226] The TCFD framework is being incorporated in varying degrees into legislation or securities exchange requirements around the world, including in Canada, Hong Kong, Japan, New Zealand, Singapore, Switzerland, and the United Kingdom.[227]

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[220] Commissioner Hester M. Peirce, Lucy's Human: Remarks at Virtual Roundtable on The Role of Asset Management in ESG Investing (Sept. 17, 2020), https://www.sec.gov/news/speech/peirce-lucys-human-091720.
[221] *Id.*
[222] Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72,846 (Nov. 13. 2020) (codified at 28 C.F.R. § 2550.404a-1 (2020)), at 72,857.
[223] US Department of Labor Proposes Rule to Remove Barriers to Considering Environmental, Social, Governance Factors in Plan Management (Oct. 13, 2021), https://www.dol.gov/newsroom/releases/ebsa/ebsa20211013.
[224] *See* Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220, 251-54 (2021) (discussing potential First Amendment challenges to ESG-related disclosure rules).
[225] U.S. Securities and Exchange Commission, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 21, 2022), https://www.sec.gov/news/press-release/2022-46.
[226] Michael Littenberg et al., *Ten Thoughts on the SEC's Proposed Climate Disclosure Rules*, HARV. L. SCH. FORUM ON CORP. GOV. (Apr. 30, 2022), https://corpgov.law.harvard.edu/2022/04/30/ten-thoughts-on-the-secs-proposed-climate-disclosure-rules/.
[227] *Id.*

Despite alignment with the TCFD's framework and over 4,000 investment firms managing over $120 trillion in assets supporting the PRI's commitment to seeking ESG disclosures from portfolio companies,[228] the SEC's proposed rules have been hit with enormous pushback in the United States. The SEC has received thousands of letters of public comment from companies, investors, auditors, academics, and trade groups.[229] Nearly two dozen U.S. senators have voiced opposition.[230] Most notably, critics of the proposed rules, including an SEC Commissioner who issued an extensive dissenting statement, have argued that the SEC lacks authority for its actions, the cost-benefit analyses in the proposed rules do not meet the requirements of the Administrative Procedure Act, and the proposed rules violate First Amendment restrictions against compelled speech.[231] These arguments will likely end up in court battles and, through an unfortunate twist, the various commentary and changing positions of regulators on ESG-related issues that have been pushing towards progress may instead be harnessed in attacks against the final rules.[232] Without mandatory climate risk disclosures in the United States, global efforts to standardize and incorporate such information into investment analysis and decision-making are significantly weakened.

Another obstacle for the ESG movement is that limited progress on E and S can lead observers to dismiss the movement as largely ineffectual or raise concerns about "greenwashing."[233] Investigations into greenwashing have indeed become salient with global behemoths such as Goldman Sachs and Deutsche Bank coming under scrutiny.[234] The SEC's enforcement efforts have already yielded a settlement with asset manager BNY Mellon for allegedly misleading investors about ESG claims.[235] Further, greenwashing claims are not limited to concerns about investors, but also encompass consumer

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228 Sara Dewey, *What to Know about the SEC's Proposed Climate Risk Disclosure Rule*, HLS ENVT'L & ENERGY L. PROG. (Apr. 27, 2022), https://eelp.law.harvard.edu/2022/04/what-to-know-about-the-sec-proposed-climate-risk-disclosure-rule/.

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

230 Littenberg et al., *supra* note 226.

231 *Id.*

232 *See, e.g.*, Sean J. Griffith, *What's "Controversial" About ESG? A Theory of Compelled Commercial Speech under the First Amendment* (May 24, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4118755 (arguing that "the proposed climate rules create controversy by imposing a political viewpoint, by advancing an interest group agenda at the expense of investors generally, and by redefining concepts at the core of securities regulation" and are thus subject to heightened scrutiny and "will likely be invalidated").

