The Quest for Legitimacy: A Public Law Blueprint for Corporate Governance

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Corporations are assuming an unexpected role: social reformers. As investors, employees, and other stakeholders increasingly call on companies to "take a stand" on controversial social issues, managers are struggling to respond. Faced with climate change, racial equity, and workplace gender issues, managers can no longer stay above the fray and retreat into the rhetoric of profit maximization. Corporate responses are frequently garnering backlash from stakeholders, as progressives accuse firms of hypocrisy and "greenwashing," and conservatives warn that a "woke" elite is imposing its values on the public. Corporate governance scholarship, unsure of how to address these new pressures, remains stymied in a standoff between stakeholderism and shareholder primacy.

Corporate law's fiduciary duty model provides little guidance to firms on how to navigate these social issues. Instead, this Article argues that reactions

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against managers' choices, when they are portrayed as arbitrary, unrepresentative, and biased, are akin to the "legitimacy challenges" often mounted against government officials and regulatory agencies. To enhance the legitimacy of agency decisions, administrative law has honed a sophisticated toolkit to promote goals such as transparency, accountability, consultation, and reason-giving.

This Article reveals previously unnoticed parallels between administrative and corporate law to improve corporate decisionmaking on social issues. We argue that corporate law should expand beyond its fiduciary duties approach to embrace legitimacy-enhancing governance tools based on the public law blueprint. We examine connections between administrative and corporate law through real world illustrations from climate change, #MeToo, and Black Lives Matter. Firms that adopted governance tools inspired by the public law blueprint reshaped their decisions and gained better acceptance from stakeholders. But when firms failed to embrace these tools, they experienced adverse reactions from investors and stakeholders alike, often losing firm value.

This Article has a clear normative payoff. These governance tools should become standard corporate governance practice. Embracing this public law blueprint will improve relations with stakeholders, reduce the possibility of costly legitimacy challenges, and improve firm value in a manner appealing to both stakeholderism and shareholder primacy proponents.

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INTRODUCTION

Corporations are increasingly becoming our era's unexpected laboratories for social reform. From climate change[1] and workplace

[1] *See* LUZ CERVANTES, TIM LETTS, LIAM VITA & TIM JULIANI, WORLD WILDLIFE FUND FOR NATURE, POWER FORWARD 4.0: A PROGRESS REPORT OF THE FORTUNE 500'S TRANSITION TO A NET-ZERO ECONOMY 6 (2021).

gender equality[2] to embracing Black Lives Matter[3] and fighting for voting rights,[4] corporations have launched a myriad of initiatives to promote key social goals. But instead of receiving acclaim for their zeal, corporate managers are facing mounting waves of criticism from across the ideological spectrum.[5] Progressives denounce corporate social initiatives as mere facades aimed to deflect from the lack of desired progress, illustrated by their "greenwashing" critique of corporate actions on climate change.[6] Conservatives bemoan companies' newfound enthusiasm for social causes as out-of-bounds for profit-making entities and castigate managers as mouthpieces of "woke" elites who are imposing their values on an unwilling public.[7] Republican politicians have begun to retaliate against corporate choices they see as an affront to their constituents' values, such as when the Florida legislature stripped Disney of its special tax status after Disney employees pressured executives to speak up against Florida's "Don't Say Gay" law.[8]

The intensity of these conflicts is harming the integrity of our markets, as accurate disclosures are becoming harder to come by.

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[2] *See* Jeanne Sahadi, *For the First Time, There's a Woman on Every S&P 500 Board. But They're Still in the Minority*, CNN BUSINESS (Dec. 17, 2020, 3:40 PM EST), https://www.cnn.com/2020/12/16/success/women-sp-500-board-directors/index.html [https://perma.cc/XR5X-LV3S].

[3] *See* Levi Sumagaysay, *Companies Declared "Black Lives Matter" Last Year, and Now They're Being Asked to Prove It*, MARKETWATCH (Mar. 6, 2021, 4:34 PM EST), https://www.marketwatch.com/story/companies-declared-black-lives-matter-last-year-and-now-theyre-being-asked-to-prove-it-11614972986 [https://perma.cc/8264-TQY2].

[4] *See* David Gelles & Andrew Ross Sorkin, *Hundreds of Companies Unite To Oppose Voting Limits, but Others Abstain*, N.Y. TIMES (May 27, 2021), https://www.nytimes.com/2021/04/14/business/ceos-corporate-america-voting-rights.html [https://perma.cc/A9CJ-TRWU].

[5] Gerald F. Seib, *How Corporate America Became a Political Orphan*, WALL ST. J. (July 23, 2021, 10:55 AM EST), https://www.wsj.com/articles/how-corporate-america-became-a-political-orphan-11627052148 [https://perma.cc/M28X-RBCP].

[6] *See infra* Part I.C.1.

[7] *See infra* Part I.C.2.

[8] *See* Anthony Izaguirre, *Florida Legislature Votes to Strip Disney of Self-Government After Opposition to "Don't Say Gay" Bill*, PBS NEWSHOUR (Apr. 21, 2022, 7:30 PM EDT), https://www.pbs.org/newshour/economy/florida-legislature-votes-to-strip-disney-of-self-government [https://perma.cc/4XDR-SRXH].

Fearful of adverse reaction, some firms are withholding information about their environmental initiatives[9] or their reproductive health benefits.[10] On the other hand, SEC regulators are tightening rules to address the skyrocketing flow of funds into vehicles purportedly investing in socially responsible firms.[11] With credible information in short supply, trust in the abilities of corporate leaders to navigate these crises is crumbling. Critics on both political sides are openly wondering whether managers should wield such wide-ranging authority over society.

Faced with the most severe challenge to its normative foundations in decades, corporate law appears unsure of how to respond. On one side, stakeholderism proponents argue that corporate managers should consider the effects of their social decisions on stakeholder groups.[12] However, they have not yet put forth a coherent vision about how to

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[9] *See* Madeleine Speed, *"Green Hushing" on the Rise as Companies Keep Climate Plans from Scrutiny*, FIN. TIMES (Oct. 18, 2022), https://www.ft.com/content/5fd513c3-e23f-4daa-817e-aa32cf6d18d4 [https://perma.cc/UKX3-N888].

[10] *See* PAUL WASHINGTON, THE CONFERENCE BOARD, THE U.S. CORPORATE RESPONSE TO RECENT SUPREME COURT DECISIONS (2022), https://www.conference-board.org/pdfdownload.cfm?masterProductID=39648 [https://perma.cc/VLM4-ZUZD] (finding 51% of surveyed companies have addressed reproductive rights internally, while only 10% of companies have made, or plan to make, a public statement about *Dobbs*). *See generally* Shea Holman & Hannah Naylor, *The* Dobbs *Decision: Emerging Trends in Corporate Response*, THE PURPLE CAMPAIGN (July 21, 2022), https://www.purplecampaign.org/purple-post/2022/7/20/the-dobbs-decision-emerging-trends-in-corporate-response [https://perma.cc/9K65-C99V] (discussing corporate actions taken to improve employees' reproductive health benefits and state legislatures punishing firms for such actions).

[11] Press Release, U.S. Sec. & Exch. Comm'n, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors 1 (Mar. 21, 2022), https://www.sec.gov/news/press-release/2022-46 [https://perma.cc/5DJY-3EQB]; Amanda M. Rose, *A Response to Calls for SEC-Mandated ESG Disclosure*, 98 WASH. U. L. REV. 1821, 1828 (2021).

[12] In summary, we use "stakeholderism" to refer to a debate that has been raging in corporate law for the last five years. It is typically used as an alternative view to shareholder profit maximization, which was the dominant conceptualization of corporate law for a century. For more discussion, see generally Elizabeth Pollman, *The Making and Meaning of ESG* (Euro. Corp. Governance Inst., Working Paper No. 659, 2022).

achieve their goal.[13] Meanwhile, shareholder primacy adherents fear integrating stakeholder concerns into managerial decisionmaking is not operationalizable,[14] or, more nefariously, managers will use such efforts to insulate themselves from shareholders.[15]

At this perilous crossroads, this Article argues that corporate law should look beyond the conventional fiduciary duty analysis to help firms navigate these uncharted waters. Fights over managerial choices on social issues conform with what public law theorists recognize as legitimacy challenges, which occur when stakeholders distrust powerholders' competence, discredit their impartiality, and question their motives.[16] Administrative law, in particular, has been finely attuned to the legitimacy challenges of agencies holding powers over the citizenry, which have surrounded agency policymaking since its inception.[17] In response, administrative lawyers, politicians, and

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[13] *See* Lynn S. Paine, *What Does "Stakeholder Capitalism" Mean to You?: A Guide to the Four Main Types*, HARV. BUS. REV., Sept.–Oct. 2023, https://hbr.org/2023/09/what-does-stakeholder-capitalism-mean-to-you [https://perma.cc/TYC3-DC88].

[14] *See, e.g.*, HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE 44 (1996) (discussing the costs of implementing corporate governance mechanisms to broaden corporate constituencies).

[15] *See, e.g.*, Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 100-01 (2020) [hereinafter *The Illusory Promise*] (arguing corporate managers will utilize the increased discretion generated from adopting stakeholderism to insulate themselves from regulation).

[16] *See infra* Part I.A.

[17] *See generally, e.g.*, JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT (1978) (discussing the problems associated with legitimating the administrative state); JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938) (discussing the rise and role of the administrative state in modern government and providing an expertise theory of administrative legitimacy); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (discussing the rise of presidential administration and arguing it can legitimate the contemporary administrative state); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975) (critiquing the interest representation theory of administrative legitimacy); Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1 (2022) (discussing the problem of legitimating the administrative state at a time of high political polarization and embracing an agonistic theory of administrative legitimacy). One of the authors has contributed to this debate. *See generally* Christopher S. Havasy, *Relational Fairness in the Administrative State*, 109 VA. L. REV. 749 (2023) (proposing the theory of relational fairness grounded in the relations between agencies and potentially affected persons

scholars have honed a toolbox of institutional design and policy mechanisms to bolster the legitimacy of agency decisionmaking by offering substantive and procedural justifications for agency authority over the citizenry.[18]

This Article demonstrates that the values animating administrative law's toolbox share many previously unrecognized parallels with decisionmaking mechanisms in corporate governance. We identify an array of voluntary governance tools deployed by companies at moments of social upheaval and analyze the legitimacy payoffs these tools bring to firms. Corporations that adopted these "legitimacy-enhancing governance tools" fared better than those that failed to do so.[19] Thus, given current governance developments, corporate law should complement its fiduciary duty analysis with a public law-based approach to improve corporate legitimacy. By embracing the public law blueprint and systematically adopting these governance tools, corporate managers can improve their decisionmaking, gain wider acceptance with their stakeholders, and preserve value for shareholders.

Conventional corporate law approaches managerial decisions through the lens of fiduciary duty doctrine in a principal-agent setting, which helps illuminate agents' self-serving behavior. Under fiduciary duty scrutiny, corporate law seeks to rein in executive compensation,[20] prevent controllers from diverting value away from minority shareholders,[21] and demand fair negotiations and prices in mergers and

and suggesting potential reforms to democratically legitimate the American federal administrative state).

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

[19] *See infra* Part III.

[20] *See, e.g.*, *In re* Invs. Bancorp, Inc. S'holder Litig., 177 A.3d 1208, 1211 (Del. 2017) (holding that directors must exercise their discretion in setting executive compensation in accordance with their fiduciary duties).

[21] *See, e.g.*, Kahn v. M&F Worldwide Corp., 88 A.3d 635, 644 (Del. 2014) (holding that, to benefit from the deferential business judgment standard of review in a merger between a controlling stockholder and its corporate subsidiary, the merger must be conditioned ab initio upon both the approval of an independent, adequately empowered special committee that fulfills its duty of care and the uncoerced, informed vote of a majority of minority shareholders).

acquisitions.[22] In this vein, many corporate law scholars are wary that expansive socially-oriented mandates will provide managers with unfettered discretion and new grounds for abuse.[23] Whether spending corporate profits on personal projects or diverting attention away from poor financial performance toward "green" initiatives, social considerations are endlessly malleable. Nor, as these scholars point out, is the need for expansive social mandates based on doctrinal problems or inconsistencies. From a fiduciary duty perspective, when a managerial choice does not violate any laws and falls within the broad confines of the business judgment rule,[24] it represents a legally justified exercise of discretion. As long as managers see a socially-oriented choice as broadly benefiting shareholders, corporate law provides them with the legal authority to make it. Thus, these scholars see little reason to tinker with the fiduciary duty model.

But, as companies are increasingly realizing, legal justification on its own does little to quell the criticisms currently leveled against managers. Denunciations include inadequate credentials and lack of expertise on social issues, doubts about managers' representativeness and accountability, and fears about their elitist biases and ideological motivations, among other concerns.[25] Whether complaining that companies are doing too little or too much, stakeholders are targeting their grievances on the processes and outcomes of managerial choices, in addition to any potential misuse of corporate profits. They view managers not only as business luminaries, but also as social leaders who wield massive influence over our society and make critical decisions

[22] *See, e.g.*, Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983) (describing the concept of fairness, the key requirement of the duty of loyalty, as encompassing two basic aspects: fair dealing and fair price).

[23] *See* Lucian A. Bebchuk & Roberto Tallarita, *Will Corporations Deliver Value to All Stakeholders?*, 75 VAND. L. REV. 1031, 1038 (2022); Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 768 (2015).

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

[25] *See infra* Part I.C.

with far-reaching social implications.[26] Steering this influence is a role that corporate governance, focused as it is on fiduciary duties, is struggling to accommodate.

Compare these grievances to the doubts that have perpetually surrounded administrative policymaking since the emergence of the modern administrative state: lack of democratic authorization, concerns about an overpowerful rule-setter, unease at the delegation of important policy choices to unaccountable and unrepresentative officials, and opaqueness of decisionmaking processes.[27] To contend with these fears, public law does not stop at mere legal justifications to legitimize the exercise of agency authority.

Rather, administrative law has developed a legitimacy framework with a sophisticated toolkit of mechanisms to also enhance the social and moral criteria for the legitimacy of agency decisions, such as the notice-and-comment rulemaking process requiring agencies to disclose a potential rule to interested parties before the rule is finalized and then agencies deliberating with interested parties about the potential rule.[28] These mechanisms enhance both the sociological and moral legitimacy of agency actions. *Sociological legitimacy* is conferred when key stakeholders accept and respect a decision as legitimate.[29] *Moral legitimacy* arises from the substantive justifications and processes used to reach the decision being seen as "the right thing to do" even in the face of objections or limitations in legal authority.[30] If corporate law seeks to help managerial choices regain social and moral affirmation among its stakeholders, it must reorient its governance tools toward

[26] *See generally* Aaron K. Chatterji & Michael W. Toffel, *The New CEO Activists*, HARV. BUS. REV., Jan.–Feb. 2018), https://hbr.org/2018/01/the-new-ceo-activists [https://perma.cc/B9XN-3M83] (discussing the rise of CEOs taking stands on political and social issues unrelated to the core work of their businesses); Ryan Krause & Toyah L. Miller, *From Strategic Leaders to Societal Leaders: On the Expanding Role of Executives and Boards*, 46 J. MGMT. 1315, 1316 (2020) (same among the broader category of business "strategic leaders").

[27] *See infra* Part II.A.

[28] *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 527 (2003) (discussing how agencies' choice of procedures addresses its lack of majoritarian legitimacy); *infra* Part III.

[29] *See infra* Part I.A.

[30] *See infra* Part I.A.

improving the sociological and moral legitimacy of managerial decisionmaking.

This claim is the main theoretical project of this Article. We begin with discussing the administrative law toolkit developed to improve the legitimacy of agency decisions, such as notice-and-comment, disclosure and transparency, independent monitoring mechanisms, scientific and technocratic expertise, standardizing policymaking, and securing enforcement.[31] We then pair these well-established administrative law tools with novel governance tools that companies have voluntarily developed in order to address looming social issues. Our pairing reveals the institutional parallels in the two approaches and explores how the corporate tools can produce similar legitimating effects to the well-established ones in administrative law.[32]

For example, the notice-and-comment process during agency informal rulemaking shares many features with companies' stakeholder outreach efforts that seek to formalize input from interested groups.[33] Just like notice and comment,[34] stakeholder participation fosters deliberation to help inform decisionmakers' perspectives and formulate solutions better suited to realities on the ground, thus boosting the moral legitimacy of the firm's ultimate decision. Moreover, through the subsequent reasoned dialogue, both notice and comment and stakeholder participation help encourage interested groups to embrace the final rule, thus improving sociological legitimacy. We draw similar comparisons between other administrative procedures and corporate governance, such as transparency and sustainability disclosure, agency expertise and corporate reliance on professionals, and the choice between policymaking types for agencies compared to ESG standardization for private companies.

Throughout this Article, we apply our legitimacy framework to analyze how firms have responded to recent legitimacy challenges.[35]

[31] *See infra* Part II.A.

[32] *See infra* Part II.

[33] *See infra* Part II.B.

[34] *See* Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1720 (2007) (discussing the goal of notice-and-comment as ensuring that agencies face public input before producing important policies).

[35] *See infra* Part II.

Drawing examples from climate change,[36] #MeToo,[37] Black Lives Matter,[38] and other instances, we show how some managers have imperiled their position by neglecting the sociological and moral legitimacy of their decisions. In contrast, other companies responded to heated legitimacy challenges by reforming their internal governance through institutional mechanisms that can be better understood through a legitimacy framework rather than a fiduciary duty lens. We find that companies that use these governance tools are more likely to gain broad acceptance of their decisions from stakeholders. Particularly when companies' past actions become the target of intense turmoil among stakeholders, managers emerge as successfully responsive when they embrace measures similar to our proposed legitimacy-enhancing governance toolkit.[39]

Our theoretical analysis and real-world examples bring forward a set of clear normative rewards for managers, investors, and other stakeholders alike.[40] The public law blueprint can help both managers and stakeholders navigate the conflicting interest groups, raging cultural wars, and demands for improving performance in this new business environment. In the examples we discuss, companies turn to different tools depending on their immediate goals in each case. But our analysis also shows that these tools are mutually reinforcing because they address different aspects of corporate legitimacy.[41] Therefore, they would work better if adopted as a coherent and systematic framework, thus forming our public law blueprint. For example, improved disclosures will provide a stronger disciplining effect on managers if the company also adopts more robust accountability mechanisms. A systematic embrace of this blueprint will help managers grasp emerging concerns in a broader set of issues and help them gather intelligence on the ground, offer solutions where possible, and negotiate compromises early and effectively.[42]

[36] *See infra* Parts II.C–D.

[37] *See infra* Parts II.B, G.

[38] *See infra* Parts II.B, E.

[39] *See infra* Part II.

[40] *See infra* Part III.

[41] *See infra* Part III.C.

[42] *See infra* Part III.C.2.

Our blueprint should appeal both to those who want to see companies embrace stakeholders' interests and those who advocate for strict adherence to profit maximization and shareholder primacy.[43] For the first camp, we offer to stakeholders a direct pathway into the corporate decisionmaking process, allowing them to evaluate managers' proposals, register concerns, and help shape eventual choices. By opening their decisionmaking processes to stakeholder input and monitoring, we argue, managers can also better preserve or increase firm value when their actions are likely to trigger costly legitimacy challenges from corporate stakeholders. This feature should reassure proponents of shareholder primacy.

Our blueprint would usher a bold expansion of tasks and institutional commitments into the current corporate governance, requiring additional resources and effort for companies. But far from being an outlandish suggestion, this blueprint adopts solutions that many companies are already putting in place, which indicates that managers are already gauging that the benefits outweigh the costs. In the alternative, if managers fail to adopt such tools in time, then they risk the ever-increasing possibility that disgruntled stakeholders may mobilize legitimacy challenges that can severely hurt the firm's value and managers' standing as social leaders. In these situations, our examples demonstrate that regaining lost stakeholder trust is an uphill battle for managers, often requiring costlier and more extensive interventions into corporate governance than managers proactively adopting our proposals.[44]

This Article will proceed as follows. Part I lays out the framework built by public law and theory to analyze the legitimacy of political institutions. We explore the distinction between legal, sociological, and moral criteria for legitimacy and argue that corporate law's current legitimating framework, which focuses on legal justifications for managerial decisions, falls short on sociological and moral grounds. Part II illustrates our argument for adjusting administrative law mechanisms designed to enhance moral and sociological legitimacy and argues their corporate analogues should be imported into corporate governance,

[43] *See infra* Part III.D.

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

which forms our blueprint for reform. Throughout this Part, we offer concrete illustrations of actual legitimacy challenges by stakeholders and assess managerial responses against our identified legitimacy-enhancing governance tools. Part III examines our main descriptive takeaways from these case studies of stakeholder-driven legitimacy challenges and makes the normative case for managers to adopt our blueprint proactively and systematically. The systematic adoption of these legitimacy-enhancing governance tools will likely improve long-term firm value in a manner that is appealing to both shareholder primacy and stakeholderism advocates.

