An Introduction to Anti-ESG Legislation

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Abstract

The role of environmental, social, and governance (ESG) factors in corporate decision-making was one of the hottest topics in corporate governance in 2022. For example, during just one week (June 6-12, 2022), the Harvard Law School Forum on Corporate Governance published 12 posts including "ESG" as a tag. While the ESG label arguably constitutes great branding, the use of ESG factors is seen by many as a serious encroachment on free-market capitalism. In fact, according to The Heartland Institute, as of April 5, 2022, twenty-eight states had initiated some form of "anti-ESG action." This Essay will provide an overview of these actions.

I. Introduction

The role of environmental, social, and governance (ESG) factors in corporate decision-making was one of the hottest topics in corporate governance in 2022. For example, during just one week (June 6-12, 2022), the Harvard Law School Forum on Corporate Governance published 12 posts including "ESG" as a tag. While the ESG label arguably constitutes great branding, the use of ESG factors is seen by many as a serious encroachment on free-market capitalism. Noting that ESG and "stakeholder capitalism" may be used interchangeably – at least in some

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contexts – the following excerpt from one of my prior writings may be relevant:[2]

> Capitalism in the context of corporate governance may be understood as an economic system that equates efficiency with corporate managers only pursuing projects that they reasonably expect will have a positive impact on the value of the corporation's shares (accounting for opportunity costs). Such projects may be referred to as positive net-present-value (NPV) projects. Stakeholder capitalism, on the other hand, may be understood a number of different ways, including: (1) an improved form of calculating NPV; (2) a conscious choice to sacrifice some NPV in order to advance broader social objectives; (3) a form of rent-seeking; (4) a form of green-washing; (5) a manifestation of the agency problem whereby managers prioritize their personal political preferences over NPV; (6) a manifestation of the agency problem whereby managers prioritize their personal financial wealth over NPV; (7) a form of crony capitalism.[3]

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[2] *Cf.* Stefan J. Padfield, *Does Stakeholder Capitalism Have A (Viewpoint) Diversity Problem?*, 13 U. P. R. BUS. L.J. 1, 3 (2022) ("[W]hether it's called ESG, woke capital, or stakeholder capitalism, these are just codes for liberal policies and politics.") (quoting Free Enterprise Project, Investor Value Voter Guide 2021, 1-2); Lance Ang, *The Start of History for Corporate Law: Shifting Paradigms of Corporate Purpose in the Common Law*, 38 WIS. INT'L L.J. 427, 454 (2021) ("the World Economic Forum has released a set of ESG metrics and disclosures called the Stakeholder Capitalism Metrics"). *But cf.* Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563 (2021) (arguing that while "the corporate social responsibility movement transformed into shareholder value-oriented environmental, social, and governance (ESG) standards, stakeholder capitalism became relegated to a new separate form of entity known as the benefit corporation").

[3] Stefan J. Padfield, *Crony Stakeholder Capitalism*, __ KY L. J. __ (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4164089.

Accordingly, we have witnessed an "ESG backlash."[4] In fact, according to The Heartland Institute (hereinafter, "Heartland"), as of April 5, 2022, twenty-eight states have initiated some form of "anti-ESG action."[5] This Essay will provide an overview of these actions.

Following this Introduction, Part II will examine some potential tensions between capitalism and ESG. Specifically, this Part will provide brief definitions of both capitalism and ESG, followed by an explanation of why they may be in conflict. Part III will then examine some general types of anti-ESG legislation, focusing on what have been referred to as "divestment bills" and "ESG bans." Much of this section, as well as the remainder of the Essay, will summarize the relevant work of Heartland. Accordingly, it is worth learning a bit more about this organization.

Heartland describes itself as "one of the world's leading free-market think tanks."[6] Relying heavily on Heartland for a brief introduction to anti-ESG legislation, as I do in this Essay, makes sense if for no other

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[4] *See* Richard Morrison, *The ESG Backlash*, NAT'L. REV. (Mar. 9, 2022), https://www.nationalreview.com/2022/03/the-esg-backlash/ ("Conservatives have come to see this collection of business trends, most often encountered at corporate conferences and investing seminars, as yet another 'woke' assault on mainstream society. Their growing opposition to ESG will likely chill industry enthusiasm and curtail the growth confidently predicted by many of its advocates.").

[5] *Environmental, Social, and Governance (ESG) Scores*, THE HEARTLAND INST., available at https://www.heartland.org/ESG/esg.