233 *See, e.g.*, Tim Quinson, *Greenwashing Is Increasingly Making ESG Moot*, BLOOMBERG (Mar. 16, 2022), https://www.bloomberg.com/news/articles/2022-03-16/greenwashing-is-increasingly-making-esg-investing-moot-green-insight. On "greenwashing" as a term referring to "misleading environmental communication," see Amanda Shanor & Sarah E. Light, *Greenwashing & The First Amendment*, COLUM. L. REV. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4178318. The alternative term "bluewashing" is sometimes used to refer to deceptive or misleading social claims. Sarah Dadush, *Identity Harm*, 89 U. COLO. L. REV. 863, 877 (2018).

234 *See* Patrick Temple-West & Joshua Franklin, *SEC Investigating Goldman Sachs for ESG Claims*, FIN. TIMES (June 10, 2022), https://www.ft.com/content/5812ab1f-c2d4-4681-a6be-45f0befd92df; William Langley & Joe Miller, *DWS Chief Resigns After Police Raid Over Greenwashing Claims*, FIN. TIMES (June 1, 2022), https://www.ft.com/content/50f5c4a1-5ebe-40cc-a89f-2952f58ba324; Patrick Temple-West & Stefania Palma, *SEC Prepares to Crack Down on Misleading ESG Investment Claims*, FIN. TIMES (May 23, 2022), https://www.ft.com/content/6fefdb2c-f72e-4e52-b95b-c0727aeb1a94.

235 *Id.*

protection issues. For example, several environmental organizations have filed a complaint with the Federal Trade Commission, which is charged with enforcing false advertising law, that contends that Chevron has overstated and misrepresented its efforts to reduce greenhouse gas emissions and increase investments in renewable energy.[236] A slew of claims and ESG-related litigation are on the horizon as corporate statements and pledges about environmental and social issues have seen "exponential growth."[237]

More generally, attacks on ESG as an ineffective movement due for a reckoning are on the rise.[238] Tariq Fancy, the former chief investment officer for sustainable investing at BlackRock attracted global attention with his claim that ESG is "marketing gobbledygook" that "is actively misleading people" and creating a "dangerous distraction" from regulation that would fit the scale of problems such as climate change.[239] Corporate finance expert Aswath Damodaran has memorably called the ESG movement a "gravy train" and asserted that investment funds, accounting firms, consulting firms, and ESG measurement services are its real beneficiaries rather than stakeholders.[240] In his view, CEOs have encouraged this gravy train to keep rolling because of "the power it gives them to bypass shareholders and evade accountability."

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

[237] *See* Shanor & Light, *supra* note 233 (discussing "exponential growth in environmental marketing claims"); Adam B. Badawi & Frank Partnoy, *Measuring How Corporations Impact Society: The Relationship between ESG Metrics and Securities Litigation* (examining the relationship between ESG metrics and securities litigation) (manuscript on file with the author); Aisha I. Saad & Diane Strauss, *The New "Reasonable Investor" and Changing Frontiers of Materiality: Increasing Investor Reliance on ESG Disclosures and Implications for Securities Litigation*, 17 BERKELEY BUS. L.J. 397 (2020) (examining securities litigation trends related to ESG disclosures); Emily Strauss, *Climate Change and Shareholder Lawsuits*, Duke L. Sch. Public Law & Legal Theory Series No. 2022-41 (Aug. 3, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4174681 (examining climate-related shareholder suits and arguing that "climate disclosures may not be enforced in a socially optimal way" under the current regime for shareholder litigation); Veronica Root Martinez & Gina-Gail Fletcher, *Equality Metrics*, 130 YALE L.J. FORUM 869 (2021) (discussing how "many of the statements issued by corporations in support of the Black Lives Matter movement look more like marketing campaigns than like blueprints for the implementation of specific strategies"); John Rice, *Rainbow-Washing*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4193059 (forthcoming NE. U. L. REV.) (examining how shareholder litigation could address corporate "rainbow-washing" claims in support of the LGBTQIA+ community).