I. POLITICAL AND CORPORATE LEGITIMACY

The justification of why institutions should wield power over citizens is a perennial concern in public law and political theory.[45] Through the concept of legitimacy, scholars in these fields have developed analytical frameworks for understanding and categorizing justifications for the exercise of power by political institutions over citizens. This Part begins by outlining the public law approach to legitimacy. We then discuss why legitimacy concerns apply to corporate law and how corporate governance is currently a battleground for contrasting views of legitimacy. Today, as corporations are pushed to take stands on various social issues, the real extent of managerial power has been laid bare for all stakeholders. This realization has resulted in the quest for legitimacy in corporate law beginning anew.

A. *Legitimacy in the Political Context*

Polarization has come to define our moment in time. However, all democratic societies must grapple with different opinions among the various groups they bring together, with their mismatched ideological

[45] *See generally, e.g.*, Allen Buchanan, *Political Legitimacy and Democracy*, 112 ETHICS 689 (2002) (discussing the relationship between legitimacy and democracy); Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005) (discussing the different types of legitimacy and their relation to the U.S. Constitution); Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307 (2001) (discussing the role of the rule of law in legitimating a constitutional democratic state); *supra* note 17.

commitments, material needs, and cultural backgrounds. This problem, known to theorists as moral pluralism,[46] makes reaching consensus on most policy outcomes exceedingly difficult.[47]

Moral pluralism creates two main challenges for any political institution that holds power over citizens. Ex ante, there will be conflicts between opposing groups during decisionmaking, both about the inputs relevant to the decision and about the process used to reach the decision. Ex post, moral pluralism creates the possibility that those who lost out in the decisionmaking process will refuse to follow the chosen course of action.[48] The presence of moral pluralism in societies thus creates a high probability of "legitimacy challenges" for political institutions: for what reason, citizens question, should they abide by decisions of their government, particularly when those decisions violate their deeply held convictions?[49]

[46] For discussion of the problem of moral pluralism in the modern democratic state see generally, Joshua Cohen, *Moral Pluralism and Political Consensus*, *in* PHILOSOPHY, POLITICS, AND DEMOCRACY 38 (2009), WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1995), and JEREMY WALDRON, LAW AND DISAGREEMENT (1999).

[47] *See generally* John S. Dryzek & Simon Niemeyer, *Reconciling Pluralism and Consensus as Political Ideals*, 50 AM. J. POL. SCI. 634 (2006) (discussing the importance of consensus and why it is difficult to achieve given moral pluralism). The difficulty of reaching consensus given moral pluralism often grounds the necessity of using majority rule. *See* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 174 (William Rehg trans., MIT Press 1996); William A. Galston, *Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory*, 40 WM. & MARY L. REV. 869 (1999).

[48] For discussions of pluralism, social cohesion, and conflict, see, for example, AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 18-26 (1996), James Bohman, *Public Reason and Cultural Pluralism: Political Liberalism and the Problem of Moral Conflict*, 23 POL. THEORY 253, 256-59 (1995), and William A. Galston, *Realism in Political Theory*, 9 EUR. J. POL. THEORY 385, 390-93 (2010).

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

One possible response is coercion.[50] But coercive enforcement, such as sanctions or police powers, saps state resources,[51] diverts policymakers' attention, and is likely to cause anger, frustration, or even resistance among the population.[52] Rather than depleting their coffers and inciting hostility, decisionmakers are better off justifying their decisions to citizens.[53] The hope is that these justifications may at least help, if not sway, opposing groups to their position, satisfying these groups into going along with the chosen decision.[54] The value of legitimacy lies in justifying the power held by political institutions to

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[50] This is the classic answer by Thomas Hobbes, whereby legitimacy is generated by the sovereign's ability to effectively enforce the social contract. THOMAS HOBBES, LEVIATHAN 121-29 (Cambridge Univ. Press 1996) (1651).

[51] U.S. city and county governments spent 15% and 19% of their respective budgets on police, corrections, and courts in 2017. *Criminal Justice Expenditures: Police, Corrections, and Courts*, URB. INST.: STATE & LOC. BACKGROUNDERS, https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/criminal-justice-police-corrections-courts-expenditures (last visited Sept. 20, 2023) [https://perma.cc/8TGS-K458].

[52] GILLEY, *supra* note 49, at xii ("Nothing will turn heads like the cry of 'legitimacy crisis.' That cry, where it is a true reflection of citizen beliefs, will corrode the power of a ruler beyond what legions of soldiers or crates of gold can restore. A lot is riding on the question of legitimacy."); *cf.* Margaret Levi & Audrey Sacks, *Legitimating Beliefs: Sources and Indicators*, 3 REGUL. & GOVERNANCE 311, 311 (2009) (stating that "[t]he more a government is effective and trustworthy, the more legitimacy that government is likely to attain, and the more it will possess the potential to elicit compliance without excessive monitoring or punitive action").

[53] For discussion on the stability created by institutions acquiring legitimacy, see generally Alex Bitektine & Patrick Haack, *The "Macro" and the "Micro" of Legitimacy: Toward a Multilevel Theory of the Legitimacy Process*, 40 ACAD. MGMT. REV. 49 (2015), Bruce Gilley, *The Meaning and Measure of State Legitimacy: Results for 72 Countries*, 45 EUR. J. POL. RSCH. 499 (2006), and Maykel Verkuyten & Arjan Reijerse, *Intergroup Structure and Identity Management Among Ethnic Minority and Majority Groups: The Interactive Effects of Perceived Stability, Legitimacy, and Permeability*, 38 EUR. J. SOC. PSYCH. 106 (2008).

[54] *See generally* Simon Caney, *Liberal Legitimacy, Reasonable Disagreement and Justice*, 1 CRITICAL REV. INT'L SOC. & POL. PHIL. 19 (1998) (discussing the problem of social disagreement for liberalism and the role of concept of legitimacy can help to reduce it); Jonathan Quong, *Disagreement, Asymmetry, and Liberal Legitimacy*, 4 POL., PHIL. & ECON. 301 (2005) (same); *supra* note 43 (same).

citizens to help divergent societal forces coalesce under goals set by the institutions.[55]

These justifications come in three distinct types. Legal legitimacy determines whether a decision satisfies the proper procedural and substantive requirements established by the legal system.[56] This form of legitimacy puts the law at the heart of the inquiry, examining whether the chosen outcome is within the procedural and substantive boundaries set by law. Not all legal errors raise a question of illegitimacy; rather, such a claim denotes a strong or persistent deviation from established legal practice.[57]

Sociological legitimacy focuses on the citizens' perceptions regarding an institution or its decisions.[58] If the public regards the institution as justified under their own belief systems and opinions, then they are likely to follow it for some reason beyond the mere threat of sanction. As Max Weber articulated, "[T]he basis of every system of authority, and correspondingly of every kind of willingness to obey, is a belief, a belief by virtue of which persons exercising authority are lent prestige."[59] Because sociological legitimacy is a subjective concept that is expressed according to citizens' own beliefs, it can change over time if citizens change their minds.

Finally, moral legitimacy asks whether an institution is normatively acceptable or justifiable to citizens. From a substantive standpoint, the institution or its decisions may accord with some standard of moral

[55] For discussion of the value of legitimacy for political institutions, see, for example, ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 138 (Univ. of Chi. Press 1963) (1956), WILLIAM A. GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE 3-5 (2002), Joshua Cohen, *Pluralism and Proceduralism*, 69 CHI.-KENT L. REV. 589, 598-600 (1994) (discussing how legitimate democratic procedures can justify substantive policy outcomes), Dryzek & Niemeyer, *supra* note 47, at 3-5 (same).

[56] Some also speak of the authoritative legal legitimacy of decisions, which denotes whether a decision is legally binding in character. *See* Fallon, *supra* note 45, at 1794-95.

[57] *See id.* at 1795-96.

[58] Gillian E. Metzger, *Considering Legitimacy*, 18 GEO. J.L. & PUB. POL'Y 353, 357-58 (2020); *see also* Fallon, *supra* note 45, at 1795-96; James Weinstein, *Hate Speech Bans, Democracy, and Political Legitimacy*, 32 CONST. COMMENT. 527, 534 (2017).

[59] MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 364 (Talcott Parsons ed., A.M. Henderson & Talcott Parsons trans., Free Press 1964) (1947).

evaluation or set of beliefs, such as utilitarianism or a conception of justice.[60] Alternatively, some theorists argue that institutions can build moral legitimacy by following normatively acceptable procedures, such as through a process of deliberating with constituents.[61] Others combine the substantive and procedural perspectives, advocating for procedural moral legitimacy within a bound of reasonable outcomes.[62] In our analysis below, we employ both procedural and substantive criteria for moral legitimacy.[63]

At this point, one might wonder why three different sources of legitimacy are analytically necessary. But consider the implications when a decision holds one type of legitimacy without the other two. For example, a law can be validly generated through the legislative process, establishing its legal legitimacy, but it may face widespread opposition and backlash by the public, whereby it lacks sociological legitimacy.[64] Alternatively, this law might enjoy the support of a large percentage of the public and hold sociological legitimacy, but disproportionately harm the rights of a protected minority group, thereby rendering it morally

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

[61] *See generally* JAMES BOHMAN, PUBLIC DELIBERATION: PLURALISM, COMPLEXITY, AND DEMOCRACY (1996) (proposing a pure procedural theory of legitimacy focused on properly structuring the procedures of the state); Bernard Manin, Elly Stein & Jane Mansbridge, *On Legitimacy and Political Deliberation*, 15 POL. THEORY 338 (1987) (same).

[62] For a discussion of proposing a rational proceduralist theory of legitimacy that combines both properly structuring procedures with certain substantive limits, see generally HABERMAS, *supra* note 47, and JOHN RAWLS, POLITICAL LIBERALISM (1993).

[63] This Article remains agnostic about the "correctness" of moral legitimacy theories because many readers will view substantive or procedural legitimacy as important to analyzing corporate decisionmaking.

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

illegitimate.[65] While distinct concepts, legal, sociological, and moral legitimacy can also be mutually reinforcing concepts. For example, a decision validly taken in accordance with the law might satisfy procedural criteria that enhance its appeal to constituents and comport with core substantive values, ultimately convincing the public more handily that it is worthy of respect.

B. Legitimacy in Corporate Law

Legitimacy analyses have mostly focused on public institutions given the sweeping powers of government. More recently, theorists have utilized the legitimacy framework to analyze the power and authority of certain private organizations in contexts such as public-private partnerships, private standard-setting, and government subcontracting.[66] But corporations, these creatures of the marketplace that nurture private initiative, seem at first glance far removed from the exercise of power that typically demands justification.

In fact, the agglomeration of resources in large public companies, their influence on our politics, and the agenda of those running them have long worried some academics and policymakers, who saw this managerial power as demanding justification.[67] In this Section, we first narrow our focus to define which types of corporate decisions invoke the legitimacy claims we are concerned with in this Article. We then argue that, by understanding these conversations as legitimacy claims, we can explain the turmoil surrounding public corporations today. We end this Part by arguing that corporate law's current focus on legal legitimacy underspecifies the legitimacy claims brought by

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

[66] *See generally* CHIARA CORDELLI, THE PRIVATIZED STATE (2020) (theorizing the proper role and limits of privatization in a democratic state); Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377 (2006) (same) , Benjamin Cashore, *Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule-Making Authority*, 15 GOVERNANCE 503 (2002) (same), Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 549-56 (2000) (same), and Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003) (same).

[67] *See infra* notes 73–75.

stakeholders. For decades, corporate law had emphasized legal legitimacy, which kept companies far from social controversies and focused on internal agency conflicts and governance mechanisms. However, the true power of firms to affect the rights and freedoms of various stakeholders is increasingly being laid bare as the social implications of companies' choices are becoming exposed.[68] As a result, corporate managers ensuring their decisions satisfy only legal legitimacy are failing to adequately justify their decisions to stakeholders. This under-specification can result in stakeholder backlash and widespread controversies when stakeholders challenge why corporate managers are making decisions regarding important social issues.

1. Corporate Actions that Demand Legitimacy

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

Corporate law, in turn, has entrusted the power to steer corporate choice to few elite managers whose latitude, though not boundless, is

[68] *See, e.g.*, Izaguirre, *supra* note 8 (discussing Disney's choice to publicly weigh in on anti-LGBTQ legislation); *see also* Rachel Sandler, *Shareholder Lawsuit Alleges Pinterest Executives Enabled and Ignored Workplace Discrimination*, FORBES (Dec. 1, 2020, 4:08 PM EST), https://www.forbes.com/sites/rachelsandler/2020/12/01/shareholder-lawsuit-alleges-pinterest-executives-enabled-and-ignored-workplace-discrimination/?sh=c900f313acd6 [https://perma.cc/C7XB-XYHK] (discussing complaints of racial discrimination made by employees at Pinterest).

still virtually "unfettered."[69] To encourage entrepreneurial initiatives, the business judgment rule allows managers to act as they see fit for the interests of the corporation and its shareholders, provided there are no conflicts of interest and they do not violate the law.[70] Both internal corporate governance mechanisms, such as monitoring by independent directors, and external ones, such as gatekeeper oversight and securities disclosure, are also oriented toward shareholders, thereby leaving alternative inputs outside the decisionmaking process.[71]

As members of the board, some managers do need to gain reelection annually, so shareholder voting could theoretically provide a check on their decisionmaking. However, in practice, mobilizing shareholders against the board is a highly costly and procedurally burdensome effort, particularly in large public companies with dispersed shareholder bases.[72] For this reason, Adolf Berle, who helped define modern corporation law, worried that managers constitute an "automatic self-perpetuating oligarchy."[73] As he provocatively put the problem, "Power

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[69] John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1643 (1989) ("[D]irectors possess unfettered discretion."); *see also* Jeffrey N. Gordon, *Corporations, Markets, and Courts*, 91 COLUM. L. REV. 1931, 1963 (1991); Lynn A. Stout, *The Problem of Corporate Purpose*, ISSUES GOVERNANCE STUD., no. 48, June 2012, at 1, 5 ("[D]irectors of public companies enjoy virtually unfettered legal discretion to determine the corporation's goals.").

[70] The business judgement rule protects managers from liability for decisions made for "any rational business purpose." Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985) (quoting Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971)); *see also* Gagliardi v. TriFoods Int'l, Inc., 683 A.2d 1049, 1051 (Del. Ch. 1996) (stating that absent "self-dealing or improper motive, a corporate officer or director is not legally responsible to the corporation for losses that may be suffered as a result of a decision that an officer made or that directors authorized in good faith").

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

[72] *See* Bo Becker, Daniel Bergstresser & Guhan Subramanian, *Does Shareholder Proxy Access Improve Firm Value? Evidence from the Business Roundtable's Challenge*, 56 J.L. & ECON. 127, 130 (2013); Michael S. Kang, *Shareholder Voting as Veto*, 88 IND. L.J. 1299, 1306-07 (2013).

[73] A.A. BERLE, JR., ECONOMIC POWER AND THE FREE SOCIETY 8-9 (1957).

without responsibility is, philosophically, a perilous matter."[74] Even though managerial discretion is subject to market forces and regulatory commands, even former Chancellor and law professor William T. Allen acknowledged that the mere perception of such corporate power requires a theory to legitimate it.[75]

Controversies are bound to arise given broad managerial power extending over a wide variety of societal issues that can radically impact stakeholders. Competing values and conflicting interest groups vie to win out during managerial decisionmaking, which often results in tradeoffs being necessary between various stakeholder groups. Harmed parties can raise substantive disagreements and procedural contestations, question corporations' moral commitments, and refuse to go along with management directives.

This problem constitutes a quintessential problem of moral pluralism. Given the ability of corporate managers to alter the rights and liberties of others and the diversity of ideological stakeholder viewpoints, corporate law was previously concerned with the legitimacy of managerial decisionmaking.[76] As we explain below,[77] corporate law has settled on a framework that emphasizes legal legitimacy, justifying managerial decisions so long as they are allowed by lawmakers and taken in furtherance of shareholder interests. As the corporate governance machine made this viewpoint dominant,[78] the preponderance of this

[74] A.A. Berle, Jr., *Non-Voting Stock and "Bankers' Control*,*"* 39 HARV. L. REV. 673, 674 (1926).

[75] William T. Allen, *The Mysterious Art of Corporate Governance*, 22 CORP. BD., no. 130, Sept. 2001, at 1, 2-3.

[76] *See, e.g.*, Bayless Manning, *Corporate Power and Individual Freedom: Some General Analysis and Particular Reservations*, 55 NW. U. L. REV. 38, 42 (1960) ("Corporate Power has therefore become illegitimate power, and we must be alarmed at the threat of the corporation and the unlegitimated acts of an unpropertied management . . . ."); A.A. Berle, *Economic Power and the Free Society*, *in* THE CORPORATION TAKE-OVER 91, 103 (Andrew Hacker ed., 1964) ("[W]henever there is a question of power there is a question of legitimacy. As things stand now, these instrumentalities of tremendous power have the slenderest claim of legitimacy."). *See generally* JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780–1970 (1970) (discussing the various theories to legitimate the business corporation in modern time).

[77] *See infra* Part II.B.2.

[78] *See* Lund & Pollman, *supra* note 24, at 2578-2608.

framework was seldom questioned. As a result, even the language of legitimacy has gradually faded from corporate law scholarship. But the shortcomings of removing the legitimacy framework from corporate law are becoming increasingly clear.

Before this discussion, two clarifications are necessary. First, legitimacy inquiries can operate at different levels of generality. For example, some may involve the legitimacy of the corporation as a system for organizing resources and production in a society or the overall legitimacy of a specific corporation.[79] Such inquiries are not the focus of this Article. Instead, we analyze the legitimacy of corporate decisions by managers that produce large-scale societal implications and alter the rights and liberties of stakeholders.[80] Not all corporate decisions invite legitimacy claims. Some managerial decisions may make business sense but lack broader societal imprint, such as firing an underperforming employee or opening a retail outlet in an up-and-coming area. Other managerial decisions may involve the interests of some stakeholders without meaningfully altering their liberties, for example, choosing between transport methods that have a similar environmental profile. The deeper the social and moral resonance of a corporate choice, the starker the legitimacy claim will be.

We choose managerial decisions as our level of analysis because each action may involve distinct values and justifications that can be addressed through each company's decisionmaking processes.

[79] *See generally* ERIC W. ORTS, BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM (2013) (proposing a theory of legitimacy for the firm qua firm within society); William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471 (1989) (discussing various theories of legitimacy for the firm qua firm in the modern period); Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987) (same).

[80] By focusing on the legitimacy of corporate decisions under the current socio-legal system, this Article operates in the realm of non-ideal theorizing of a situated socio-economic institution. *See generally* Laura Valentini, *Ideal vs. Non-Ideal Theory: A Conceptual Map*, 7 PHIL. COMPASS 654 (2012) (discussing the different theoretical conceptions of ideal vs. non-ideal theory). This Article does not engage in ideal theory to design corporate governance from scratch. *See generally* ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) (2017) (proposing an ideal theory to legitimate the role of companies in democratic society); ABRAHAM A. SINGER, THE FORM OF THE FIRM: A NORMATIVE POLITICAL THEORY OF THE CORPORATION (2019) (same).

Ultimately, the sum of individual corporate actions plays a role in determining the overall legitimacy of a specific firm or, more generally, the legitimacy of corporations in society. But these wider legitimacy inquiries would likely unfold through broader political processes into which we do not seek to intervene.

Second, corporations lack typical government enforcement powers, such as imprisonment or monetary sanctions.[81] But even though firms do not normally impose their will through brute force,[82] they can systematically alter the way millions of people pursue their lives and enjoy their freedoms. For example, by setting workplace conditions, from the use of restroom breaks to the pursuit of sexual harassment allegations, companies not only affect their employees' livelihood and personal growth, but they also set the tone for industry-wide practices.[83] Technology companies have revolutionized communication, but for those concerned about the cost to their privacy, fully opting out of these

[81] The philosophical literature has debated how closely firms are analogous to governments, called the "firm-state analogy." The majority view is that there are enough similarities that firms can be compared to states. *See* Roberto Frega, Lisa Herzog & Christian Neuhäuser, *Workplace Democracy — The Recent Debate*, 14 PHIL. COMPASS, Feb. 19, 2019, at 1, 4-5 (listing a number of theorists who believe the state-firm analogy is appropriate). *But see generally* Richard J. Arneson, *Democratic Rights at National and Workplace Levels*, *in* THE IDEA OF DEMOCRACY 118 (David Copp, Jean Hampton & John E. Roemer eds., 1993) (arguing that the firm-state analogy is inapt).

[82] There is a long history of American corporations using violence during disagreements with stakeholders. William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1185-95 (1989). *See generally* GRAHAM ADAMS, JR., AGE OF INDUSTRIAL VIOLENCE, 1910–15: THE ACTIVITIES AND FINDINGS OF THE UNITED STATES COMMISSION ON INDUSTRIAL RELATIONS (1966) (discussing industrial violence during the Progressive Era in the United States).

[83] Amazon has come under such widespread scrutiny regarding their regulation of warehouse worker bathroom breaks that 15 U.S. senators wrote to then CEO Jeff Bezos in 2020 criticizing Amazon's treatment of their warehouse workers and seeking reform. Letter from Sherrod Brown, U.S. Senator, et al., to Jeff Bezos, Chief Exec. Officer, Amazon.com, Inc. (Feb. 7, 2020), https://s3.documentcloud.org/documents/6772867/AmazonWorkerSafetyLetterFeb72020.pdf [https://perma.cc/3ND3-P87A]; David Streitfeld, *Amazon's Clashes with Labor: Days of Conflict and Control*, N.Y. TIMES (June 15, 2021), https://www.nytimes.com/2021/04/05/technology/amazon-control-bathroom-breaks.html [https://perma.cc/WM9Z-DTPL].

outlets is impracticable and terrifyingly isolating.[84] Platforms like Uber and Airbnb are transforming the urban experience in ways that affect even those who do not use them, such as displacing low-income renters when landlords convert residential apartments into Airbnb properties.[85]

One could add many examples to this list, but the conclusion is inescapable. To the extent that corporations must compete in labor markets, appeal to consumers, and coexist with other impacted parties, they need to ensure that their decisions are not only economically efficient, but also justifiable to a broader set of stakeholders. These corporate decisions, whether positive or negative in outcome, have a direct, and even lasting, effect on stakeholders' rights, liberties, and freedoms. The growing stakeholder awareness of the many channels and spheres of corporate influence underwrites calls for the legitimacy of their powers.

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

For many decades, the prevailing answer for justifying corporate activity was through the norm of shareholder primacy: corporations' sole aim is to maximize wealth for their shareholders within the confines of the law.[86] Because managers are shareholders' agents, they can only be accountable to them, and not to any other constituency. It

[84] *See* Woodrow Hartzog & Evan Selinger, *Quitters Never Win: The Costs of Leaving Social Media*, ATLANTIC (Feb. 15, 2013), https://www.theatlantic.com/technology/archive/2013/02/quitters-never-win-the-costs-of-leaving-social-media/273139/ [https://perma.cc/3NXR-647Q].

[85] Recent studies have found that increases in Airbnb listings leads to increased rental prices. Kyle Barron, Edward Kung & Davide Proserpio, *The Effect of Home-Sharing on House Prices and Rents: Evidence from Airbnb*, 40 MKTG. SCI. 23, 23 (2020); Keren Horn & Mark Merante, *Is Home Sharing Driving Up Rents? Evidence from Airbnb in Boston*, 38 J. HOUS. ECON. 14, 14 (2017).

[86] *See, e.g.*, E. Norman Veasey, *Should Corporation Law Inform Aspirations for Good Corporate Governance Practices — or Vice Versa?*, 149 U. PA. L. REV. 2179, 2184 (2001) (discussing how Delaware law adopts shareholder primacy). *See generally* Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423 (1993) (defending the theory of shareholder wealth maximization); Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951 (2018) (defending the theory of shareholder primacy).

was the lawmakers' job to protect societal interests through statutes and regulations. Of course, nothing prevented managers from assisting other constituents when it also helped shareholders, as the corporate social responsibility movement declared.[87] But if one company veered too much toward costly stakeholder-friendly practices, the belief was that another competitor would jump in to undercut it, leaving managers with no other option but to recenter their efforts toward shareholders' profits.[88]

Portraying managers as shareholders' agents, corporate legitimacy has relied on accountability through annual elections as its key justification. Delaware's most celebrated ruling on annual elections, *Blasius Industries, Inc. v. Atlas Corp.*,[89] declared that shareholder franchise as "the ideological underpinning upon which the legitimacy of directorial power rests."[90] According to Chancellor Allen in *Blasius*, shareholder voting "is critical to the theory that legitimates the exercise of power by some (directors and officers) over vast aggregations of property that they do not own."[91] As a result of advocacy from academics and institutional investors, corporations have shed practices that shielded directors from shareholder pressures to improve the legitimacy of managerial decisionmaking, such as declassifying boards, enabling proxy access, and instituting majority voting thresholds.[92] Independent

[87] The rise of constituency statutes sought to give corporate managers legal protection for considering stakeholders other than shareholders. *See generally* Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971 (1992) (examining the rise of state constituency statutes in the 1980s); Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14 (1992) (same).

[88] For an overview of the debate on how competition pushes managerial decisions toward efficiency, see ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW (1993).

[89] 564 A.2d 651 (Del. Ch. 1988).

[90] *Id.* at 659.

[91] *Id.*

[92] *See* Lucian Bebchuk, Scott Hirst & June Rhee, *Towards the Declassification of S&P 500 Boards*, 3 HARV. BUS. L. REV. 157, 163-64 (2013); Stephen J. Choi, Jill E. Fisch, Marcel Kahan & Edward B. Rock, *Does Majority Voting Improve Board Accountability?*, 83 U. CHI. L. REV. 1119, 1175 (2016); David Yermack, *Shareholder Voting and Corporate Governance*, 2 ANN. REV. FIN. ECON. 103, 105-06 (2010). *See generally* Lucian A. Bebchuk & Scott Hirst, *Private Ordering and the Proxy Access Debate*, 65 BUS. LAW. 329 (2010) (discussing and

directors, who are not connected to management and are thought to boost responsiveness to market preferences, have gained a greater role in resolving self-dealing conflicts, setting executive compensation, and overseeing finances.[93]

Assessing this approach to corporate legitimacy, corporate governance has emphasized the firm's legal authority, hoping that moral and sociological legitimacy will follow suit through managerial decisionmaking attuned to shareholder primacy. Agency law then becomes the mechanism of legitimating managerial discretion within the firm to ensure that managers are responsible to shareholders. Meanwhile, external laws and regulations are entrusted with circumscribing the outer limits of managers' discretion. As long as this neat division of legal authority between managers and lawmakers works reasonably well in achieving desired social goals, i.e., maximize societal wealth, this legitimacy framework was widely accepted.

Yet, cracks in the foundation of this division are growing bigger and becoming impossible to ignore, threatening its moral and sociological support. For years, companies have been ex ante lobbying policymakers for their interests,[94] while using cost-benefit analysis and litigation to ex post invalidate restrictive regulations to increase firm profits.[95] But to address the key challenges of our era, like climate change or gender equality in the workplace, lawmaking activity is hardly sufficient.[96] This

arguing for multiple corporate governance mechanisms to reduce the insulation of the corporate board from shareholders).

[93] Jeffrey N. Gordon, *Independent Directors and Stock Market Prices: The New Corporate Governance Paradigm* (Euro. Corp. Governance Inst., Working Paper No. 74, 2006); *see also* Lucian A. Bebchuk & Michael S. Weisbach, *The State of Corporate Governance Research*, 23 REV. FIN. STUD. 939, 944 (2010).

[94] *See generally* LEE DRUTMAN, THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE (2015) (analyzing and discussing the methods and magnitude of corporate lobbying in America).

[95] *See* Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 435-40 (2015).

[96] *See generally* Aneil Kovvali, *Stark Choices for Corporate Reform*, 123 COLUM. L. REV. 693 (2023) (discussing why both political and corporate reforms are needed to help stakeholders).

insufficiency is especially the case in our current political climate of widespread polarization and dysfunction.[97]

However, even when the political system works well, politicians can only set general directions or goals. They cannot devise one-size-fits-all solutions applicable across companies, nor can they mandate the organizational changes necessary to translate abstract objectives into everyday practices.[98] Therefore, individual companies are increasingly under pressure to take action on a range of controversial social issues, from transforming employees' daily working conditions to solving global challenges like climate change.[99] To plan and implement such changes, some commentators have been urging companies to abandon their exclusive focus on shareholders and instead consider the interests of a broader set of stakeholders during their decisionmaking.[100]

Surprisingly, powerful shareholders are also embracing these calls. Large asset managers and pension funds now dominate U.S. equity markets. Index funds own thirty percent of all public equity in the United States. The Big Three asset managers —Blackrock, Vanguard,

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[97] Larry Fink in 2019 mentioned political dysfunction in his discussion of reinvigorating the concept of corporate purpose. Letter from Larry Fink, Chief Exec. Officer, BlackRock, to CEOs, Regarding Purpose and Profit (2019), https://www.blackrock.com/americas-offshore/en/2019-larry-fink-ceo-letter [https://perma.cc/F9JL-X2TE]; Edward B. Rock, *For Whom Is the Corporation Managed in 2020? The Debate over Corporate Purpose*, 76 BUS. LAW. 363, 368 (2021); *see also* Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1561-62 (2018) ("Given the gridlock in the federal government, change via corporate social activism can prove to be much more appealing and effective.").

[98] *See* STEPHEN M. BAINBRIDGE, CORPORATE GOVERNANCE AFTER THE FINANCIAL CRISIS 129 (2012) (criticizing "one-size-fits-all" law being applied to corporations); Jill E. Fisch, *Leave It to Delaware: Why Congress Should Stay out of Corporate Governance*, 37 DEL. J. CORP. L. 731, 735 (2013) ("[M]arket developments have enabled investors to use moderated responses and private ordering to address perceived problems, without incurring excessive costs or destabilizing management authority."); Joseph A. Grundfest, *The SEC's Proposed Proxy Access Rules: Politics, Economics, and the Law*, 65 BUS. LAW. 361, 362 (2010). *But see* Michal Barzuza, *Inefficient Tailoring: The Private Ordering Paradox in Corporate Law*, 8 HARV. BUS. L. REV. 131, 132 (2018) (criticizing the argument that private ordering necessarily leads to efficient tailoring).

[99] Vivian Hunt, Bruce Simpson & Yuito Yamada, *The Case for Stakeholder Capitalism*, MCKINSEY & CO. (Nov. 12, 2020), https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/the-case-for-stakeholder-capitalism [https://perma.cc/K6H5-U34H].

[100] *See* Pollman, *supra* note 12.

and State Street — alone collectively control fifteen to twenty percent of each company on average.[101] Growing literatures are debating the implications of this concentrated ownership,[102] but some critical takeaways are clear from a legitimacy standpoint. Initial predictions that index funds lack incentives to monitor companies whose shares they cannot sell proved largely a miscalculation.[103] In fact, these shareholders can achieve economies of scale by creating specialized monitoring teams that engage directly with managers and directors behind closed doors, working with proxy advisors and other expert groups and NGOs, and building coalitions with other investors. In these powerful new players' agendas, ESG issues feature prominently, whether it is because they are more concerned about risks generally,[104] or because they are more attuned to portfolio-level externalities.[105] These investors are demanding that management use their discretion to achieve social goals and are increasingly using their voting power to support shareholder resolutions in that direction.[106]

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

[102] *See, e.g.*, Bebchuk & Hirst, *supra* note 101, at 741; Kovvali, *supra* note 96, at 720.

[103] For early concerns, see John C. Coates, *The Future of Corporate Governance Part I: The Problem of Twelve* 14 (Harv. Pub. Law, Working Paper No. 19-07, 2018). For discussion of index fund monitoring, see Ryan Bubb & Emiliano Catan, *The Party Structure of Mutual Funds*, 35 REV. FIN. STUD. 2839, 2842-43 (2022). *See generally* Jie (Jack) He, Jiekun Huang & Shan Zhao, *Internalizing Governance Externalities: The Role of Institutional Cross-Ownership*, 134 J. FIN. ECON. 400, 403-16 (2019) (finding that the cross-ownership of the stocks of peer firms increases the active monitoring role of institutional investors).; Quinn Curtis, Jill E. Fisch & Adriana Robertson, *Do ESG Mutual Funds Delivers on Their Promises?* 120 MICH. L. REV. 393, 424-36 (2021) (finding that ESG funds vote differently than their non-ESG peers on shareholder ESG proposals).

[104] *See* Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1426-39 (2020) [hereinafter *Corporate Law*].

[105] Jeffrey N. Gordon, *Systematic Stewardship*, 47 J. CORP. L. 627, 628-29 (2022); Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1, 5-6 (2020).

[106] *See* Caleb N. Griffin, *Environmental & Social Voting at Index Funds*, 44 DEL. J. CORP. L. 167, 204-05 (2020). Executives at BlackRock, State Street, and Vanguard have all stated that they will increasingly use their votes to support ESG proposals. Letter from

As a result, the powerful voices of these influential investors have joined the chorus of stakeholderism proponents in pushing management to embrace social priorities. Due to this advocacy, corporate managers have been increasingly embracing their newly found role of addressing social needs to improve stakeholder welfare.[107] However, this shift has also laid bare the true extent of managerial power, not simply as a means of maximizing wealth, but also as an arbiter of social disagreements that create large-scale changes for stakeholders and society at large. Managers, accustomed to the permissiveness of the business judgment rule, have simply followed the same approach for social issues. However, this approach left them largely unprepared for the legitimacy challenges and ensuing stakeholder controversies that occurred when their decisionmaking processes and outcomes on controversial social issues lacked proper justification. Unsurprisingly, they found themselves in turmoil, as the next Section shows.

C. New Legitimacy Challenges Against Corporate Decisions

Faced with increasing pressure to "take a stand" on a broad swath of social and political issues, corporate managers have found themselves at a crossroads. With stakeholders often outraged and shareholders pushing related resolutions, managers' inaction rings hollow amidst social turbulence. Weary of shareholder battles, fearful of losing consumer trust, and emboldened by their peers, firms have increasingly jumped into action on controversial social issues. Yet, reactions to managerial initiatives often prove as divisive as the causes to which they profess support. Many stakeholders end up unhappy with the decisions that managers eventually take, question whether business leaders

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Larry Fink, Chief Exec. Officer, BlackRock, to CEOs, Regarding a Fundamental Reshaping of Finance (2020), https://www.blackrock.com/americas-offshore/en/larry-fink-ceo-letter [https://perma.cc/2HRR-MQVL]; STATE ST. GLOB. ADVISORS, STEWARDSHIP REPORT 2018–19, at 25 (2019); *see also* Glenn Booraem, *What We Do. How We Do It. Why It Matters: Vanguard's Investment Stewardship Commentary*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 1, 2019), https://corpgov.law.harvard.edu/2019/05/01/what-we-do-how-we-do-it-why-it-matters-vanguards-investment-stewardship-commentary/ [https://perma.cc/4SJF-BZTQ].

[107] *See* Paine, *supra* note 13.

should even be trusted to make decisions on issues that affect important rights and freedoms, and sometimes fight to resist them.

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

1. Greenwashing: Managerial Hypocrisy and Inadequacy

Activists on the left often wonder whether the hurried enlightenment of America's corporate elite to a particular problem is genuine, or whether grand corporate gestures are used to mask the lack of any real reform.[108] By casting managers as hypocritical and self-serving, these critics attack their suitability as leaders on issues involving broad societal implications. "Greenwashing," which exemplifies this critique, castigates companies for adopting token actions that are failing to move the needle to slow down climate change.[109] Companies' well-advertised sustainability plans, critics note, often lack specific measures and objectives, as only over a third of S&P 500 companies have set detailed targets and timelines.[110] Others criticize companies that continue to resist science-based climate policies despite their climate pledges.[111] Further, state authorities around the United States have launched a

[108] Helen Lewis, *How Capitalism Drives Cancel Culture*, ATLANTIC (July 14, 2020), https://www.theatlantic.com/international/archive/2020/07/cancel-culture-and-problem-woke-capitalism/614086/ [https://perma.cc/AW5D-GF98].

[109] Sebastião Vieira de Freitas Netto, Marcos Felipe Falcão Sobral, Ana Regina Bezerra Ribeiro & Gleibson Robert da Luz Soares, *Concepts and Forms of Greenwashing: A Systematic Review*, 32 ENV'T SCIS. EUR., no. 19, 2020, at 1, 2.

[110] Peter Eavis & Clifford Krauss, *What's Really Behind Corporate Promises on Climate Change?*, N.Y. TIMES (May 12, 2021), https://www.nytimes.com/2021/02/22/business/energy-environment/corporations-climate-change.html [https://perma.cc/SH5C-SZK4].

[111] *Netflix: Responsible Policy Engagement Analysis 2022*, CERES, https://www.ceres.org/practicingRPE/netflix (last updated Oct. 22, 2022) [https://perma.cc/29KT-L6HN] (showing that Netflix corporate governance does not meet CERES's expectations on how it should incorporate exposure to climate risks into its corporate decisionmaking).

wave of lawsuits against Big Oil companies arguing they deceived consumers[112] when managers chose to seed doubts about the evidence and steer public debate about climate change in their favor.[113] Given managerial constraints to be profit-making, progressives fear that their choices cannot go as far as necessary in tackling the dire consequences of climate change.

To explain why companies are rushing to declare their fealty to environmental priorities, critics point to shifting market preferences. As consumers become more conscious about the impact of their buying preferences, they are increasingly willing to channel their purchases towards environmentally responsible companies.[114] For progressives, corporations are simply signaling the values of their clientele,[115] engaging in a ruthless marketing campaign without any intention to follow up, which they see as performative and hypocritical.

Claims of hypocrisy can be catastrophic for managers' sociological legitimacy because they threaten the bonds of trust that firms must establish with stakeholders. Greenwashing charges, we argue here, are claims that managerial decisionmaking is sociologically illegitimate because these stakeholders doubt the reasoning and decisions provided by corporate executives regarding how they are going to tackle climate change. In this manner, there is a *lack* of belief among stakeholders regarding managerial decisions on climate issues. When faced with

[112] Rebecca Hersher, *Lawsuit Alleging Oil Companies Misled Public About Climate Change Moves Forward*, NPR (Jan. 25, 2022, 4:55 PM EST), https://www.npr.org/2022/01/25/1075560742/oil-lawsuit-climate-change-baltimore [https://perma.cc/9V64-3JE3]; *State Suits Against Oil Companies*, THE STATE ENERGY & ENV'T IMPACT CTR., N.Y.U. L. SCH., https://stateimpactcenter.org/issues/climate-action/suits-against-oil-companies (last visited Nov. 27, 2023) [https://perma.cc/8MZG-BKDK].

[113] Chris McGreal, *Big Oil and Gas Kept a Dirty Secret for Decades. Now They May Pay the Price*, GUARDIAN (June 30, 2021, 3:00 AM EDT), https://www.theguardian.com/environment/2021/jun/30/climate-crimes-oil-and-gas-environment [https://perma.cc/YPW3-ZEWY].

[114] Adam Winkler, *Corporate Political Conscience*, NEW REPUBLIC (Apr. 30, 2018), https://newrepublic.com/article/147796/corporate-conscience-big-business-liberal-politics [https://perma.cc/S84J-R9HT].

[115] Tara Isabella Burton, *Are Corporations Becoming the New Arbiters of Public Morality?*, VOX (Aug. 17, 2017, 3:00 PM EDT), https://www.vox.com/identities/2017/8/17/16162226/corporations-replacing-churches-americas-conscience [https://perma.cc/LA3L-K2CE].

social activists' misgivings and lackluster press reports of their efforts, managers are unlikely to convince their stakeholders that they have taken credible steps in the right direction.

Stakeholders concerned about greenwashing also question the moral legitimacy of managerial decisionmaking due to their doubts that firms are making good faith and science-based decisions around these issues.[116] Further, stakeholder concern of managerial hypocrisy potentially sullies managers' moral legitimacy because it portrays managers as providing false public reasons to justify their decisions. Uncaring and untrustworthy, climate activists fear that managers are not in a position to show leadership in such core societal issues.

While "greenwashing" itself refers to climate change, similar progressive mistrust about managers' motivations and commitments appears in other subject-matters too. For example, as we will discuss in more detail below, when corporations rallied to proclaim that they support racial equality efforts in the immediate aftermath of George Floyd's tragic murder, many stakeholders pointed out that their treatment of minority employees was far from being unblemished and challenged companies to do more.[117] Employees were quick to go public with their experiences of managerial misbehavior when external pronouncements of support by corporate executives appeared hypocritical compared to how executives mistreated minority staffers within the company.[118] Now years later, many progressives are left wondering whether managers' statements have actually translated into meaningful action.[119]

[116] Netto et al., *supra* note 109, at 2.

[117] Tracy Jan, Jena McGregor, Renae Merle & Nitasha Tiku, *As Big Corporations Say "Black Lives Matter," Their Track Records Raise Skepticism*, WASH. POST (June 13, 2020, 6:21 PM EDT), https://www.washingtonpost.com/business/2020/06/13/after-years-marginalizing-black-employees-customers-corporate-america-says-black-lives-matter/ [https://perma.cc/YL96-XGEC].