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

[239] Robert Armstrong, *The ESG Investing Industry Is Dangerous*, FIN. TIMES (Aug. 23, 2021), https://www.ft.com/content/ec02fd5d-e8bd-45bd-b015-a5799ae820cf (quoting essay by Tariq Fancy); *see also* King & Pucker, *supra* note 6 (noting that "every former asset manager professional" interviewed in their study expressed "skepticism" and "were doubtful about ESG investing"). On the false dichotomy between internal and external reforms for corporate governance and regulation, see Aneil Kovvali, *Stark Choices for Corporate Reform*, COLUM. L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4067505.

[240] Aswath Damodaran, *The ESG Movement: The "Goodness" Gravy Train Rolls On!*, MUSINGS ON MARKETS (Sept. 14, 2021), https://aswathdamodaran.blogspot.com/2021/09/the-esg-movement-goodness-gravy-train.html.

Many of these challenges and critiques are "hyperboles"[241] or at least can be partially sorted out with time. For example, although there is some cause for concern about the opacity to investors of relying on the ESG label,[242] there is also evidence that ESG funds are offering their investors increased ESG exposure without increasing costs or reducing returns.[243] To the extent consideration of ESG issues adds value to the investment decision-making process, it is likely asset managers will persist in doing so.[244] New taxonomies could also be created to help investors make informed investment decisions.[245] Regulatory rulemaking could increase transparency about investment company names.[246] Cracking down on greenwashing or other misleading claims could aid in long-term efforts to ensure the credibility of ESG-related statements and disclosures.

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

C. Proposals for the Future of ESG

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

The first set of proposals suggest a friendly amendment by adding or subtracting words from the acronym. Such proposals might add emphasis to certain existing

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[241] Serafeim, *supra* note 1, at 19; *see also* Judy Samuelson, *ESG: Not woke capitalism or greenwashing—but an opportunity for employee voice*, QUARTZ (July 20, 2022), https://qz.com/2185351/esg-not-woke-capitalism-or-greenwashing-but-an-employee-arena/ (arguing that ESG has become "a political issue" but it is "neither woke capitalism nor cynical greenwashing," rather an "imperfect, ever-evolving effort to assess the risk companies face if they fall short in the race to contain the Earth's temperature rise and make capitalism work for more people").

[242] *See, e.g.*, Dana Brakman Reiser & Anne Tucker, *Buyer Beware: Variation and Opacity in ESG and ESG Index Funds*, 41 CARDOZO L. REV. 1921 (2020) (providing data from 2018-2019 showing great variation among ESG funds that is "largely opaque to consumers—who rely on the ESG acronym at their peril").

[243] Curtis et al., *supra* note 148, at 393.

[244] *See* Lieber, *supra* note 120 (noting that Vanguard, Fidelity, and TIAA have ESG products "because it adds value to the investment decision-making process" and so "[i]t's here to stay").

[245] *See, e.g.*, Eric C. Chaffee, *Index Funds and ESG Hypocrisy*, 71 CASE W. RES. L. REV. 1295, 1317-20 (2021) (proposing a taxonomy for ESG fund names).

[246] The SEC has stated it plans to consider whether to propose amendments to the Investment Company Act provision that addresses investment company names that are likely to mislead investors. U.S. Securities & Exch. Comm'n, Sunshine Act Notice (May 18, 2022), https://www.sec.gov/os/sunshine-act-notices/sunshine-act-notice-open-052522.

components, which is generally the authors' aims, but would not likely alter the fundamental tension that exists between the term's flexibility and big tent approach and the corresponding challenges and critiques it engenders.

For example, Leo Strine, the former Chief Justice of the Delaware Supreme Court, has proposed that another E be added to ESG to increase the salience of employees in ESG discussions and analyses.[247] Although such construction might laudably keep the treatment of workers in the mix of ESG issues commonly addressed, the S in ESG already included such a possibility and labor-related issues have been a key example since the *Who Cares Wins* initiative, building on one of the core principles of the Global Compact. Further, adding a component does not change the difficulty of empirical measurement and the potential for tensions and tradeoffs.[248]

Another proposal, advanced by David Larcker and Brian Tayan, is to take the G out of ESG.[249] As a reflection of how the history of the term ESG has been lost, they observe that "[a] perplexing question is why governance—the 'G' in ESG—is included as a third factor."[250] In their view, "[g]overnance is unlike E and S" and "an ineffective measure of how socially responsible a company is" and so "[a] more honest assessment of a company's commitment to stakeholders would leave governance variables out of the rating."[251] Yet Larcker and Tayan seem to simply conceive of governance differently from the institutions that originally coined the term ESG. Instead of integrating consideration of governance mechanisms that are interlinked with E and S, and that execute on such policies, Larcker and Tayan characterize "governance [a]s an *overlay*" and "environmental and social components of ESG a[s] *outcomes*."[252] Such an approach might appeal to some ESG proponents, but likely only a fraction as the endorsing institutions of the *Who Cares Wins* initiative included some of the world's largest banks and they viewed G as crucially interlinked to fulfilling the promise of better environmental and social performance. Traders at asset management funds also find the G in ESG to be critical, especially in vendor and counterparty relationships as it can help to avoid government scrutiny by providing a window into compliance with ethical standards, internal controls, and codes of conduct.[253] Moreover, even if a component of ESG was removed, there would still be

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

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

249 *See* Larcker et al., *supra* note 11, at 3 (arguing that it is a "myth" of ESG that it should include governance because "[t]he need for governance quality is universal among organizations"); David F. Larcker & Brian Tayan, *The Case for Taking the 'G' Out of ESG*, WALL ST. J. (Apr. 28, 2022), https://www.wsj.com/articles/esg-the-case-for-taking-out-the-g-11651004068.

250 Larcker & Tayan, *supra* note 249; *cf.* Jonathan R. Macey, *ESG Investing: Why Here? Why Now?*, Yale L. & Econ. Res. Paper (Mar. 10, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3942903 (arguing that "ESG investing and governance can be explained, at least in part, as a response to the failure of government" to address broad social problems and "[t]his explains the 'E' and the 'S' in ESG [b]ut it does not explain the 'G' or governance component").

251 Larcker & Tayan, *supra* note 249.

252 *Id.*

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

two, each with a multiplicity of possible sub-issues that could vary widely by context and over time, and thus not solving the difficulty of empirical measurement or the potential for tensions and tradeoffs.

Interestingly, it is often the S instead of G that is "single[d] out . . . as a different kind of category from its peers."[254] As David Wood explained, "The E invokes issues as such carbon intensity or energy and resource consumption that are easily quantifiable and with comparable units of measure; The G invokes industry standards of board structure, shareholder rights, or standards of business ethics on which there is relatively widespread agreement in principle; but the S invokes issues which are often hard to quantify, not so clearly linked to the risk/reward analysis in investment decision-making, and may touch on culturally specific norms that do not so easily translate into guidance for (often globally focused) investment decision-makers."[255] The S might be seen as "softer" or "mushier" than E and G, as well as "more likely to invoke ethical issues that lie beyond the scope of proper investment strategy or to require cultural judgments about potential consumer, reputational, or political risks that are particularly difficult to gauge."[256] In any event, whether it is the S or the G that is more unlike the others, such proposals and analyses of the divergence between ESG components only underscore that the term will likely continue to be the site of contestation even as its embrace has gone mainstream.

And, by contrast to those who wish to add or subtract a letter from ESG, some scholars have pushed for deconstructing the term altogether. Tracing the history of ESG's origins indeed raises the counterfactual question of what might have occurred if instead of lumping E, S, and G together, the underlying issues had been pursued separately. Swasti Gupta-Mukherjee has proposed disentangling climate change from ESG as "our era's defining issue" and because it is a macro risk factor that impacts physical assets and produces direct costs.[257] According to this view, combining ESG mandates "could inadvertently dilute the awareness, understanding, and action pertaining to climate risk in particular."[258] For some this argument carries great weight, and the market has already launched some novel financial instruments focused specifically on environmental responsibility such as green bonds.[259] But for others, climate change is correlated or intertwined with other important socio-economic concerns, or linked to other environmental issues such as biodiversity loss, and trying to distance climate change from ESG would not be palatable or perhaps even feasible as the term ESG would still exist as an umbrella term for a great number of efforts and investments.