[118] *See infra* Part II.B.

[119] *See* Yume Murphy, *One Year After #BlackoutTuesday, What Have Companies Really Done for Racial Justice?*, Vox (June 2, 2021, 8:30 AM EDT), https://www.vox.com/the-goods/22463723/blackout-tuesday-blm-sephora-starbucks-nike-glossier [https://perma.cc/CY57-XM6A].

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

Conservatives, corporations' traditional allies, are just as critical of the direction managers are taking regarding many social issues. Conservatives have increasingly adopted the pejorative use of the term "woke"[120] to denounce companies' social initiatives which they view as biased and politicized.[121] They portray "woke" corporations as mouthpieces of the progressive left, ruled by an Ivy-League educated elite steeped in liberal teachings.[122] Like the criticism from progressives, conservatives are suspicious of managers' motivations, seeing companies' embrace of a social justice agenda as an attempt to lure Democrats in light of their recent electoral gains.[123] In turn, conservatives cast themselves as protectors of people's traditional freedoms and liberties,[124] at risk by the onslaught of "woke" capital keen to dictate, regulate, and constrain.

Echoing these claims a few weeks after the passage of voting restrictions in Georgia in 2021, Minority Leader Mitch McConnell (R-KY) attacked companies for getting involved in "election law to environmentalism to radical social agendas to the Second Amendment,"

[120] By embracing the term "woke" as a pejorative, conservatives have coopted a term that has a long history of usage by African Americans to denote the awareness of racial discrimination and injustice. Jeffrey Barg, Opinion, *How the Right Stole "Woke" and Turned It into a Derisive Insult*, PHILA. INQUIRER (Aug. 4, 2021, 11:55 AM EST), https://www.inquirer.com/opinion/woke-bill-maher-olympics-republicans-right-language-20210804.html [https://perma.cc/EC7Z-VCF7].

[121] *See* Ross Douthat, *The Rise of Woke Capital*, N.Y. TIMES (Feb. 28, 2018), https://www.nytimes.com/2018/02/28/opinion/corporate-america-activism.html [https://perma.cc/HCJ2-E4AB].

[122] *See generally* VIVEK RAMASWAMY, WOKE, INC.: INSIDE CORPORATE AMERICA'S SOCIAL JUSTICE SCAM (2021) (describing that many large corporations have become "woke" by considering political issues during corporate decisionmaking and arguing against the practice); STEPHEN R. SOUKUP, THE DICTATORSHIP OF WOKE CAPITAL: HOW POLITICAL CORRECTNESS CAPTURED BIG BUSINESS (2021) (same).

[123] *See* Douthat, *supra* note 121.

[124] Sen. Marco Rubio (R-FL) introduced legislation, called the "Mind Your Own Business Act of 2021," which would amend the Securities and Exchange Act of 1934 to allow certain shareholders to sue that company if it promotes "divisive concepts" for reasons unrelated to pecuniary interests. S. 2829, 117th Cong. § 1 (2021).

thereby "dabbling in behaving like a woke parallel government."[125] He warned, "[c]orporations will invite serious consequences" if they become "a vehicle for far-left mobs to hijack our country from outside the constitutional order."[126] The express analogy of corporate initiative to government power and the charge of corporate absolutism are emblematic of how deeply some conservatives perceive these corporate choices as challenging the legitimacy of corporate managers.

The circumstances that led to Senator McConnell's protestations illustrate how fundamental the challenge of moral pluralism poses for the legitimacy of managerial decisionmaking. In March 2021, the CEOs of prominent Georgia-based companies Delta Airlines and Coca-Cola backtracked on their previous support of a Republican-sponsored voting law by subsequently denouncing it as unduly restricting access of Black Georgians to vote.[127] These announcements were not knee-jerk reactions, but a result of direct lobbying efforts by prominent Black executives,[128] employees,[129] and voting rights organizations on corporate executives at these firms.[130]

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[125] Burgess Everett, *McConnell: Big Business Acting Like "Woke Parallel Government*," POLITICO (Apr. 5, 2021, 11:13 AM EDT), https://www.politico.com/news/2021/04/05/mcconnell-corporate-america-woke-parallel-government-479042 [https://perma.cc/9A5F-FSZ8].

[126] *Id.*

[127] Quinn Scanlan, *Delta, Coca-Cola Forcefully Condemn Georgia Elections Bill as Activists Ramp Up Pressure on Corporations*, ABC NEWS (Mar. 31, 2021, 1:59 PM), https://abcnews.go.com/Politics/delta-now-opposes-georgias-elections-bill-activists-ramp/story?id=76789220 [https://perma.cc/8TUW-VBK9]; Kelly Yamanouchi, Greg Bluestein & Matt Kempner, *Coke, Delta Oppose Georgia's "Unacceptable" Voting Law*, ATLANTA J.-CONST. (Mar. 31, 2021), https://www.ajc.com/news/business/delta-ceo-calls-georgia-voting-legislation-unacceptable/HZYG2CTB3RH5JBD5EDWVE52KDM/ [https://perma.cc/9VBQ-9N8P].

[128] David Gelles, *Inside Corporate America's Frantic Response to the Georgia Voting Law*, N.Y. TIMES (Apr. 5, 2021), https://www.nytimes.com/2021/04/05/business/voting-rights-ceos.html [https://perma.cc/U6PE-779K].

[129] *Id.*

[130] *See* Hannah Sampson, *Delta Faces Boycott Threats for Stance on New Georgia Voting Law*, WASH. POST (Mar. 29, 2021, 12:45 PM EDT), https://www.washingtonpost.com/travel/2021/03/29/delta-georgia-voting-law-boycott/ [https://perma.cc/982M-P985]; Quinn Scanlan, *Advocacy Groups Target Georgia Companies in Campaign Against Restrictive Voting Bills*, ABC NEWS (Mar. 18, 2021, 3:05 AM), https://abcnews.go.com/Politics/advocacy-

The backlash from conservatives was just as swift. Encouraged by former President Trump,[131] conservative consumers called on a counter boycott of Delta. Meanwhile, a *Wall-Street Journal* editorial criticized "woke and weak CEOs" that have "bowed to the woke mob."[132] These attacks note how forcible CEOs' influence can be and proceed to challenge their decisionmaking process as undemocratic and illegitimate.

Voting rights legislation undoubtedly affects corporate stakeholders as members of our political society given that it concerns a core political right of citizens.[133] In this sense, both the liberal and conservative responses to corporate engagement regarding the Georgia voting rights bill concerned the legitimacy of managerial decisionmaking. From the perspective of conservatives, the accusation of elitist bias and "wokeness" towards managerial decisionmaking on the voting rights bill formulates a textbook legitimacy challenge on sociological and moral grounds. Sociologically, conservatives argued that managerial decisions to denounce the bill was out-of-sync with the underlying societal values on voting rights issues.[134] Morally, these critics attacked managers' decisions to speak out against the bill as wrong-headed on its merits by diverting corporate attention from profit maximization and stepping

groups-target-georgia-companies-campaign-restrictive-voting/story?id=76509179 [https://perma.cc/KKJ7-4VM5].

[131] Rebecca Falconer, *Trump Calls for Boycott of More Companies over Georgia Voting Law*, AXIOS (Apr. 3, 2021), https://www.axios.com/2021/04/04/trump-calls-for-boycott-of-more-companies-over-georgia-voting-law [https://perma.cc/U36E-89EX].

[132] Opinion, *Woke and Weak CEOs*, WALL ST. J. (Apr. 1, 2021, 6:39 PM EST), https://www.wsj.com/articles/woke-and-weak-ceos-11617316767?mod=opinion_lead_pos1 [https://perma.cc/SD4B-UV5R].

[133] National Voter Registration Act, 42 U.S.C. § 1973 (1) ("The Congress finds that . . . the right of citizens of the United States to vote is a fundamental right . . . ."); Reynolds v. Sims, 377 U.S. 533, 561-62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society.").

[134] *See, e.g.*, Press Release, Mitch McConnell, Minority Leader, U.S. Senate, Corporations Shouldn't Fall for Absurd Disinformation on Voting Laws (Apr. 5, 2021), https://www.mcconnell.senate.gov/public/index.cfm/pressreleases?ID=54AB06DF-4E02-4991-BC94-6D980FE85925 [https://perma.cc/R8X5-YH5C] (condemning corporations for weighing in on Georgia's voting law when "[m]ore than 70 percent of Americans . . . favor commonsense voter I.D. requirements").

into policymaking areas that corporate managers had no business getting involved in.

Voting rights is not the only issue where accusations of "wokeness" encapsulate conservative claims of illegitimacy. Big Tech and social media companies have been under fire for exhibiting anti-conservative bias, particularly after decisions from Facebook and Twitter to remove Donald Trump from their platforms.[135] Companies that have spoken in favor of stricter gun laws, transgender rights, and reproductive health have also become targets of similar attacks.[136]

II. HOW TO BOOST CORPORATE LEGITIMACY

Distinguishing between legal, sociological, and moral legitimacy provides us with an analytical lens to examine how decisionmakers who hold authority justify the exercise of their powers. This need is particularly acute for decisionmakers who have not been elected by the population affected by their choices, and thus can neither claim a direct bond with their audience, nor profess to operate in accordance with their audience's preferences. In public law, this problem has been at the core of debates about the legitimacy of the administrative state, giving rise to an extensive literature on its legitimacy.[137] This literature has examined tools used by administrative agencies to establish the legitimacy of their actions, highlighting successes and pitfalls. The resulting template for administrative law's legitimacy toolkit has already found applications in other areas of law that also face legitimacy concerns. For example, International Law adapted this toolkit to

[135] *See* Cristiano Lima, *Tech Companies May Face a Flurry of Probes if GOP Retakes House*, WASH. POST (July 5, 2022, 9:03 AM EDT), https://www.washingtonpost.com/politics/2022/07/05/tech-companies-may-face-flurry-probes-if-gop-retakes-house/ [https://perma.cc/GGC4-YARZ] (discussing multiple recent hearings that congressional Republicans held regarding bias in technology companies).

[136] *See* Ben Casselman & Jim Tankersley, *Looking for Bipartisan Accord? Just Ask About Big Business*, N.Y. TIMES (May 14, 2021), https://www.nytimes.com/2021/05/14/business/economy/big-business-politics-economy.html [https://perma.cc/HL6S-D3GX] ("Companies have faced similar criticism after speaking out in favor of stricter gun laws, transgender rights and other issues . . . ."); Holman & Naylor, *supra* note 10.

[137] *See supra* Part I.A.

address the proliferation of decisions by international bodies that were often created outside the formalities of international treaties.[138]

In this Part, we use the administrative law toolkit of legitimacy-enhancing methods to illustrate how stakeholder governance can boost the legitimacy of corporate decisions. Because analogizing corporations to administrative agencies is unusual, we discuss their parallels and note where their legitimacy trajectories converge or diverge.[139] We examine different tools used in administrative law, identify their parallel in corporate governance, and explore their successes and failures in addressing legitimacy concerns. Using this theoretical framework, we also analyze real-world examples from companies' responses to mounting stakeholder-driven grievances and show that, to best address them, companies are embracing the legitimacy-enhancing governance tools that we advocate.

A. From Administrative Legitimacy to Corporate Legitimacy

Commentators have discussed the problem of legitimating the administrative state for over a century.[140] Administrative agencies lack the institutional structure that we associate with democratic governance: they are not mentioned in the U.S. Constitution; agency staff are not elected; and electoral supervision is often circumscribed

[138] *See generally, e.g.*, Michael S. Barr & Geoffrey P. Miller, *Global Administrative Law: The View from Basel*, 17 EUR. J. INT'L L. 15 (2006) (discussing the Basel Committee on Banking Supervision as a potential model for international law-making with greater accountability and legitimacy); Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT'L L. 1 (2006) (providing general background on the modern discourse surrounding global administrative law); Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 LAW & CONTEMP. PROBS. 63 (2005) (examining the potential for drawing on U.S. administrative law in the development of a global administrative law to secure greater accountability in the exercise of regulatory authority).

[139] In a prescient article, Cary Coglianese briefly noted over 15 years ago that descriptively corporate governance mechanisms were starting to resemble administrative governance mechanisms. Cary Coglianese, *Legitimacy and Corporate Governance*, 32 DEL. J. CORP. L. 159, 159 (2007).

[140] *See supra* note 17. For discussion regarding the legitimacy of administrative institutions even before the twentieth century, see Christopher S. Havasy, *Radical Administrative Law*, 77 VAND. L. REV. (forthcoming 2024) (manuscript at 14-33).

through the use of for-cause protection.[141] However, agencies are tasked with powers typically afforded to institutions with democratic credentials, such as creating binding legal rules.[142] As a result, some commentators question the sociological and moral legitimacy of administrative agencies by calling them illiberal and undemocratic.[143]

In response, administrative law has adopted procedural and substantive methods to improve the legitimacy of agencies.[144] These methods prominently include the APA's requirements for informal rulemaking to establish notice-and-comment procedures, the participatory and procedural rights according to parties during formal rulemaking and adjudications, agency formalization of their internal procedures, legal doctrines aimed to improve the substantive outcomes of administrative policymaking, as well as numerous other statutes and regulations that require agency transparency and disclosure of information to interested parties.[145]

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[141] For discussions of agency insulation, see Rachel E, Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 27-30 (2010), and Paul R. Verkuil, *Separation of Powers, The Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 330-36 (1989).

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

[143] *See generally, e.g.*, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014) (discussing the legitimacy of the expansion of the modern administrative state); D.A. Candeub, *Tyranny and Administrative Law*, 59 ARIZ. L. REV. 49 (2017) (arguing that there is a crisis of legitimacy stemming from the inherent conflict between the assumptions underlying those of administrative law and the Constitution); Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & LIBERTY 475 (2016) (arguing that deference to agencies inappropriately extends beyond policy-laden judgments that are properly reserved to agencies to include legal questions that should be decided by courts); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994) (discussing how the modern administrative state circumvents the Constitution and proposing solutions).

[144] *See* Lisa Schultz Bressman, *Procedure as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1758-67 (2007) [hereinafter *Procedure as Politics*] (discussing the various procedural requirements to agency rulemaking adopted by judges in the 20th Century to improve the legitimacy of agency policymaking).

[145] *See, e.g.*, 5 U.S.C. §§ 551-559 (governing the process by which federal agencies develop and issue regulations); *id.* § 552 (providing that any person has the right to request access to federal agency records or information); Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. §§ 1-16 (defining how federal advisory committees operate); Government in the Sunshine Act, 5 U.S.C. § 552(b) (requires almost all meetings

Like agency actions, corporate decisions affect stakeholders that have varying abilities to provide input to managerial decisionmaking processes. In administrative governance, the different stakeholder groups can range from a small number of interested parties up to millions of individuals and other state and federal institutions. Corporate decisions similarly affect multiple internal stakeholder groups, including managers, employees, and shareholders, as well as large numbers of stakeholders outside the corporation, including consumers, other businesses, and the general public.[146] Similar to agency decisions, these stakeholders may criticize the soundness of corporate decisions that affect them and fault management for decisionmaking processes that exclude alternative viewpoints. This is the core of the legitimacy demand that corporate managers must answer through their decisionmaking processes and outcomes.

When relying on legal legitimacy alone to justify their choices, corporations have faced pushbacks that echo the criticisms leveled against administrative agencies. Corporations are creatures of legal fiction, established by statutes that allow wide discretion to management to do as it pleases.[147] And like agencies, corporations' links

conducted by federal agencies be open to the public); Guidance on Ex Parte Communications, 74 Fed. Reg. 52795 (Oct. 14, 2009) (Department of Energy rules for disclosing ex parte communications). *See generally, e.g.*, Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361 (2016) (discussing the commercial use of the Freedom of Information Act ("FOIA")); Richard Murphy, *Enhancing the Role of Public Interest Organizations in Rulemaking via Pre-Notice Transparency*, 47 WAKE FOREST L. REV. 681 (2012) (discussing the concern that the rulemaking process as currently structured unduly favors industry over public interest groups); Richard J. Pierce, Jr., *Legislative Reform of Judicial Review of Agency Actions*, 44 DUKE L.J. 1110 (1995) (discussing a particular mode of analyzing judiciary review of agency actions).

[146] *See* R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH 8-22 (1984); Archie B. Carroll, *The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders*, 34 BUS. HORIZONS, July–Aug. 1991, at 39, 44; David K. Millon, *Redefining Corporate Law*, 24 IND. L. REV. 223, 233-35 (1991).

[147] *See* Carl Kaysen, *The Corporation: How Much Power? What Scope?*, *in* THE CORPORATION IN MODERN SOCIETY 90 (Edward S. Mason ed., 1959) ("[T]ypically, the large corporation . . . operates in a situation in which the constraints imposed by market forces are loose, and the scope for managerial choice is considerable."); MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE 235 (1994) ("American managers have often not been held accountable for their performance.").

to democratic legitimation are quite fragile and indirect. While corporate choices impact many different groups, only shareholders vote in corporate elections. Even so, several collective action problems and financial constraints discourage shareholders from banding against management absent large-scale or high salience problems.[148] Additionally, under existing corporate law, incumbent directors and other corporate officials hold significant influence over shareholder meetings.[149] The rise of dual-stock firms further strengthens the power of corporate managers.[150]

The hierarchical structure of corporations, with management at the top of an extensive chain of command, also resembles the makeup of administrative agencies, which are typically led by politically appointed heads or commissions presiding over a hierarchically organized career staff.[151] This structural resemblance generates similar logistical and epistemic challenges. Both systems need to ensure that information flows smoothly bottom-up, so that management is appraised of developments and remains connected to concerns on the ground. Conversely, both agencies and corporations must also monitor the implementation of leadership directives top-down to constrain shirking and minimize conflicts of interest.[152]

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[148] *See* Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029, 2050-59 (2019); Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 526-29 (1990).

[149] *See* LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION 80-83 (2004) (discussing CEO influence over the appointment of independent directors); Lee Harris, *The Politics of Shareholder Voting*, 86 N.Y.U. L. REV. 1761, 1770-71 (2011) (discussing how directors can exclude various shareholder proposals); Yermack, *supra* note 92, at 109-10 (discussing the various benefits held by managers and directors to influence shareholder voting).

[150] *See* Lucian A. Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 VA. L. REV. 585, 602-07 (2017).

[151] Martin Reeves, Edzard Wesselink & Kevin Whitaker, *The End of Bureaucracy, Again?*, BOS. CONSULTING GRP. (July 27, 2020), https://www.bcg.com/publications/2020/changing-business-environment-pushing-end-to-bureaucracy [https://perma.cc/49GC-VFDQ].

[152] *See* Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 LAW & CONTEMP. PROBS. 57, 90-97 (1991) (discussing information flow in agencies). For discussion of information flow in corporations, see generally Stephen M. Bainbridge, *Participatory Management Within a Theory of the Firm*, 21 J. CORP. L. 657 (1996), and

However, the line of accountability in corporate structures ends with the board of directors.[153] In contrast, administrative agencies remain part of the government, subject to political supervision.[154] Because their political superiors are democratically elected, agencies are subject to pressure to justify their actions to the electorate. Corporate managers, on the other hand, are not exposed to electoral winds to a similar degree. Still, one can easily imagine state or federal legislators intervening to alter aspects of corporate governance they find problematic, as Congress did with Sarbanes-Oxley[155] and Dodd-Frank.[156] And of course, the state can always regulate corporate conduct. In that respect, by defending the legitimacy of corporate decisionmaking, corporations are also protecting their social license to operate.[157]

For these reasons, the legitimacy toolkit employed by agencies can guide how companies can utilize similar approaches to improve their legitimacy. Each Section below in this Part explores how administrative

Lawrence E. Mitchell, *Structural Holes, CEOs, and Informational Monopolies: The Missing Link in Corporate Governance*, 70 BROOK. L. REV. 1313 (2005).

153 *See* Stephen M. Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 IOWA L. REV. 1, 27-28 (2002) ("[T]he board of directors emerged as a governance institution capable of exercising fiat [power]."). Barring, of course, the possibility of shareholders holding boards accountable through piercing the corporate veil or agency doctrines, which plaintiffs have failed to use against public companies. Richmond McPherson & Nader Raja, *Corporate Justice: An Empirical Study of Piercing Rates and Factors Courts Consider when Piercing the Corporate Veil*, 45 WAKE FOREST L. REV. 931, 943 (2010) ("[T]here are no cases in which courts pierced the corporate veil of a public corporation . . . .").

154 *See generally* Kagan, *supra* note 17 (discussing the relationships between the President and the administrative state); Stuart Shapiro, *OIRA Inside and Out*, 63 ADMIN. L. REV. 135 (2011) (discussing executive oversight of agencies). For discussions of congressional oversight of agencies, see generally, for example, JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT (1990), and Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006).

155 18 U.S.C. § 1514A(a).

156 15 U.S.C. § 78u(6).

157 *See generally* Neil Gunningham, Robert A. Kagan & Dorothy Thornton, *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 LAW & SOC. INQUIRY 307 (2004) (examining the concept of corporate "social license"); Hillary A. Sale, *The Corporate Purpose of Social License*, 94 S. CAL. L. REV. 785 (2021) (analyzing the concept of a social license in the context of corporate governance).

law approaches translate into corporate governance. Table 1 summarizes our argument.

Table 1. The Moral and Sociological Legitimacy of Stakeholder Governance

Administrative Procedure	Corporate Governance	Moral Legitimacy	Sociological Legitimacy
Notice and Comment	Stakeholder Participation	Getting input from those likely to be affected improves outcome	Affected parties are more receptive after participating
Transparency	Sustainability Disclosure	Companies declare commitments that are hard to renege	All parties can follow companies promises and confirm credibility
Internal Controls, Gatekeepers, Compliance	Sustainability and Ethics Departments	Accurate information improves quality of deliberation	Enhances credibility and trust from stakeholders
Technocrats	Private Experts	Well-researched policies are more likely to be effective	Reduces concerns about biases and arbitrariness
Adjudication v. Rulemaking	Standardization	Pooling resources to get it right	Reduces concerns about equity, free-riding, competition
Enforcement	Board Oversight and Accountability	Decisionmaking takes into account considerations out of the process so far	Stakeholders see their interests reflected in the board's mandate

B. From Notice-and-Comment to Stakeholder Participation

The notice-and-comment process was a key innovation of the Administrative Procedure Act ("APA"), which requires agencies to publicly announce their intended rulemaking to the public and provide interested parties the opportunity to submit reactions.[158] Notice-and-comment efforts seek to cast a wide net, attracting constituencies ranging from individual citizens and NGOs to well-resourced public companies and industry associations.[159] After hearing their views, the APA drafters felt that agencies will be more willing to address their concerns and less likely to reach arbitrary decisions.[160] By requiring agencies to justify their stance towards constituents' input, the APA cements the obligation to hear from stakeholders before a rule is finalized.[161]

Notice-and-comment has had a profound impact on administrative rulemaking. Input from varied participants has often proved formative for the proposed rules, as agencies frequently make substantial changes in response to commentary.[162] Faced with a negative reception, some agencies withdraw the proposal, or amend and circulate it anew. To avoid backlash, agencies often seek feedback at an early stage, asking stakeholders for views regarding the advisability of a rule and possible directions.[163]

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[158] 5 U.S.C. § 553(c).

[159] *See generally* Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 144 (2011) (discussing the role of notice-and-comment in EPA rulemaking); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128 (2006) (empirical analysis of the effectiveness of notice-and-comment rulemaking).

[160] *See* Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 223-25 (1986).

[161] Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 473-74 (2013).

[162] *See* Wagner et al., *supra* note 159, at 132; Yackee & Yackee, *supra* note 159, at 134 (showing agencies change the content of their rules between the notice of proposed rulemaking and final rule).

[163] *See* Jennifer Nou & Edward H. Stiglitz, *Strategic Rulemaking Disclosure*, 89 S. CAL. L. REV. 733, 751-55 (2016); Wagner et al., *supra* note 159, at 124-28.

Companies' efforts to reach out to stakeholders and get their feedback on company decisions mirror notice-and-comment. A key step in many ESG initiatives involves convening consultations with stakeholders who may be impacted by company activities on issues ranging from launching new products to reassessing workplace relationships.[164] Measures like employee and consumer surveys are well established tools for helping companies grasp their constituents' reactions, but in recent years firms have also been experimenting with different direct outreach methods.[165]

The value of corporate communications with stakeholders lies in similar legitimacy considerations that animate notice-and-comment. From a moral perspective, learning from affected parties can reveal hitherto unknown concerns that companies can address, hidden costs that the company can avoid, or suggest areas of improvement.[166] In addition, stakeholder outreach efforts boost the sociological legitimacy of management choices. After an opportunity to communicate their concerns to management, to hear different views, and to discuss company options, stakeholders are likely to be more accepting of management's ultimate choices, even when those decisions go against their personal preferences.[167] Moreover, direct communication between

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[164] *See* Gadinis & Miazad, *Corporate Law*, *supra* note 104, at 1426-40 (discussing the epistemic benefits from managerial engagement with stakeholders).

[165] *Id.* at 1435.

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

[167] *See* MARC J. EPSTEIN & ADRIANA REJC BUHOVAC, MAKING SUSTAINABILITY WORK: BEST PRACTICES IN MANAGING AND MEASURING CORPORATE SOCIAL, ENVIRONMENTAL, AND ECONOMIC IMPACTS 178-80 (2d ed. 2014); Steve Hoeffler, Paul N. Bloom & Kevin Lane Keller, *Understanding Stakeholder Responses to Corporate Citizenship Initiatives: Managerial Guidelines and Research Directions*, 29 J. PUB. POL'Y & MKTG. 78, 85 (2010); James D.C. Barrall, *Building Relationships with Your Shareholders Through Effective Communication*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 13, 2012), https://corpgov.law.harvard.edu/2012/11/13/building-relationships-with-your-shareholders-through-effective-communication/ [https://perma.cc/NZ9Z-7VK2].

management and stakeholders helps bridge gaps between the executive suite and the company's production line, or between a company and its surrounding community.

These moral and sociological legitimacy motivations are evident in companies' efforts to address social movements that rocked workplace relationships, like #MeToo and Black Lives Matter.[168] Companies at the heart of #MeToo scandals, like Uber and Wynn, put together town hall meetings with thousands of employees, hoping to provide a voice to those that have felt silenced for too long.[169] At Wynn, women's leadership forums continued after the scandal broke to become part of the firm's normal operations.[170] To ensure that channels of communication with employees remained open and workplace changes remained on track, many companies established dedicated ombudsmen for hearing complaints and executive committees tasked with focusing on the employee experience that reached out to employees to learn from their experiences.[171] For example, Fox News established a workplace inclusion committee, composed in part of outside diversity experts, that conducts and publicly releases an annual survey of employees and establishes links with company efforts to improve diversity and inclusion.[172]

Two examples arising out of companies' response to Black Lives Matter illustrate how stakeholder input can redefine management's perspectives. After Starbucks refused to allow employees to wear Black

[168] *See* Gadinis & Miazad, *supra* note 104, at 1443 n.213 (discussing corporate forums to hear from employees in the wake of #MeToo); Brian S. Lowery, *We Need to Stop Tiptoeing Around Race*, STAN. GRADUATE SCH. OF BUS. (Oct. 15, 2020), https://www.gsb.stanford.edu/insights/we-need-stop-tiptoeing-around-race [https://perma.cc/Z9RX-5KX6] (discussing Genentech's use of dialogue circles to encourage employees and management to talk about issues of race).

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

[170] *See* Press Release, Wynn Las Vegas, Wynn Resorts Holds Second Women's Leadership Forum (Aug. 9, 2018), https://press.wynnlasvegas.com/press-releases/wynn-resorts-holds-second-women-s-leadership-forum/s/f30181ef-ef27-42fd-8efb-5aa1edb4c3cd [https://perma.cc/T9RT-LV8H].

[171] *See* Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1657-60 (2018).

[172] *Workplace Civility and Inclusion*, FOX NEWS, https://www.foxnews.com/compliance (last visited Sept. 15, 2023) [https://perma.cc/C8WD-XCZF].

Lives Matter-related attire at work,[173] employees started a social media campaign against management, and leaked internal documents that contained plainly inadequate reasons for the ban. They pointed out that Starbucks encourages store managers to hand out LGBTQ+ and marriage equality-related attire to store employees,[174] noting the differential treatment between the two social justice causes. By asking management to justify the differential treatment, the employees made legitimacy demands on managers for their decisions. Faced with demands for accountability, Starbucks managers quickly reversed course.[175]

At Pinterest, stakeholders were determined to expose the company's failures in addressing race and gender inequity in the workplace after the company publicly proclaimed its support for racial equality.[176] Along with many other companies, Pinterest had released statements of solidarity and support for Black Lives Matter in early June 2020.[177] Some Black former employees, incensed by the divergence between public messaging and their day-to-day experience, tweeted that they were underpaid and harassed by colleagues, and retaliated against when they brought their concerns to management.[178] Soon after, the company's

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[173] Brianna Sacks & Albert Samaha, *Starbucks Won't Let Employees Wear Gear that Supports Black Lives Matter Because It Is Political or Could Incite Violence*, BUZZFEED NEWS (June 10, 2020, 1:54 PM), https://www.buzzfeednews.com/article/briannasacks/starbucks-is-now-very-pro-black-lives-matter-but-it-wont [https://perma.cc/UQK6-472R].

[174] As barista Calvin Bensen said, Starbuck's decision was "disappointing in ways I can't express in words. That statement prioritizes those who feel discomfort over Black lives." *Id.*

[175] Heather Murphy, *Starbucks Will Allow Employees to Wear Black Lives Matter Apparel*, N.Y. TIMES (Oct. 18, 2021), https://www.nytimes.com/2020/06/12/business/starbucks-blm-ban-reversed.html [https://perma.cc/8EZS-X9V4].

[176] Erin Griffith, *Pinterest Employees Demand Gender and Race Equality*, N.Y. TIMES (Oct. 20, 2021), www.nytimes.com/2020/08/14/technology/pinterest-walkout-equality.html [https://perma.cc/6EDU-HRJH].

[177] Press Release, Pinterest, Listening and Acting (June 2, 2020), https://newsroom.pinterest.com/en/post/listening-and-acting [https://perma.cc/X5TW-LKJ5].

[178] Griffith, *supra* note 176.

former COO filed a gender discrimination lawsuit.[179] Public condemnation on social media was swift, upheaval among employees culminated in a walkout, and an influential pension fund filed a fiduciary duty claim arguing that the board had ignored claims of gender and race disparities.[180]

Pinterest's management realized it needed to regain its moral and sociological legitimacy and started by building mechanisms for stakeholder participation. Pinterest announced it would form an inclusion advisory council that would have representatives from external stakeholder groups, including the NAACP, The National Transgender Center for Equality, and Asian Americans Advancing Justice.[181] Moreover, when settling the suit, Pinterest agreed to designate a member of its board to co-sponsor DEI efforts with CEO Ben Silbermann and undergo gender and racial audits twice per year,[182] thus creating mechanisms for stakeholder input to reach the board.

C. From Transparency to Sustainability Disclosure

Transparency has become synonymous with good governance and is an essential corollary of notice-and-comment rulemaking.[183] By opening the decisionmaker's processes to external monitoring, it helps affected parties understand the outcome better and assess any justifications offered. Moreover, it provides the public with the necessary information

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[179] Erin Griffith, *Pinterest Accused of Gender Bias in Suit by Former No. 2 Executive*, N.Y. TIMES (Aug. 11, 2020), https://www.nytimes.com/2020/08/11/technology/pinterest-francoise-brougher-gender-discrimination-lawsuit.html [https://perma.cc/6WLA-B3CZ].

[180] *See* Sandler, *supra* note 68.

[181] April Joyner, *Pinterest Puts $50 Million into Diversity Programs and Releases Former Employees from NDAs in a Settlement with Shareholders Following Harassment Claims*, BUS. INSIDER (Nov. 24, 2021, 3:53 PM PST), https://www.businessinsider.com/pinterest-50-million-dei-ends-ndas-shareholder-settlement-2021-11 [https://perma.cc/KKW7-7TGN].

[182] *Id.*

[183] *See* Cary Coglianese, Heather Kilmartin & Evan Mendelson, *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 926-30 (2009). Critics point to how agencies can undermine rulemaking transparency. *See* Stephen M. Johnson, *Beyond the Usual Suspects: Acus, Rulemaking 2.0, and a Vision for Broader, More Informed, and More Transparent Rulemaking*, 65 ADMIN. L. REV. 77, 123 (2013); Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 436-37 (2004).

to make its participation in public rulemaking more meaningful. Finally, it offers a written record of government decisions and rulemakings, which allows outsiders to keep a watchful eye over the government's progress, assess achievements and missteps, and urge for additional action where necessary.[184] As a result, it introduces an additional lever of discipline over government actions.

The value of transparency has long been the foundation of securities law and has traveled to sustainability disclosures as well in recent years.[185] Many companies voluntarily issue sustainability reports, which detail the company's efforts to improve their environmental footprints.[186] Initially conceived as marketing vehicles designed to promote companies' social responsibility credentials, sustainability disclosures have recently taken the shape of traditional investor information documents.[187] Today, almost all large publicly traded U.S. companies issue sustainability reports,[188] which cover a broad array of the company's social priorities besides climate. Because of their

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[184] *See* Bressman, *Procedure as Politics*, *supra* note 144, at 1751-52; Coglianese et al., *supra* note 183, at 928-29; Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 434 (1989).

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

[186] Subodh Mishra, *Sustainability Reporting: A Gap Between Words and Action*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 20, 2021), https://corpgov.law.harvard.edu/2021/10/20/sustainability-reporting-a-gap-between-words-and-action/ [https://perma.cc/5YR6-E29F].

[187] *See* Caitlin M. Ajax & Diane Strauss, *Corporate Sustainability Disclosures in American Case Law: Purposeful or Mere "Puffery"?*, 45 ECOLOGY L.Q. 703, 709 (2018) (discussing the standardization of sustainability disclosure information); Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 923, 934-41 (2019) [hereinafter *Making Sustainability Disclosure Sustainable*] (discussing the history of sustainability disclosures).

[188] Over 90% of the 250 largest companies in the world now provide sustainability disclosures. JOSÉ LUIS BLASCO & ADRIAN KING, THE ROAD AHEAD: THE KPMG SURVEY OF CORPORATE RESPONSIBILITY REPORTING 2017, at 9 (2017), https://assets.kpmg/content/dam/kpmg/xx/pdf/2017/10/kpmg-survey-of-corporate-responsibility-reporting-2017.pdf [https://perma.cc/5YG7-6ZNK].

primarily outward-facing orientation, sustainability reports serve as a vehicle to boost companies' sociological legitimacy.

Such otherwise welcome transparency unearthed a mosaic of company initiatives that signaled a rise in climate consciousness, but often left readers queasy. Piecemeal information could not adequately address the broader question: how was the company adjusting its operations and projections in view of climate change? Responding to this question called for a different type of disclosure. In lieu of vague statements in favor of environmental protection, companies now provide data about carbon emissions and undertaking specific commitments of net-zero footprints by a specific future date. These specific actions by corporations are harder to renege and thus more credible to stakeholders, in part because stakeholders can track these commitments.[189] Thus, the public can follow company developments and determine corporate progress.[190] With their credibility on the line, management is more likely to implement the goals it announced. In this way, the sociological legitimacy achieved through public commitments becomes the foundation for the moral legitimacy gained by the company once it delivers on its promises.

The importance of disclosure in boosting accountability in climate is evident in the coalitions built by investors to push for and monitor public corporate commitments. Perhaps the most prominent actor is Climate 100+, an investor coalition currently counting over 600 asset managers from around the world with a combined portfolio of over $60 trillion.[191] The motivation behind Climate Action 100+ was to target the world's largest industrial emitters and apply pressure on management

[189] Four hundred thirty-seven companies have signed the Climate Pledge to be net-zero by 2040. THE CLIMATE PLEDGE, https://www.theclimatepledge.com/ (last visited Oct. 4, 2023) [https://perma.cc/V28D-P5B2].

[190] For a discussion on how net-zero targets help improve stakeholder oversight, see Thomas Hale, Stephen M. Smith, Richard Black, Kate Cullen, Byron Fay, John Lang & Saba Mahmood, *Assessing the Rapidly-Emerging Landscape of Net Zero Targets*, 22 CLIMATE POL'Y 18, 19 (2022), and Albert C. Lin, *Making Net Zero Matter*, 79 WASH. & LEE L. REV. 679, 711-33 (2022).

[191] *See About Climate Action 100+*, CLIMATE ACTION 100+, https://wwwwww.climateaction100.org/about/ (last visited Oct. 8, 2023) https://www.climateaction100.org/about/ [https://perma.cc/X9VU-93NS].

to adopt reduction strategies.[192] But Climate Action 100+ is not just a common pledge, as participants have built a framework for sharing resources to research and monitor firms.[193] This framework would have been close to impossible without voluntary disclosure of information by companies, which helped to build up investors' monitoring arsenal, a necessary element for the success of any disclosure regime.

The impetus for greater disclosure has also been transformative for other social issues, such as diversity metrics in the workplace through the voluntary release of EEO-1 reports. Companies with over 100 employees must report their workforces' gender, racial, and ethnic diversity across all levels of seniority to the U.S. Equal Employment Opportunity Commission ("EEOC").[194] Companies do not need to make these reports public, and before Black Lives Matter, only 6.3% of companies on the Russell 1000 Index did so.[195] But in the last few years, institutional investors have joined calls to publicly disclose that data,[196] and the New York City Comptroller threatened to bring shareholder proposals to put pressure on managers.[197] By August 2021, seventy-eight

[192] *Id.*

[193] CLIMATE ACTION 100+, NET ZERO COMPANY BENCHMARK 2.0 CONSULTATION GUIDE (2022), https://www.climateaction100.org/wp-content/uploads/2022/10/Climate-Action-100-Net-Zero-Company-Benchmark-2.0-Consultation-Guide-1013.pdf [https://perma.cc/L4W3-88XC].

[194] Dieter Holger, *Companies Make EEOC Diversity Disclosures Public Amid Investor Pressure*, WALL ST. J. (Sept. 1, 2021, 6:00 AM EST), https://www.wsj.com/articles/companies-make-eeoc-diversity-disclosures-public-amid-investor-pressure-11630490400 [https://perma.cc/6YRK-E8UR].

[195] Kavya Vaghul, *A Small Fraction of Corporations Share Diversity Data, but Disclosure Is Rapidly on the Rise*, JUST CAP. (Jan. 19, 2021), https://justcapital.com/news/a-small-fraction-of-corporations-share-diversity-data-but-disclosure-is-rapidly-on-the-rise/ [https://perma.cc/4W65-2SXG].

[196] BLACKROCK, ENHANCING DIVERSITY DISCLOSURES (2021), https://www.blackrock.com/corporate/literature/continuous-disclosure-and-important-information/blk-eeo1-data-disclosure.pdf [https://perma.cc/UZY4-H2RX]; Saijel Kishan, *BlackRock to Push Companies on Racial Diversity in 2021*, BLOOMBERG (Dec. 10, 2020, 7:06 AM PST), https://www.bloomberg.com/news/articles/2020-12-10/blackrock-plans-to-push-companies-on-racial-diversity-in-2021?sref=TEalMtQ2 [https://perma.cc/R3TE-FTGD].

[197] Press Release, N.Y.C. Comptroller, Comptroller Stringer and Three New York City Retirement Systems Call on 67 S&P 100 Companies Who Issued Supportive Statements on Racial Equality to Publicly Disclose the Composition of Their Workforce by Race, Ethnicity and Gender (July 1, 2020), https://comptroller.nyc.gov/

companies in the S&P 100 Index agreed to voluntarily disclose EEO-1 data.[198]

Investors and stakeholders argue that publishing EEO-1 data improves the transparency of managerial decisions on racial equality issues by providing a standardized metric that allows for comparisons across firms across time. This transparency, in turn, helps investors gauge the effect of company initiatives on the ground[199] and overcome skepticism about their effectiveness.[200] Intel, which has disclosed EEO-1 data since 2002, explicitly believes that "open[ing] ourselves up to being critiqued" and allowing stakeholders to hold them accountable has improved their decisions on workplace diversity issues.[201] Other companies that publicly release their EEO-1 express similar sentiments — transparency and accountability run together to allow stakeholders to provide meaningful engagement during company decisionmaking on racial equality issues.[202]

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

Disclosure obligations often lead to an internal reorganization within a firm, which must make sure that the information provided accurately reflects the firm's condition and performance. In securities regulation,

newsroom/comptroller-stringer-and-three-new-york-city-retirement-systems-call-on-67-sp-100-companies-who-issued-supportive-statements-on-racial-equality-to-publicly-disclose-the-composition-of-their-workforce/ [https://perma.cc/K9S4-Y7LF].

198 Holger, *supra* note 194.

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

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

201 *Id.* (quoting Dawn Jones, Intel's Chief Diversity and Inclusion Officer).