A different set of proposals aims to narrow the meaning of ESG or create a larger set of more precise terms. Fixing a narrower definition of ESG could help protect against misunderstandings and greenwashing, but it might also lose the benefits of flexibility and

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[254] Wood, *supra* note 122, at 554-55 ("There have been dozens, if not hundreds, of conference panels, blog posts, listserve chats, and other discussions that pose the S in ESG as a problem to be solved.").
[255] *Id.*
[256] *Id.* at 555.
[257] Gupta-Mukherjee, *supra* note 16; *see also* ECONOMIST, *supra* note 8 (arguing that E, S, and G should be unbundled and "[i]t is better to simply focus on E" and that E should stand "for emissions alone").
[258] *Id.*
[259] *See, e.g.*, Dorothy S. Lund, *Corporate Finance for Social Good*, 121 COLUM. L. REV. 1617 (2021) (discussing impact bonds, green bonds, carbon offsets, and related financial instruments).

adaptability that has allowed ESG to evolve over time and vary by geographic region and company. Narrowing ESG would also likely mean that some of the proponents of ESG would no longer embrace it as a concept that serves their goals or interests – some of the existing proponents would no longer fit under the big tent.

Creating a sufficiently clear and narrow definition is also a considerable challenge as attempts at drafting legal terms often give way to more interpretational disputes than clarity. For example, the European Union Commission has notably aimed to take major steps forward in defining various ESG and sustainability-related obligations with the proposed Corporate Sustainability Due Diligence Directive,[260] but such efforts have in turn led to a new batch of interpretational issues to be worked through and critiques about loopholes and other concerns.[261]

Another idea would be to create a taxonomy of different, more precise terms for concepts related to ESG.[262] This could provide for greater market differentiation of investment products and accountability. A key potential area for greater clarity and precision could be distinguishing between ESG as "inputs" into an investment process and ESG as "outputs" or goals to be maximized, with the latter carrying an understanding that it may involve trade-offs with financial returns and the need for further specification of the type of goals being pursued.[263] The SEC's proposal to enhance disclosures by investment advisers about ESG practices, and the use of the ESG label on funds, moves in this direction.[264] The European Union's taxonomy on sustainability aims to provide definitions for which economic activities can be considered environmentally sustainable.[265] A taxonomy of different ESG terms or labels might, however, multiply terminology that might be confusing or unwieldy, and global variation would amplify this dynamic.

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[260] European Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 (Feb. 23, 2022), https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF.

[261] *See, e.g.*, Sarah Ellington, *Ten Areas of Continued Uncertainty in the EU Commission Proposal for a Corporate Sustainability Due Diligence Directive*, WATSON FARLEY & WILLIAMS (July 6, 2022), https://www.wfw.com/articles/ten-areas-of-continued-uncertainty-in-the-eu-commission-proposal-for-a-corporate-sustainability-due-diligence-directive/; *EU: Disappointing Draft on Corporate Due Diligence*, HUMAN RIGHTS WATCH (Feb. 28, 2022), https://www.hrw.org/news/2022/02/28/eu-disappointing-draft-corporate-due-diligence.

[262] *See, e.g.*, Chaffee, *supra* note 245.

[263] *See* Kirk, *supra* note 121 (arguing to split the meaning of ESG between inputs and outputs).

[264] U.S. Sec. & Exch. Comm'n, SEC Proposes to Enhance Disclosures by Certain Investment Advisers and Investment Companies About ESG Investment Practices (May 25, 2022), https://www.sec.gov/news/press-release/2022-92. On navigating First Amendment issues related to regulating greenwashing, see Shanor & Light, *supra* note 233.

[265] European Commission, EU Taxonomy for Sustainable Activities, https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/eu-taxonomy-sustainable-activities_en. The EU has also made efforts at comprehensive sustainability disclosure requirements under the umbrella of Sustainable Finance Disclosure Regulation (SFDR). Eurosif, SFDR, https://www.eurosif.org/policies/sfdr/.