202 Theo Francis, Inti Pacheco & Thomas Gryta, *Big Companies Disclose Details on Gender, Race in Workforces*, WALL ST. J. (Mar. 1, 2021, 6:29 PM EST), https://www.wsj.com/articles/big-companies-disclose-details-on-gender-race-in-workforces-11614594601 [https://perma.cc/5SRP-JXDS] ("The widening disclosures help add substance to pledges by many executives last year to give priority to diversity, said Sheri Wyatt, a PwC partner who advises companies on [ESG] issues . . . . 'Transparency leads to greater accountability,' Ms. Wyatt said.").

the mandatory disclosure literature reveals companies' incentives to provide information voluntarily and set up the internal mechanisms necessary to collect it.[203] The accuracy and regularity of the information released helps portray the company's condition as clearly as possible to stakeholders. There are also multiple agency legitimacy gains from enlisting companies' help in monitoring operations and gathering critical information. From a moral legitimacy standpoint, compliance and internal control officers are well acquainted with the firm's operations and are well placed to monitor its function and staff, thus assuring the effectiveness of the agency's regulations.[204] Through a well-resourced and organized internal controls' department, managers can carry out the mission of adhering to the agency's commands. From a sociological perspective, internal control efforts both help provide shareholders and stakeholders with accurate information and signal management's commitments, thus helping stakeholders gain trust and credibility in the agency's decisions.

In addition to improving disclosure accuracy, regulators hope that this internal reorganization will also push executives to clean up their act, put an end to dubious practices, and avoid committing others in the future.[205] According to an oft-repeated mantra in securities law, "sunlight is the best disinfectant."[206] Of course, it is rarely that simple.

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[203] *See* George S. Georgiev, *Too Big to Disclose: Firm Size and Materiality Blindspots in Securities Regulation*, 64 UCLA L. REV. 602, 646-48 (2017) (discussing the benefits to internal corporate governance from securities disclosure); Daniel Bias, Benjamin Lochner, Stefan Obernberger & Merih Sevilir, *Going Public and the Internal Organization of the Firm* 10-12 (IAB-Discussion Paper No. 14, 2022) https://doku.iab.de/discussionpapers/2022/dp1422.pdf [https://perma.cc/29YD-ERD2] (discussing how German firms internally reorganize after going public to satisfy securities regulation and compliance requirements).

[204] *See* Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 934 (2017) (detailing pressures from criminal enforcement authorities over companies to build up their supervisory and risk management functions with appropriate staffing and resources).

[205] *See* Georgiev, *supra* note 203, at 646-67; Paul G. Mahoney, *Mandatory Disclosure as a Solution to Agency Problems*, 62 U. CHI. L. REV. 1047, 1048 (1995).

[206] The phrase was originally said by future Justice Louis Brandeis. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914). The term has been adopted as an organizing mantra in securities regulation. *See* Thomas Lee Hazen, *Identifying the Duty Prohibiting Outsider Trading on Material Nonpublic Information*, 61

The conflicts of interest surrounding the release of this information are well established, which has given rise to a regulatory framework that sets specific audit standards, safeguards the independence of the internal controls department, establishes protection for whistleblowers, and provides access to board committees.[207] A key pillar of this regulatory framework is its external gatekeepers, such as audit firms, lawyers, and investment banks, which conduct due diligence over the information disclosed and confirm its accuracy, thus helping reduce the informational asymmetries with shareholders and regulators.[208] Enforcement authorities have also motivated companies to create compliance departments that streamline internal monitoring and collect evidence that can help establish violations of the law.[209]

Managers also improve the legitimacy of their decisions from reinforcing internal monitoring with validation from external independent professionals. From a moral legitimacy standpoint, professionals bring expertise, industry knowledge, and additional resources, assisting companies with accurately structuring their information gathering efforts. Moreover, they review and confirm results, express concerns, and offer concrete suggestions for improvement to managers, thus providing stakeholders with a degree of independent accountability over managerial decisions. The efforts of these internal and external professionals also confer sociological legitimacy to managers. By signing onto the disclosures and

HASTINGS L.J. 881, 882 (2010) ("[T]he securities laws are based on the premise that sunlight is the best disinfectant.").

[207] *See* Leslie Boni & Kent L. Womack, *Wall Street Research: Will New Rules Change Its Usefulness?*, 59 FIN. ANALYSTS J. 25, 29 (2003); Usha Rodrigues & Mike Stegemoller, *Placebo Ethics: A Study in Securities Disclosure Arbitrage*, 96 VA. L. REV. 1, 44-45 (2010).

[208] *See* Andrew F. Tuch, *Multiple Gatekeepers*, 96 VA. L. REV. 1583, 1592-97 (2010). *See generally* Stephen Choi, *Market Lessons for Gatekeepers*, 92 NW. U. L. REV. 916 (1998) (discussing the role of intermediaries to screen for product quality and certify value for purchasers).

[209] *See* Stavros Gadinis & Amelia Miazad, *The Hidden Power of Compliance*, 103 MINN. L. REV. 2135, 2146, 2177-79 (2019) (discussing the explosion of compliance departments in firms over the past decade); Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2077-78 (2016) (discussing internal corporate reorganization resulting from growing compliance requirements); Veronica Root Martinez, *Complex Compliance Investigations*, 120 COLUM. L. REV. 249, 257-66 (2020) (discussing the role and function of compliance within corporate governance).

institutionalizing these internal and external checks within the firm, managers signal to regulators, investors, and stakeholders that they can trust the provided disclosures and use it as a basis for assessing managers' performance.

A similar evolution is unfolding within companies that have decided to bolster their internal operations to better support their ESG disclosures.[210] Companies are building up sustainability and ethics departments designed to consolidate management of stakeholder-oriented initiatives under one roof, gather information, and promote uniform implementation across the whole corporate group.[211] Worried that company departments fail to adopt consistent metrics and that they may engage in parallel initiatives, sustainability offices are seeking to establish company-wide policies. Moreover, as investors are inquiring about progress from year to year, accurate information and measurement helps establish management accountability. Thus, sustainability departments align company practices with management's priorities and improve the quality of information and deliberation about these priorities with stakeholders, thus advancing its moral legitimacy. By enhancing shareholders' and stakeholders' reliance on the information they provide and the initiatives they undertake, sustainability departments also deepen the company's sociological legitimacy.

These considerations motivated the wide adoption of the framework proposed by the Task Force on Climate-related Financial Disclosures ("TCFD")[212] which was put forward by the Financial Stability Board, a G-20-backed international body of central bank heads, financial regulators, and treasury appointees. The TCFD framework focuses on issues such as governance and board oversight, internal controls for identifying climate-related risks, and strategy for assessing the

[210] *See* Gadinis & Miazad, *Corporate Law*, *supra* note 104, at 1429-30; Virginia Harper Ho, "*Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide*, 36 J. CORP. L. 59, 91 (2010); P.M. Vasudev, *The Stakeholder Principle, Corporate Governance, and Theory: Evidence from the Field and the Path Onward*, 41 HOFSTRA L. REV. 399, 448-50 (2012).

[211] *See* Gadinis & Miazad, *Corporate Law*, *supra* note 104, at 1422-26 (discussing that firms are rapidly expanding their staffing of sustainability departments).

[212] Colton et al., *supra* note 192.

information.[213] By underlining the importance of internal corporate functions, the TCFD framework embraces procedural legitimacy, seeking to ensure investors that companies will achieve better outcomes if they follow the right process.[214] To maximize its sociological legitimacy among both firms and investors, the TCFD relied heavily on bureaucratic expertise by enlisting former regulators, like Mike Carney, former head of the Bank of England, and Mary Schapiro, former SEC Chair, as Chair and Vice Chair, respectively.[215] The SEC's recent climate disclosure proposal, as well as similar rules implemented by policymakers around the world, leverage the TCFD framework.[216]

Companies issuing sustainability reports are increasingly recruiting external auditors to provide assurance that they are reporting information accurately.[217] Sometimes, these external providers help companies understand what type of information they need to collect and identify appropriate measures and standards. By enhancing the reporting capacity of their clients, assurance helps them produce more informative disclosures, thus assisting their moral legitimacy. External auditors also address the information asymmetries between the company and its shareholders and stakeholders, which are stark given the uncertainty enveloping sustainability metrics. Having company disclosures validated by highly specialized outside experts, or by audit firms known for high-quality audits, helps reduce the information gap and reassures investors that company reports reflect actual

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[213] *See id.*

[214] *See* FIN. STABILITY BD., RECOMMENDATIONS OF THE TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES 17-18 (2017), https://www.fsb-tcfd.org/recommendations/ [https://perma.cc/S47W-EF66].

[215] *See id.* at i, 45.

[216] FIN. STABILITY BD., TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES 2021 STATUS REPORT 20 (2021), https://www.fsb.org/2021/10/2021-status-report-task-force-on-climate-related-financial-disclosures/ [https://perma.cc/D4BK-WHV7]; Statement by Allison Herren Lee, Comm'r, U.S. Sec. & Exch. Comm., Shelter from the Storm: Helping Investors Navigate Climate Change Risk (Mar. 21, 2022), https://www.sec.gov/news/statement/lee-climate-disclosure-20220321 [https://perma.cc/9L8Z-3ZPS].

[217] *See* WBCSD, REPORTING MATTERS — SIX YEARS ON: THE STATE OF PLAY 12 (2018), https://www.wbcsd.org/contentwbc/download/5778/76990/1 (last visited Sept. 20, 2023) [https://perma.cc/UX6F-AH65] (finding 78% of their 158 member companies have some form of external assurance of their sustainability reports).

achievements, rather than company public relations. Thus, the involvement of external auditors in developing corporate sustainability reports also builds the disclosures' sociological legitimacy with corporate stakeholders.

E. From Government Technocrats to Private Experts

Building expertise within government has been traditionally evoked as a key justification for creating the administrative state.[218] Rational analysis of policy can help achieve the best solutions to social problems, away from the ebb and flow of popular ideas.[219] Moreover, generalist politicians often have trouble understanding the technicalities of regulatory issues, which requires deep technical knowledge. Certain regulatory fields can become so technical that politicians and judges cannot guide regulatory policy to their preferred directions.[220] From capital adequacy standards to acceptable pollutant levels and internet regulation, agencies devise and adopt comprehensive and technical frameworks to further the policy goals that generalist politicians would be unable to generate.

Just like generalist politicians, many business executives lack the technical background necessary to understand many social issues, risking missteps as they make decisions on these issues.[221] Enlisting

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[218] *See* ELIZABETH FISHER & SIDNEY A. SHAPIRO, ADMINISTRATIVE COMPETENCE 280 (2020); LANDIS, *supra* note 17, at 23-24; Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 157-62, 168 (2003).

[219] *See* LANDIS, *supra* note 17, at 142-43.

[220] *See* Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from* Chevron *and* Mistretta, 57 U. CHI. L. REV. 481, 516 (1990). *See generally* Jeffrey S. Banks & Barry R. Weingast, *The Political Control of Bureaucracies Under Asymmetric Information*, 36 AM. J. POL. SCI. 509 (1992) (modelling how interest groups develop influence in policymaking through having an asymmetric information advantage over regulatory actors).

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

experts who can shed light on the problem and potential solutions can help companies avoid or climb out of such quagmires. In some social issues, experts can offer perspectives that managers failed to grasp. In other areas, experts can bring their insights to propose new approaches or solutions, such as suggesting more environmentally friendly production methods and materials.

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

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

One of the most illustrative utilizations of outside expertise to help companies overcome a legitimacy challenge is the novel practice of civil rights audits. Civil rights audits are typically conducted by respected third parties who systemically analyze the company to determine whether its structure, decisionmaking, policies, and products discriminate against or have a discriminatory effect on groups historically subject to discrimination.[222] The audit involves multiple

[222] Saijel Kishan, *What Are Civil Rights Audits, and Why Are Companies Doing Them?*, BLOOMBERG (Dec. 2, 2022, 9:11 AM PST), https://www.bloomberg.com/news/articles/

forms of analysis, including interviews with senior executives, employees, and external organizations affected by the corporation in question.[223] Airbnb conducted the first civil rights audit in 2016 and the effort quickly expanded to other corporations after concerted advocacy from stakeholders, including civil rights organizations and members of Congress.[224] Recently, Lauren Murphy, a former director at the ACLU who conducted the Facebook civil rights audit, compiled a widely-endorsed best practices guide, to begin the process of standardizing the civil rights audit process.[225]

For stakeholders, these audits enhance management transparency and accountability by providing the basis for more substantive dialogues with management on how to improve the company. According to Trillium Asset Management, an investor proponent of civil rights audits, if "management is truly committed to make racial justice a critical element of its operations then in practice it can and should treat it like any other operations issue and audit it as such."[226] Glass Lewis, the proxy advisory firm, generally favors civil rights audits in its recommendations, recognizing that they help customer-facing companies grapple with issues of racial equity and avoid high-profile controversies.[227] These stakeholders want to ensure their management's public statements of support are not illusory claims of solidarity, thus

2022-05-03/what-civil-rights-audits-are-and-why-firms-do-them-quicktake#xj4y7vzkg [https://perma.cc/7Q9N-2EAG].

[223] Naomi Nix, *CEOs, Boards Are Urged to Embrace Civil Rights Audits* (*Correct*), BLOOMBERG L. (Oct. 21, 2021, 9:32 AM), https://news.bloomberglaw.com/esg/ceos-boards-are-urged-to-embrace-corporate-civil-rights-audits [https://perma.cc/U3MX-HPLR].

[224] LAURA W. MURPHY, THE RATIONALE FOR AND KEY ELEMENTS OF A BUSINESS CIVIL RIGHTS AUDIT 8 (2021), http://www.civilrightsdocs.info/pdf/reports/Civil-Rights-Audit-Report-2021.pdf [https://perma.cc/AN3N-QFNB].

[225] LAURA W. MURPHY, FACEBOOK'S CIVIL RIGHTS AUDIT — FINAL REPORT 5, 8 (2020), https://about.fb.com/wp-content/uploads/2020/07/Civil-Rights-Audit-Final-Report.pdf) [https://perma.cc/LXF6-6P76].

[226] SOC Inv. Grp., Racial Equity Audits: A Critical Tool for Shareholders, YOUTUBE (Apr. 13, 2021), https://www.youtube.com/watch?v=6ricfqm3QvU [https://perma.cc/394K-PZB5].

[227] Saijel Kishan, *Shareholder-Advisory Firms Take Opposing Views on Racial Audits*, BLOOMBERG L. (Apr. 17, 2021, 6:00 AM), https://news.bloomberglaw.com/esg/shareholder-advisory-firms-take-opposing-views-on-racial-audits?context=search&index=5 [https://perma.cc/HTN3-WPRD].

safeguarding the company's sociological legitimacy.[228] The audits allow stakeholders to engage in ongoing and iterative deliberation with corporate managers to improve corporate decisions around racial justice issues so as to increase the legitimacy of their decisions.[229]

F. From Ad Hoc Determinations to Standardization

The choice between adjudication and rulemaking is of critical importance for administrative agencies.[230] Rulemakings enunciate principles of policy that embrace the agency's goals and apply uniformly against all regulated entities, while adjudications seek to impose discipline and resolve policy questions arising from the specific facts. Rulemaking provides certainty and predictability, which allows regulated industries to adjust their practices accordingly. Moreover, rulemakings tend to level the playing field among competitors, since every company is subject to the same set of rules.[231] On the other hand, adjudications offer the opportunity to examine cases closely and tailoring solutions to facts.[232] Rather than revisiting the literature on the

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[228] *See, e.g.*, Remarks by Thomas P. DiNapoli, N.Y. State Comptroller, at the SEIU Capital Stewardship Program and CtW Investment Group Webinar, Racial Equity Audits: A Critical Tool for Shareholders (Apr. 13, 2021), https://nyscomptroller.medium.com/remarks-by-new-york-state-comptroller-thomas-p-397b006d1d5c [https://perma.cc/7M8A-QND5].

[229] *See* SOC Inv. Grp., *supra* note 226.

[230] The optimal balance between rulemaking and adjudications is a perennial topic in administrative law. For a discussion on the choice of agencies to engage in rulemaking or adjudication to generate agency policy, see generally, for example, Richard K. Berg, *Re-Examining Policy Procedures: The Choice Between Rulemaking and Adjudication*, 38 ADMIN. L. REV. 149 (1986), Jeffrey J. Rachlinski, *Rulemaking Versus Adjudication: A Psychological Perspective*, 32 FLA. ST. U. L. REV. 529 (2005), David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

[231] For discussions of the benefits of rulemaking, see Warren E. Baker, *Policy by Rule or* Ad Hoc *Approach — Which Should It Be?*, 22 LAW & CONTEMP. PROBS. 658, 671 (1957), and Shapiro, *supra* note 230, at 972.

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

choice between rulemaking and adjudication, our goal is to underline a simple reality: rulemakings bring clarity to regulatory choices *at a general policy level*, while adjudications require parties to invest resources in resolving the issue *ad hoc*.

Similar dynamics have dogged corporate adoption of ESG in the last decade. Many market actors urged companies to think harder about their social mission and develop ESG initiatives. Initially, these pressures did not coalesce around a single set of specific principles, but were expressed in vague terms that left lots of leeway to management.[233] Since every company has different sets of stakeholders, distinct operating structures, and their own needs, many market players were reluctant to advocate for one-size-fits-all approaches and asked management to take the lead.[234] Large institutional investors showed preference for *ad hoc* determinations of ESG initiatives and opted to use non-public engagements with management to promote their ESG agenda.[235]

For all its flexibility, the initial ad hoc approach to ESG left many gaps. Managers were often unclear about the deliverables and uncertain about metrics, which left climate-concerned investors frustrated at their

[233] For example, the UN's Principles for Responsible Investment focuses on six vague and aspirational principles for signatories to incorporate into their decisionmaking. *What Are the Principles for Responsible Investing?*, UNPRI, https://www.unpri.org/about-us/what-are-the-principles-for-responsible-investment (last visited Sept. 20, 2023) [https://perma.cc/5AQ8-E5V7].

[234] *See, e.g.*, U.S. SEC. & EXCH. COMM'N INV. ADVISORY COMM., RECOMMENDATION OF THE INVESTOR ADVISORY COMMITTEE: HUMAN CAPITAL MANAGEMENT DISCLOSURE 3 (2019) (recommending against "one-size-fits-all" mandatory disclosure requirements and encouraging standards that allow manager reporting flexibility).

[235] *See* Jonathan Bailey, Bryce Klempner & Josh Zoffer, *Sustaining Sustainability: What Institutional Investors Should Do Next on ESG*, MCKINSEY & CO. (June 22, 2016), https://www.mckinsey.com/industries/private-equity-and-principal-investors/our-insights/sustaining-sustainability-what-institutional-investors-should-do-next-on-esg [https://perma.cc/Z4C9-P2UV]; MATT ORSAGH, JAMES ALLEN, JUSTIN SLOGGETT, ANNA GEORGIEVA, SOFIA BARTHOLDY & KRIS DOUMA, CFA INST., ESG INTEGRATION IN THE AMERICAS: MARKETS, PRACTICES, AND DATA 66 (2018), https://www.cfainstitute.org/-/media/documents/survey/esg-integration-in-the-americas.ashx [https://perma.cc/CH5B-NE3J].

inability to judge managerial actions.[236] Amidst confusion about ESG features and growing demand for ESG investment products, many companies labeled their products and processes as ESG-friendly based on assessments that worked best for their purposes.[237] Soon, policymakers and market players were concerned that companies were attaching the ESG moniker indiscriminately.

Gradually, investors started switching their support in favor of more standardization. For example, Blackrock and State Street have publicly endorsed the SASB standards, which help companies assess whether the environmental and social risks in their production and operation are material.[238] SASB is a non-profit comprised of industry experts modeled on the International Accounting Standards Board ("IASB"), an industry body that issues accounting standards followed by countries around the world.[239] Like IASB, SASB emphasizes its governance principles, including separation between its administrative management (who

[236] *See* Sara Bernow, Jonathan Godsall, Bryce Klempner & Charlotte Merten, *More than Values: The Value-Based Sustainability Reporting That Investors Want*, MCKINSEY & CO. (Aug. 7, 2019), https://www.mckinsey.com/business-functions/sustainability/our-insights/more-than-values-the-value-based-sustainability-reporting-that-investors-want [https://perma.cc/3U8L-DUGK] (discussing investor frustration with corporate sustainability reports); Simon MacMahon, *The Challenge of Rating ESG Performance*, HARV. BUS. REV., Sept.–Oct. 2020, https://hbr.org/2020/09/the-challenge-of-rating-esg-performance [https://perma.cc/48F5-MS2M] (discussing the difficulty of rating corporate sustainability due to differing information).

[237] *See* Meredith Jones, Opinion, *For ESG Investors, the Newest Challenge Is Separating Fact from "Greenwashing,"* MARKETWATCH (Oct. 15, 2019, 9:41 AM EST), https://www.marketwatch.com/story/for-esg-investors-the-newest-challenge-is-separating-fact-from-greenwashing-2019-10-15 [https://perma.cc/WN4Q-HQ62]; Shivaram Rajgopal, *What's Behind the Label: Quality, ESG, Value, Growth . . . ?*, FORBES (June 10, 2020, 10:10 AM EDT), https://www.forbes.com/sites/shivaramrajgopal/2020/06/10/whats-behind-the-label-quality-esg-value-growth/?sh=378942ef6922 [https://perma.cc/JP86-HCKF].

[238] *SASB Standards Overview*, SASB STANDARDS, https://www.sasb.org/standards/ (last visited Sept. 22, 2023) [https://perma.cc/Z9TT-5RQR]; Letter from Larry Fink, *supra* note 106 (expressing support for the SASB standards); Cyrus Taraporevala, Pres. & Chief Exec. Officer, State St. Glob. Advisors, to Board Members (Jan. 28, 2020), https://www.ssga.com/library-content/pdfs/insights/CEOs-letter-on-SSGA-2020-proxy-voting-agenda.pdf [https://perma.cc/GRL9-C3LD] (stating the firm endorses the SASB standards and makes it the foundation of their own metric to measure a firm's ESG standards).

[239] *Governance Archive*, SASB STANDARDS, https://www.sasb.org/about/governance/standards-board/ (last visited Sept. 20, 2023) [https://perma.cc/EC8Q-4NCU].

oversee funding) and its standard-setting staff, to establish its legitimacy and defend against claims of industry bias, unbridled progressivism, or utopianism.[240] Its industry-based approach relies heavily on technical expertise and scientific evidence, further buttressed by an extensive public notice-and-comment process.[241]

The move toward standardization in the ESG context strengthens the legitimacy of companies' efforts. The resources devoted into producing, negotiating, testing, and implementing the standards offer greater comfort that chosen policy targets reflect the underlying social values given the needs of the companies implementing them. As the standards gain followings in companies around the globe, concerns about international competition grow less stark.[242] The effort to strike the right balance speaks to the moral legitimacy of the policymaking effort. Moreover, the public articulation of the standards, which makes them open to debate and improvement, sets the foundation for procedural legitimacy through ongoing deliberation. For policymakers and reformers alike, information about the standard's success or failure becomes easier to evaluate. At the same time, openness and transparency of compliance help boost the sociological legitimacy of companies' efforts. When the market coalesces on a single standard, gaining external stakeholders' trust becomes more straightforward. Consumers can be assuaged more readily by benchmarking a company's performance as following standard industry practice. Regulators and governments can assess an industry-wide principle more quickly and effectively, compared to trying to second-guess divergent choices firm-by-firm.

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

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[240] *Id.*

[241] *SASB Standards Overview*, *supra* note 238.

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

stifling competition.[243] Yet, current ESG standards are often created by investor coalitions, like Climate 100+, or investor-backed NGOs, such as SASB, which are not tied to the interests of a specific industry and are generated by independent experts.[244] Companies therefore cannot influence the content of these rules as directly as in conventional self-regulatory initiatives, while investors can use their shareholder voting power to monitor management's compliance, further enhancing the credibility of companies' efforts. Due to these credentials, investor-backed standards are likely to attract greater acceptance among stakeholders than ad hoc company practices, further uplifting the legitimacy of the standards.

G. From Enforcement to Board Accountability

The power to pursue violations of their rulemakings and have sanctions ordered against transgressing corporations affords administrative agencies with a weighty lever against firms.[245] Agency enforcement powers provide an important backstop to ensure the effectiveness of agency rules and policies through pressuring compliance among regulated communities. Given that agencies lack traditional democratic procedures, agency effectiveness, and the social welfare gains created through their effectiveness, have been crucial groundings for both the sociological and moral legitimacy of the administrative state.[246]

[243] For discussions of the problems with self-regulation, see CHRISTINE PARKER, THE OPEN CORPORATION 135-67 (2002), Harper W. Boyd, Jr. & Henry Claycamp, *Industrial Self-Regulation and the Public Interest*, 64 MICH. L. REV. 1239, 1248-52 (1966), and Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 323 (2005).

[244] One prime example is SASB, which does not have any representatives from industry on their Standards Board. *See Governance Archive*, supra note 239 (listing the members of SASB's governance board from 2011-22).

[245] On administrative enforcement powers, see generally JOEL MINTZ, ENFORCEMENT AT THE EPA 9-20 (2012) (describing the EPA's enforcement powers), and Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1042-46 (2013) (describing general agency enforcement powers).

[246] For welfarism justifications of the administrative state, see CASS R. SUNSTEIN, THE COST-BENEFIT REVOLUTION 23 (2018), and Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U. L. REV. 673, 693 (2015). Effectiveness has long been a central normative value in

At present, no single agency has the mandate to oversee companies' sustainability efforts, but given the broad set of issues involved in social concerns, multiple agencies have jurisdiction over different aspects of sustainability initiatives, ranging from the EPA to the Department of Labor.[247] Importantly for public companies, the SEC has proposed mandating climate-related disclosures, which signals their intention to monitor compliance and potentially bring enforcement actions.[248] Companies voluntarily issuing sustainability reports are already subject to litigation risks from shareholders, either for stock price changes due to faulty disclosure under securities law, or for violation of fiduciary duties if their conduct fails the good faith standard.[249] However, shareholders' lawsuits based on ESG disclosures and statements have so far failed to elicit support from federal and state courts, in part because of the high threshold required to hold boards accountable.[250]

In response to the reticence of public institutions, investors and stakeholders are increasingly turning to their own mechanisms to pressure firms on social issues. Activist shareholders have brought scores of ESG-related proposals at general meetings with considerable

administration. *See* PRESIDENT'S COMM. ON ADMIN. MGMT., REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT 2 (1937).

[247] *See* Fisch, *Making Sustainability Disclosure Sustainable*, *supra* note 187, at 934-41 (discussing the various US agencies with regulatory jurisdiction regarding corporate sustainability); Virginia Harper Ho, *Nonfinancial Risk Disclosure and the Costs of Private Ordering*, 55 AM. BUS. L.J. 407, 414-30 (2018) (same).

[248] Press Release, U.S. Sec. & Exch. Comm'n, *supra* note 11.

[249] Marc S. Gerber, Caroline S. Kim & Jeongu Gim, *Voluntary Environmental and Social Disclosure*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 27, 2021), https://corpgov.law.harvard.edu/2021/07/27/voluntary-environmental-and-social-disclosures/ [https://perma.cc/WV9L-8U9B]; *cf.* Karen K. Nelson & A.C. Pritchard, *Carrot or Stick? The Shift from Voluntary to Mandatory Disclosure of Risk Factors*, 13 J. EMPIRICAL LEGAL STUD. 266, 287-95 (2016) (finding firms with high litigation risk increase voluntary disclosures to mitigate their risk).

[250] *See generally* Sara K. Orr & Bart J. Kempf, *Voluntary Sustainability Disclosure and Emerging Litigation*, 19 CLIMATE CHANGE, SUSTAINABLE DEV., & ECOSYSTEMS COMM. NEWSL., Nov. 2015 (discussing recent shareholder cases brought based on corporate voluntary sustainability disclosures); Jason Meltzer, Elizabeth Ising, Andrew Tulumello, David Debold, Perlette Jura, Lori Zyskowski & Bryson Smith, *Corporate Social Responsibility Statements — Recent Litigation and Avoiding Pitfalls*, GIBSON DUNN (Mar. 9, 2017), https://www.gibsondunn.com/corporate-social-responsibility-statements-recent-litigation-and-avoiding-pitfalls/ [https://perma.cc/7JLD-T8WQ] (same).

success.[251] Influential shareholder advisory firms are increasingly supporting ESG proposals deemed worthwhile.[252] When this pressure fails to yield results, and investors are convinced that changes cannot happen without management changes, they have launched campaigns against directors and placed their candidates on the board.[253] Ultimately, investors are seeking to hold boards accountable on ESG matters by whatever means are available to them.

Investor-driven initiatives against corporate management and directors was particularly strong after #MeToo, as investor groups linked a lack of board diversity to creating corporate cultures where sexual harassment and discrimination was tolerated.[254] State Street, for example, first launched its "Fearless Girl" campaign in 2017 by stating it would start to target all-male boards under the belief that a lack of board diversity resulted in unethical behavior that hurt long-term firm value.[255] When this move failed to yield the desired results, State Street doubled down and announced in 2018 that it would soon vote against all members of all-male boards.[256] Other asset managers, such as BlackRock

[251] In 2021, shareholders brought 287 Governance proposals, 239 Social proposals, and 112 Environmental proposals. *Shareholder Proposal Developments During the 2021 Proxy Season*, GIBSON DUNN (Aug. 19, 2021), https://www.gibsondunn.com/wp-content/uploads/2021/08/shareholder-proposal-developments-during-the-2021-proxy-season.pdf [https://perma.cc/DCE2-WGGS].

[252] *See* Christopher S. Auguste et al., *ESG Voting Policy Updates for the 2022 Proxy Season*, KRAMER LEVIN (Jan. 28, 2022), https://www.kramerlevin.com/en/perspectives-search/esg-voting-policy-updates-for-the-2022-proxy-season.html [https://perma.cc/G2VR-XBK9] (discussing ISS's and Glass Lewis's recent changes to their recommendation frameworks to increase their support of ESG proposals).

[253] *See* Shirley Westcott, *2021 Proxy Season Review*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 5, 2021), https://corpgov.law.harvard.edu/20 q21/08/05/2021-proxy-season-review/ [https://perma.cc/R62E-NRTU] (discussing the Exxon Mobile and Engine No. 1 proxy fight resulting from management failure to implement ESG measures).

[254] *See generally* Miazad, *supra* note 169 (discussing corporate responses to internal sexual harassment problems during and after the #MeToo movement).

[255] *Fearless Girl*, STATE ST. GLOB. ADVISORS, https://www.ssga.com/us/en/intermediary/ic/capabilities/esg/asset-stewardship/fearless-girl (last visited Sept. 20, 2023) [https://perma.cc/VRC2-W5ZD].

[256] Andrea Vittorio & Jeff Green, *State Street to Vote Against More Directors at Male-Only Boards*, BLOOMBERG (Sept. 27, 2018, 6:00 AM PDT), https://www.bloomberg.

and Vanguard, joined the push for board diversity and leading proxy advisors, including ISS and Glass Lewis, began to use board gender diversity in their vote recommendations.[257] Meanwhile, other investors, such as California pension funds, argued that directors were responsible for the billions of dollars lost by investors as a result of the various #MeToo scandals at firms.[258] When #MeToo scandals at specific firms caused large-scale stock price declines, some investors instead chose to file derivative suits and alleged the directors breached their fiduciary duties by not properly monitoring sexual harassment at the firm.[259]

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

com/news/articles/2018-09-27/state-street-to-vote-against-more-directors-at-male-only-boards.

[257] *See* Bradley Keoun, *All-Male Boards Could Face New Pressure From Shareholder Adviser ISS*, THE STREET (Sept. 19, 2018, 12:16 PM EDT), https://www.thestreet.com/investing/all-male-boards-could-face-new-pressure-from-shareholder-adviser-iss-14716455; GLASS LEWIS, 2018 PROXY SEASON PREVIEW — UNITED STATES (2018), https://www.glasslewis.com/wp-content/uploads/2018/03/2018-Proxy-Season-Preview-US.pdf [https://perma.cc/8Z2V-2VK9].

[258] *See* Bloomberg, *California Pension Trustees Call for Disclosures of #MeToo Costs*, L.A. TIMES (Jan. 14, 2019, 4:35 PM PDT), https://www.latimes.com/business/la-fi-calpers-calstrsmetoo-20190114-story.html [https://perma.cc/6VHL-9HEV].

[259] *See* Hemel & Lund, *supra* note 171, at 1587-89.

III. A New Corporate Governance Blueprint: The Promises of Legitimacy-Enhancing Governance Tools

Here, we argue that corporate governance should utilize the lessons from administrative law outlined in the previous Part and adjust them into a new blueprint tailored to business needs. As discussed above, some companies have already begun taking steps in this direction, showing that this is a realistic proposal that management can implement in a cost-effective manner without alarming markets. In contrast, when companies fail to buttress their legitimacy ahead of their business choices on controversial social issues, the ensuing legitimacy challenge is harder to overcome, as management's moral standing is already in doubt among stakeholders. By adopting our suggestions in a systematic and ongoing manner, companies will be better placed to ground their decisions and anticipate emerging concerns by stakeholders that otherwise appear unpredictable to uninformed management. The tools we propose are mutually reinforcing, as they address different aspects of moral and sociological legitimacy. Thus, they can bolster management's legitimacy, credibility, and trustworthiness and prevent crises from exploding.

A. *Corporate Managers Are Already Embracing Legitimacy-Enhancing Governance Tools*

Corporations are increasingly faced with the impact of their business choices on different stakeholder groups inside and outside the firm. When addressing social issues enmeshed in business decisions, corporate managers find themselves in uncharted waters. In the short term,[260] wrong decisions on social issues can end up being costly for businesses in the form of employee walkouts, consumer boycotts, reduced access to investor funds, and shareholder suits. More broadly, repeated legitimacy challenges may result in the company's overall business model coming under question.

The previous Part demonstrated that corporate managers are already adopting some legitimacy-enhancing governance tools into their decisionmaking. This fact is important in two respects. First, even if

[260] *See supra* Part II.

corporate law scholarship has not yet embraced the legitimacy framework,[261] corporate managers are acutely aware of creating potential stakeholder-driven legitimacy challenges and are developing ad hoc mechanisms to mitigate them. It is time for corporate law theory to catch up to these changes on the ground. Second, the fact that corporate managers are already utilizing some legitimacy-enhancing governance tools demonstrates that our suggestions are not fanciful theoretical ideas, but real-world solutions that companies can implement without scaring away shareholders. Indeed, in many situations, investors themselves are clamoring for managers to implement these tools from our proposed toolkit.[262] Other firms have chosen to adopt some legitimacy-enhancing governance tools proactively in order to build credibility with stakeholders.[263] Thus, our proposals fall in line with shareholder expectations and stakeholder predispositions, allowing managers to gain welcome feedback they would have otherwise had difficulty obtaining from stakeholder groups.

B. Regaining Legitimacy After a Challenge Is an Uphill Battle

Unfortunately, many firms are adopting legitimacy-enhancing governance tools only after suffering a legitimacy challenge. By then, however, doubts about management's standing have solidified among stakeholders and manager efforts appear disingenuous to them. This situation can create stakeholder backlash that inflames, rather than quells, the existing storm. Stakeholder concerns of management hypocrisy have propelled many legitimacy challenges.[264] For example, when Pinterest management sought to address minority employees' serious complaints of mistreatment by creating a diversity council, it emboldened stakeholders to take employee complaints seriously and

[261] *See supra* notes 76, 78 (mentioning the few corporate law articles that discuss the concept of legitimacy).

[262] During the 2021 shareholder proxy season, investors clamored for firms to release EEO-1 reports and conduct civil rights audits at record levels to hold managers accountable on corporate diversity and civil rights issues.

[263] *See supra* Section II.C (discussing Intel's voluntary adoption of EEO-1 disclosure).

[264] *See supra* Part II. *See generally* David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811 (2001) (discussing the role of public shaming and reputation to corporate decisionmaking).

doubt the sincerity of the managerial response. The employee reaction soon ballooned to a consumer boycott and a shareholder lawsuit against management.[265] Similarly, after the New York Times revealed that Google's management was aware of credible sexual harassment allegations against executive Andy Rubin when it offered him a $90 million severance package, many employees were incensed.[266] Efforts to address the moral fallout through town hall meetings and email apologies failed to calm the waters, as employees saw the executives' stance as "flimsy" and "so not accountable."[267] Soon after, 20,000 employees protested with a walkout.

In both situations, management tried to address a legitimacy challenge by adopting approaches like those we advocate: establishing direct communication with stakeholders, touting the company's credentials in public announcements, recognizing the fallout and committing to ensure it does not get repeated in the future. While welcome, these attempts often fall on deaf ears by this point because stakeholders no longer trust management. For many, management's efforts look like "too little, too late." To attempt to regain stakeholder trust, management then must expend significant effort, time, and resources, such as by inviting outside experts for consultations, holding civil rights audits, and instituting broad-ranging reforms within the corporate hierarchy.

Even after expending these efforts, it is unclear whether a company will be able to regain its legitimacy with stakeholders after a crisis. When Uber faced an intense legitimacy challenge in 2017 after it mishandled sexual harassment allegations, toxic workplace claims, and a lawsuit over stolen intellectual property, shareholders demanded a management change and CEO Travis Kalanick resigned.[268] Facebook, hit

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[265] *See supra* Section II.B (discussing the Pinterest example).

[266] Daisuke Wakabayashi & Katie Benner, *How Google Protected Andy Rubin the "Father of Android*,*"* N.Y. TIMES (Oct. 25, 2018), https://www.nytimes.com/2018/10/25/technology/google-sexual-harassment-andy-rubin.html [https://perma.cc/J4DB-AATL].

[267] Sara Ashley O'Brien, *One Year After the Google Walkout, Key Organizers Reflect on the Risk to Their Careers*, CNN BUS. (Jan. 9, 2020, 12:00 PM EST), https://www.cnn.com/2019/11/01/tech/google-walkout-one-year-later-risk-takers/index.html [https://perma.cc/P96Z-3QQF].

[268] Elizabeth Dwoskin, *Uber Founder Travis Kalanick Resigns as CEO amid a Shareholder Revolt*, WASH. POST (June 21, 2017, 3:06 AM EDT),

by a litany of blunders and scandals,[269] is still trying unsuccessfully to regain its legitimacy with stakeholders.[270] Escaping from a harrowing portrait of a social network sacrificing its members' wellbeing for profitable clicks is not an easy task. Facebook took the unprecedented step of creating an Oversight Board, an internal court-like body for assessing what kind of speech would be acceptable on Facebook posts.[271] Despite its independent composition and funding, and the expertise and public nomination process for its members, opinion on the board's success remains divided. Overall, then, this is a cautionary tale: companies may have to go to extraordinary lengths and expend significant resources to regain their lost legitimacy, and even then, results are far from assured.

C. Legitimacy-Enhancing Governance Tools Should Be Adopted Systematically

1. Managers Should Embrace These Tools in a Systematic Way

These examples illustrate the complicated stakeholder ecosystem that managers must increasingly navigate. Sitting at the C-suite, it is not easy to predict how stakeholder groups will react to managerial choices, or which specific social issue will spark a legitimacy challenge. Managers may adopt a wait-and-see approach, but they then risk fighting a losing battle if a challenge emerges. Further exacerbating the problem, ex post

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https://www.washingtonpost.com/business/technology/2017/06/21/cecb34bc-564e-11e7-ba90-f5875b7d1876_story.html [https://perma.cc/H2DA-X7HH].

[269] Facebook struggled to deal with controversial posts by politicians. Alex Hern, *Facebook Moderators Join Criticism of Zuckerberg over Trump Stance*, GUARDIAN (June 8, 2020, 7:41 AM EDT), https://www.theguardian.com/technology/2020/jun/08/facebook-moderators-criticism-mark-zuckerberg-donald-trump [https://perma.cc/D2BE-6C5F]. Instagram faced concerns about toxic photo-sharing for teenage girls and spreading misinformation about COVID vaccines. Jeff Horwitz, *Facebook Says Its Rules Apply to All. Company Documents Reveal a Secret Elite That's Exempt*, WALL. ST. J. (Sept. 13, 2021, 10:21 AM EST), https://www.wsj.com/articles/facebook-files-xcheck-zuckerberg-elite-rules-11631541353 [https://perma.cc/LW3X-EKN4].

[270] *See id.*

[271] Kate Klonick, *Inside the Making of Facebook's Supreme Court*, NEW YORKER (Feb. 12, 2021), https://www.newyorker.com/tech/annals-of-technology/inside-the-making-of-facebooks-supreme-court [https://perma.cc/9ZGC-38TT].

responses only focus on the challenges of the past, doing precious little to address issues that may emerge in the future. To avoid operating consistently with poor information regarding stakeholder concerns, management should proactively adopt legitimacy-enhancing governance tools in a systematic manner, rather than on an ex post piecemeal approach to address the legitimacy challenges of the past.

By systematically adopting a legitimacy framework, managers broaden the range of issues that come to their attention, embrace stakeholder feedback on these issues, and set in motion processes for implementing and monitoring their initiatives. A systematic approach proactively brings a variety of different concerns to management attention, compared to the monopolistic focus on one problem after a crisis occurs. Moreover, through stakeholder participation mechanisms, affected parties can transmit their concerns to management earlier in the decisionmaking process. Thus, managers can obtain better information about emerging stakeholder concerns and maintain open lines of communication with them.