Some critics have begun to advocate for the death of ESG – scrapping the term altogether.[266] A special report in *The Economist* concluded, "As an amalgam of three words, environmental, social and governance, which sound more like a pious mantra than a force for change, its reputation is now tarnished."[267] Similarly, the former head of sustainability at CalPERS, one of the world's largest pension funds, remarked, "I think it's time for RIP ESG."[268] Such views do not necessarily reflect a belief that all efforts at investing based on environmental or social issues should be abandoned, but that a major rethinking is due.[269]

In all, these various proposals for improving the term ESG or creating new definitions or taxonomies, or even jettisoning it from usage, highlight the underlying tension at the heart of ESG and its origins that this Article has explored. The big tent of ESG, and its ambiguity about whether it is a tool for financial and risk analysis or a vehicle to creating social good, are closely connected to its challenges and critiques. The path forward is uncertain. The profit-making motive within the ESG industry, which to date has pushed towards making ESG ever bigger, could eventually hasten its collapse if credibility concerns continue. Efforts to fight greenwashing and establish some measure of accountability are important to avoid such a fate,[270] but are unlikely to save the term from continued battle, particularly as politicians have attempted to cast it as a lightning rod in the culture wars of a polarized citizenry.[271]

A better understanding of the history, usages, and consequences of ESG might help chart the course forward in these possible futures. Critical analysis of combining E, S, and G reveals the tradeoffs at stake. Amid challenges and backlash to ESG, efforts to create an altogether new term might also arise again, restarting a journey that other terms such as CSR and sustainability have also traveled.

CONCLUSION

Within just a couple decades the term ESG has gone from closed-door sessions of financial industry executives and other institutional leaders gathered by the United Nations to the everyday lingo of investors, asset managers, corporate officers and directors, employees, consumers, and regulators around the world. This Article has

[266] *See* THE ECONOMIST, *Measure Less, But Better* (July 21, 2022), https://www.economist.com/special-report/2022/07/21/measure-less-but-better ("Ideally, the term ESG should be scrapped.").
[267] *Id.*
[268] Tett, *supra* note 132.
[269] *Id.* (noting the former CalPERS sustainability head argued for rethinking what ESG means and devising "a broader, human centered approach"); ECONOMIST, *supra* note 266 (arguing for the demise of ESG and "a suitable new name" such as "natural-capital investing" that would blend climate and capitalism).
[270] *See, e.g.*, *id.* (observing that the ESG backlash "is a sign that the market is maturing and evolving, in the face of more scrutiny" and asserting that challenges might make the concept more durable as other financial innovations in history have similarly followed a pattern of pendulum swings between fast uptake and inevitable reaction and regulation); Kishan & Bloomberg, *supra* note 111 (discussing the view that the ESG "shakeout" will lead to more "honesty in markets").
[271] *See* Jeff Green & Saijel Kishan, *America's Political Right Has a New Enemy No. 1: ESG Investors*, BLOOMBERG (May 20, 2022), https://www.bloomberg.com/news/articles/2022-05-20/why-esg-investing-is-under-republican-attack#xj4y7vzkg.

provided an in-depth examination of the term and its implications, starting from its history and evolution in usage to the promise and perils of its construction.

This exploration reveals that ESG has a specific origin, but is not a fixed concept beyond the combination of three categories of issues that comprise the acronym. Just as the opaque features of legal standards can create a salutary "fog" that allows for moral deliberation,[272] the flexibility and big tent approach of the term ESG, and its facilitation of claims of alignment between value and values, are at once part of the success story in diffusing ESG widely and forming a diverse movement of proponents. The ambiguity of ESG and varying usages that developed over time have facilitated buy-in from a great variety of market actors. However, these very features that have fostered a global dialogue, attracted trillions of investment dollars, and fueled regulatory reform, are also the source of challenges and critiques that have emerged and will continue into the foreseeable future.

[272] Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214 (2010).

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