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

Additionally, systematically adopting legitimacy-enhancing tools can better prepare the companies to resist government regulatory intervention on social issues that affect corporate stakeholders. The case for regulation is often based on the fact that corporations have been unable to solve new social issues that raise legitimacy-related questions

themselves.[272] This problem has prominently occurred on climate change issues, as the SEC has already proposed mandatory climate risk disclosures in response to industry's slowness to resolve stakeholder challenges by voluntarily adopting climate risk disclosures.[273] The better companies can proactively address controversial social issues by themselves, the lower the need for government intervention. Of course, companies cannot be expected to solve all social issues. But they can help illuminate the stumbling blocks, so that when government intervention is necessary, it can build on private sector initiatives and capabilities, rather than supplant them.

2. Legitimacy-Enhancing Governance Tools Are Mutually Reinforcing

Administrative law teaches us that our proposed tools work in a mutually reinforcing manner.[274] For example, when an agency is transparent about its decisionmaking process, interested parties can participate more meaningfully during rulemaking by evaluating the agency's arguments and tailor their responses to the agency's goals and methods. Meanwhile, agency expertise can help them both make more informed choices and justify their choices to stakeholders. Legitimacy concerns span the whole timeline of agency policymaking, from its initial proposal and passage, to monitoring and enforcement. Corporate choices face similar milestones from conception to implementation, and a systematic approach can better maintain management focus throughout the lifecycle of their decisionmaking.

In contrast, when managers only implement one of the tools we propose, they risk being ineffective. For example, administrative and securities law has shown that increased disclosure without any

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

[273] Press Release, U.S. Sec. & Exch. Comm'n, *supra* note 11.

[274] *See supra* note 149; *see also* Havasy, *supra* note 140, at 27-32 (arguing that procedural, relational, and substantive values must all be present in agency policymaking to ensure the legitimacy of the decisions).

opportunities for consultation may not allow any feedback to reach the decisionmakers or for changes to be negotiated.[275] For that reason, disclosure of gender pay gaps has not led to any overhaul, as firms merely disclosed gender pay gaps without embracing additional tools for reform.[276] Stakeholders were then left with limited formal means to address gender pay gaps, even if disclosures made them aware of the problem.[277] Highlighting how private failures on social issues spur government intervention, California felt compelled to intervene with controversial gender parity statutes to address the problem after corporate disclosures failed to mitigate the problem.[278]

On the other hand, not all legitimacy-enhancing governance tools can be deployed in every possible issue. Not all issues are equally complicated or controversial, and some corporate choices may be easier to implement or monitor than others. In this respect, these tools allow for private ordering as managers can choose which combination of tools to adopt given their firm- and industry-specific stakeholder environment.[279] We both accept and welcome the likelihood that the

[275] *See, e.g.*, Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 ADMIN. L. REV. 813, 830 (2000) (asserting that financial disclosure requirements alone cannot prevent flawed or self-interested information from reaching agency panels); Kevin S. Haeberle & M. Todd Henderson, *A New Market-Based Approach to Securities Law*, 85 U. CHI. L. REV. 1313, 1327-41 (2018) (discussing the problems of overdisclosure and underdisclosure in securities regulation); Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 26-30 (1991) (discussing the doctrinal doubts of disclosure as an effective sanction in constitutional law).

[276] *See generally* Morten Bennedsen, Elena Simintzi, Margarita Tsoutsoura & Daniel Wolfenzon, *Do Firms Respond to Gender Pay Gap Transparency?*, 77 J. FIN. 2051 (2022); Jack Blundell, *Wage Responses to the Gender Pay Gap Reporting Requirements* (Ctr. for Econ. Performance Discussion Paper No. 1750, Mar. 2021) (analyzing the effects of a recent U.K. law requiring gender pay disclosure in firms over 250 employees).

[277] *See generally* Emilio J. Castilla, *Accounting for the Gap: A Firm Study Manipulating Organizational Accountability and Transparency in Pay Decisions*, 26 ORG. SCI. 311 (2015) (showing transparency must be combined with formal accountability measures to reduce the gender pay gap).

[278] Abigail Johnson Hess, *California Just Became the First State to Require Women on Corporate Boards*, CNBC (Oct. 1, 2018, 2:20 PM EDT), https://www.cnbc.com/2018/10/01/california-law-will-require-women-on-corporate-boards.html [https://perma.cc/7JK7-PXRV].

[279] On the benefits of private ordering in corporate governance, see *supra* note 96.

systematic adoption of our mechanisms will differ on firm-to-firm and industry-to-industry bases. Each legitimacy-enhancing governance tool targets a different concern, and not all concerns will be equally prominent across firms or industries.

3. Guidance for Managers and Stakeholders

Our legitimacy-enhancing governance tools provide guidance for both corporate managers and stakeholders to negotiate decisions regarding controversial social issues. For managers, these tools give them concrete ways to identify stakeholder communities and seek feedback, organize their decisionmaking in a transparent and accountable manner, and cast as wide a net as possible to gain acceptance for their choices. Because these tools are mutually reinforcing, managers are better off following our suggested approach ex ante in a systematic manner, rather than reaching out haphazardly for some of these tools in the face of a current legitimacy challenge by stakeholders. However, managers can and should also look to these tools to help diffuse legitimacy challenges after they arise.

Stakeholders also have a lot to gain from heeding to the suggestions in this Article, as we illustrate which potential proposals might work best in discussions and negotiations with management. As we have shown, stakeholders have already pressured management to embrace some of these legitimacy-enhancing governance tools to resolve their legitimacy challenges and improve managerial decisionmaking.[280] Our discussion can help stakeholders to assess the result of already-adopted tools and identify potential improvements through complementary tools not yet adopted. Moreover, our Article brings together approaches utilized in various companies and builds the foundation for a set of best practices that, together, can move the needle on important social issues. In the long run, this information diffusion will allow for a degree of standardization to occur across firms, as stakeholders and management settle on their preferred legitimacy-enhancing governance tools to adopt during managerial decisionmaking.

[280] *See supra* Part II.

D. This Blueprint Should Appeal to Shareholder Primacy and Stakeholderism Advocates

Corporate governance scholars and practitioners are at a theoretical impasse between stakeholderism and shareholder primacy. On one hand, stakeholderism proponents have long complained that current corporate law structures are inadequate to address the corporate governance challenges surrounding social issues that affect diverse sets of stakeholders.[281] However, even scholars positively inclined towards stakeholderism are pessimistic about it actually informing corporate law given the corporate governance machine's focus on shareholder primacy.[282]

Meanwhile, shareholder primacy advocates are critical of contemporary stakeholderism efforts, even though they are also concerned with improving social welfare.[283] Many shareholder primacy advocates question whether operationalizing stakeholder perspectives in managerial decisionmaking is feasible.[284] These advocates also warn that allowing managers to have a roving ability to be concerned with

[281] For a discussion on the problems generated by the current shareholder primacy governance framework and proposing a set of governance changes to augment the voice of stakeholders to reduce these problems see generally Christopher M. Bruner, *Corporate Governance Reform and the Sustainability Imperative*, 131 YALE L.J. 1217 (2022), and Kent Greenfield, *Defending Stakeholder Governance*, 58 CASE W. RSRV. L. REV. 1043 (2008).

[282] Lund & Pollman, *supra* note 24, at 2629-31 (describing why the "corporate governance machine" is unlikely to allow stakeholderism to usurp shareholder primacy).

[283] *See* William W. Bratton & Michael L. Wachter, *Shareholders and Social Welfare*, 36 SEATTLE U. L. REV. 489, 502 (2013) (stating shareholder wealth maximization and social welfare maximization are "often . . . connected in the legal literature"). For prominent shareholder primacy advocates who seek to improve social welfare, see REINIER R. KRAAKMAN, PAUL DAVIES, HENRY HANSMANN, GERARD HERTIG, KLAUS J. HOPT, HIDEKI KANDA & EDWARD B. ROCK, THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 17-19 (2004), and Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 440 (2001).

[284] *See* Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain*, 94 S. CAL. L. REV. 1467 (2021) (finding managers and directors in states with constituency statutes do not negotiate to materially benefit other stakeholders during the sale of their companies).

stakeholders will increase managerial insulation and decrease managerial accountability to investors.[285]

Our proposal for corporate managers to systematically integrate legitimacy-enhancing governance tools into their decisionmaking should appeal to both stakeholderism and shareholder primacy advocates. For stakeholderists, this Article proposes concrete reforms to corporate law and governance that provide managers the tools to consider stakeholders during managerial decisionmaking on social issues. These tools provide mechanisms for stakeholders to have ex ante input in managerial decisionmaking and ex post accountability over managers. For those worried about how to reconcile stakeholderism with corporate governance institutions built to promote profit maximization,[286] our proposed toolkit provides a blueprint for a dependable negotiation framework to begin to develop concrete governance reforms. In our proposed setting, managers obtain information and make discretionary but credible commitments, while stakeholders gain access to the decisionmaking process and monitor outcomes.

For shareholder primacy advocates, our proposals provide both shareholder value and accountability-based reasons to embrace legitimacy-enhancing governance tools. Willingly or not, corporate managers find themselves enmeshed in controversial social issues,[287] which are largely uncharted terrain for business leaders. Perhaps unsurprisingly then, managers have frequently found themselves in heated legitimacy challenges as stakeholder groups have become emboldened to pressure firms on social issues. Employee walkouts, consumer boycotts, and shareholder proxy battles hurt firm value through decreased employee productivity, reduced sales, and diverted management attention. The systematic ex ante adoption of our blueprint will likely reduce the number of legitimacy challenges and

[285] *See* Bebchuk & Tallarita, *The Illusory Promise*, *supra* note 15, at 100-01 (arguing that corporate managers will use stakeholderism to insulate managerial decisionmaking from shareholder and judicial oversight).

[286] *See* Lund & Pollman, *supra* note 24, at 2629-31.

[287] For potential reasons why, see generally 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).

mitigate their severity when they occur, thereby maintaining or improving firm value.

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

E. Addressing Potential Criticisms

Even if convinced about the value of adopting a legitimacy framework for corporate decisionmaking and adopting our blueprint in a systematic manner, some might still be concerned about the costs of reorienting corporate governance toward improving the legitimacy of managerial decisions, or the advisability of managers' openly recognizing the social implications of their choices. This final Section addresses these two potential overarching concerns.

1. The Costs and Benefits of Legitimacy

Building the institutional structures and processes for increasing legitimacy beyond the extent required by state and federal law is likely to have upfront costs. Ethics and sustainability departments will require staffing and management attention, stakeholder consultation processes can be lengthy, and even disclosures require a higher level of internal discipline. On the other hand, the benefits of adopting any governance framework, including this one, are notoriously hard to quantify.[288] Still,

[288] For a discussion on the difficulties in developing metrics to assess the governance of corporations, see generally Lucian A. Bebchuk & Assaf Hamdani, *The Elusive Quest for Global Governance Standards*, 157 U. PA. L. REV. 1263 (2009), and Sanjai Bhagat, Brian

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

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

Importantly, while some costs will be ongoing, others can be expected to decline over time, once management and staff streamline the framework and company responses become more standardized.[289] As the examples discussed in Part II illustrate, many companies are already experimenting with institutional mechanisms for enhancing legitimacy, either voluntarily or in response to legitimacy challenges. Industry groups are coalescing around best practices and knowledge-sharing. International bodies are forming to help standardize criteria and processes, adding much clarity to demands. Growing expertise and standardization will help simplify the choices for corporate managers.

Bolton & Roberta Romano, *The Promise and Peril of Corporate Governance Indices*, 108 COLUM. L. REV. 1803 (2008).

[289] *See* Michal S. Gal & Daniel L. Rubinfeld, *Data Standardization*, 94 N.Y.U. L. REV. 737, 752 (2019) (discussing how standardizing data compatibility between firms will reduce data costs); Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting* (*Or "The Economics of Boilerplate"*), 83 VA. L. REV. 713, 713 (1997) (discussing how the standardization of corporate contracting can reduce firm costs).

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

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

2. Firms Should Steer Clear of Socially Controversial Issues

Just ten years ago, it would have been highly unusual for corporate managers to publicly take a stance on controversial social issues not related to their core business. This abrupt reversal of managerial attitudes has left many wondering whether managers have brought legitimacy challenges upon themselves. Either because they are succumbing to stakeholder criticism or because they are eager to promote their own ideological agendas, managers now seem more likely to take the initiative in declaring their positions. If only they kept quiet

and stuck to business issues, one might think, then stakeholder-driven legitimacy problems would quiet down.[290]

There are several reasons why managers are unable to keep quiet on social issues that may potentially generate legitimacy challenges. First, some issues are impossible to avoid for certain companies and industries because they permeate key business choices. Most obviously, transportation, energy, agriculture, and other industries have greatly contributed to climate change by their normal business activities.[291] To make matters worse, some corporate managers actively chose to engage in climate change disinformation as a business practice, thus contributing to political inaction and worsening climate change.[292] In a similar vein, privacy and customer confidentiality issues have gained prominence because of the rise of digital tracking and targeted advertising. When companies base their success on disrupting existing production models, they unavoidably create new stakeholder concerns.

But even for longstanding issues, such as race and gender relations in the workplace, the tools for monitoring managers and countering corporate narratives have become more sophisticated in recent years with the rise of social media.[293] As evident when corporations stated they supported racial equality after the murder of George Floyd, stakeholders with different experiences now have the means to speak up when corporate management appears hypocritical. Once Aerica Shimizu

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[290] We thank Ed Rock for bringing this criticism to our attention.

[291] *Sources of Greenhouse Gas Emissions*, U.S. ENV'T PROT. AGENCY, https://epa.gov/ghgemissions/sources-greenhouse-gas-emissions (last visited Sept. 21, 2023) [https://perma.cc/57WV-TYZK] (stating U.S. greenhouse gas emissions by industry and activity — 27% transportation, 25% energy, 24% industry, and 11% agricultural).

[292] On industry climate disinformation and lobbying, see generally NAOMI ORESKES & ERIK M. CONWAY, MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBSCURED THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO CLIMATE CHANGE (2010), and JAMES LAWRENCE POWELL, THE INQUISITION OF CLIMATE SCIENCE (2011).

[293] Tina McCorkindale & Marcia W. DiStaso, *The Power of Social Media and Its Influence on Corporate Reputation*, *in* THE HANDBOOK OF COMMUNICATION AND CORPORATE REPUTATION 497 (Craig E. Carroll ed., 2013); SPROUT SOCIAL, THE SPROUT SOCIAL INDEX, EDITION XII: CALL-OUT CULTURE (2023), https://sproutsocial.com/insights/data/q3-2017/ [https://perma.cc/4UNY-DSB4] (finding 46% of consumers have used social media to call out brands to complain about their business); *see supra* Part II.B (discussing how stakeholders used social media to hold firms accountable).

Banks and Ifeoma Ozoma spoke up on social media about Pinterest's mistreatment of them and their stories gained an audience, Pinterest was powerless to quell the oncoming legitimacy challenge without adopting legitimacy-enhancing governance tools.[294] But corporate managers need not be bad actors to confront legitimacy challenges. For example, technology companies face widely known and persistent problems related to diversity recruitment, training, and promotion.[295] These problems persist even in tech companies where managers have proactively invested in diversity measures.[296]

Finally, it is far from certain that keeping silent would help managers navigate the tricky social environment in which they find themselves. There is no denying the increased appetite from various stakeholders for firms to take positions on social issues. There are many potential reasons for this shift in stakeholder behavior, including the increased polarization of our social lives,[297] the creation of epistemic bubbles and echo chambers that reinforce ideological narratives,[298] and the

[294] *See supra* Part II.B (discussing the Pinterest example).

[295] For a discussion on the lack of progress among tech companies on diversifying their workforce see, for example, Sara Harrison, *Five Years of Tech Diversity Reports — and Little Progress*, WIRED (Oct. 1, 2019, 7:00 AM), https://www.wired.com/story/five-years-tech-diversity-reports-little-progress/ [https://perma.cc/Z4UQ-TEWZ], and Kate Rooney & Yasmin Khorram, *Tech Companies Say They Value Diversity, but Reports Show Little Change in Last Six Years*, CNBC (June 12, 2020, 11:27 AM EDT), https://www.cnbc.com/2020/06/12/six-years-into-diversity-reports-big-tech-has-made-little-progress.html [https://perma.cc/QE7L-J95Z].

[296] *See* Harrison, *supra* note 295.

[297] On how political polarization has seeped into economic issues, see ROGER M. BARKER, CORPORATE GOVERNANCE, COMPETITION, AND POLITICAL PARTIES: EXPLAINING CORPORATE GOVERNANCE CHANGE IN EUROPE 2 (2010), EITAN HERSH, POLITICS IS FOR POWER: HOW TO MOVE BEYOND POLITICAL HOBBYISM, TAKE ACTION, AND MAKE REAL CHANGE 87 (2020), and Abhinav Gupta & Forrest Briscoe, *Organizational Political Ideology and Corporate Openness to Social Activism*, 65 ADMIN. SCI. Q. 524, 525-27 (2020). On how political polarization in corporate management reduces shareholder value, see generally Vyacheslav Fos, Elisabeth Kempf, & Margarita Tsoutsoura, *The Political Polarization of Corporate America* (Nat'l Bureau of Econ. Rsch., Working Paper No. 30183, 2023), https://www.nber.org/papers/w30183 [https://perma.cc/A4NT-Z8AT].

[298] *See generally* KATHLEEN HALL JAMIESON & JOSEPH N. CAPPELLA, ECHO CHAMBER: RUSH LIMBAUGH AND THE CONSERVATIVE MEDIA ESTABLISHMENT (2008) (discussing the development of media companies developing partisan echo chambers among their consumers); Matteo Cinelli, Gianmarco De Francisci Morales, Alessandro Galeazzi,

increased pro-social behavior of younger citizens.[299] Regardless of stakeholder motivation, managers staying mum is likely to be seen as a statement as much as speaking up. Often, stakeholders will equivocate managerial silence as indifference or even as a vote in favor of the status quo, which can itself cause backlash.[300] Against the rising tide of stakeholder complaints, managers can perhaps wash their hands and hope for the best. But managers are better off by following a systematic approach that brings together warring factions and respects diverse interests and considerations of the different corporate stakeholder groups.

CONCLUSION

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

Walter Quattrociocchi & Michele Starnini, *The Echo Chamber Effect on Social Media*, 118 PROC. NAT'L ACAD. SCI., Mar. 2, 2021, at 1 (measuring the development of echo chambers on social media); C. Thi Nguyen, *Echo Chambers and Epistemic Bubbles*, 17 EPISTEME 141 (2020) (theorizing the concepts of echo chambers and epistemic bubbles).

[299] *See generally* Barzuza et al., *supra* note 287 (discussing the investing preferences of millennials and how their investing preferences diverge from previous generations).

[300] *See* Abhinhav Gupta, *CEOs Ignore Social Issues at Their Own Peril*, WALL ST. J. (June 26, 2021, 10:00 AM EST), https://www.wsj.com/articles/ceo-social-political-issues-11624307505 [https://perma.cc/BWU4-LU4E]; Martin Reeves, Leesa Quinlan, Mathieu Lefèvre & Georg Kell, *How Business Leaders Can Reduce Polarization*, HARV. BUS. REV., Oct. 8, 2021, https://hbr.org/2021/10/how-business-leaders-can-reduce-polarization [https://perma.cc/VL2U-9UYB] ("Polarization can also affect businesses that do not speak out . . . . Silence can also be perceived as tacit support for one side of an issue.").

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

Drawing on public law discussions on the legitimacy of administrative agencies, this Article proposes a blueprint for concrete and realistic steps that can be made to corporate decisionmaking to improve the legitimacy of corporate decisions. These steps include: increasing participation with stakeholders, improving corporate managerial transparency and disclosure, embracing the use of external experts during deliberation, and standardizing the metrics and methods of corporate decisionmaking, among other proposed methods. This blueprint is not meant to be considered exhaustive, as further research is needed to identify additional steps managers can take to improve the legitimacy of their decisions.

No company will be perfect when it comes to ensuring the legitimacy of managerial decisions on social issues. By their nature, many social issues will involve stakeholders who hold different ideological positions. Sometimes some stakeholders will advocate for the company not to get involved at all, as various stakeholders will have different views on which ESG issues are central or peripheral to the business activities of the company. This situation is why we have advocated for specific governance tools that corporate managers can practically integrate into their decisionmaking processes and outcomes to provide stepwise improvements in the legitimacy of their decisions. As corporate managers improve the legitimacy of their decisions, stakeholders will

increasingly find the decisions of managers worthy of respect and compliance such that they will not launch full-scale legitimacy challenges, even if they disagree with the ultimate decision.

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