[6] *About Us*, THE HEARTLAND INST., available at https://www.heartland.org/about-us/index.html.

reason than Heartland has provided relevant testimony before at least eleven state governmental bodies.[7] However, the reader should be aware that Heartland has also received significant amounts of criticism, including charges of being a global warming "extremist"[8] or denier.[9] In fact, Heartland has devoted an entire page on its website to responding to its critics.[10] Specifically on the issue of global warming, Heartland notes:

> Surveys of climate scientists repeatedly find acknowledgement of great uncertainty about the scientific basis of our understanding of how the climate works and therefore of forecasts of future warming. Surveys and article-counting exercises that claim to find a scientific "consensus" invariably ask only if there is a human impact on climate, which we readily admit there could be, and not whether that effect is large relative to natural variability or likely to pose a serious problem. More than 31,000 scientists have signed the Oregon Petition saying "there is no convincing scientific evidence that human release of carbon dioxide, methane, or other greenhouse gases is causing, or

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7 *Environmental, Social, and Governance (ESG) Scores*, THE HEARTLAND INST., available at https://www.heartland.org/ESG/esg.

8 *Reply to Critics*, THE HEARTLAND INST., available at https://www.heartland.org/about-us/reply-to-critics/index.html.

9 *Cf.* Climate Investigations Center, *The Heartland Institute*, CLIMATE INVESTIGATIONS CTR (Aug. 4, 2017) ("The Heartland Institute is a free market think tank at the forefront of denying manmade climate change."), available at https://climateinvestigations.org/heartland-institute/. *But Cf.* Stopping Socialism TV, *New York Times Hit Piece Targets Our War on the Great Reset* (Aug 9, 2022) ("The New York Times published a hit piece targeting Justin and Donald's work at The Heartland Institute on ESG. Justin Haskins and Donald Kendal discuss the story …."), available at https://youtu.be/MWArREB06Ko.

10 *Reply to Critics*, *supra* note 8.

> will in the foreseeable future, cause catastrophic heating of the Earth's atmosphere and disruption of the Earth's climate."… Heartland's spokespersons have been invited to testify on global warming issues before Congress and in state legislatures and official government meetings in Ohio, Kentucky, Connecticut, Minnesota, Illinois, Indiana, West Virginia, Utah, New Mexico, Oregon, Washington, Montana, Colorado, Arkansas, and more. These are not the activities of a group on the "extreme margin of the discourse" on global warming. In fact, the positions on global warming expressed by spokespersons for The Heartland Institute are closer to where most scientists and economists stand than are the views of well-known alarmists such as Al Gore and James Hansen and many environmental advocacy groups.[11]

[11] *Id. Cf.* The Heartland Institute, *Friday Opening Keynote, 10/15/21 - Heartland's 14th International Conference on Climate Change.*, available at https://youtu.be/iDanVgrRnJw?t=6364.

> Lies about science lead to lies about climate change … and lies about climate change lead to lies about the need for a Great Reset [of capitalism] and lies about the need for a Great Reset lead to lies about centralizing power and control and that leads to lies about the need for authoritarianism and that's the end of freedom as we know it…. So … exposing the scientific realities about climate change is very likely one of the most important things anyone in the world can do right now to stop the rise of authoritarianism.

Id.; *Cf. About*, ARTHUR B. ROBINSON CTR. ON CLIMATE AND ENV'T POL'Y ("The Arthur B. Robinson Center on Climate and Environmental Policy at The Heartland Institute is an independent and authoritative source of research and commentary on a wide range of environmental issues, including climate change, air and water pollution, public health, and energy policy."), available at https://www.heartland.org/Center-

In addition to the foregoing, relying heavily on information distributed by Heartland in this Essay is appropriate because the focus here is on the perceptions that are driving anti-ESG legislation. Accordingly, the relevant Heartland content set forth herein should be viewed from that perspective – as opposed to conveying any suggestion that every assertion herein has been exhaustively fact-checked. This caution is particularly relevant as the Essay concludes with a deeper dive into some of the key narratives underlying the anti-ESG movement, followed by concluding remarks in Part V. The goal here is to not only introduce the reader to relevant anti-ESG actions taking place in the state legislatures across the country, but also to expose the reader to some of the underlying narratives driving these actions. Accordingly, at various points in this Essay I will state relevant arguments in a form that I believe reflects the perspectives of at least some proponents of anti-ESG legislation.

Climate-Environment/index.html; *About*, CLIMATE REALISM ("Climate Realism provides daily rebuttals to the alarmists' Climate Delusion, giving the media and interested persons access to the facts, data, and perspectives that put the daily media scares in proper perspective."), available at https://climaterealism.com/.

II. Capitalism versus ESG?

Blackrock is the largest money manager in the world, managing "a staggering $10 trillion of other people's money."[12] Blackrock's CEO is Larry Fink, and both Fink individually and Blackrock as a whole have been aggressively pushing stakeholder capitalism and ESG.[13] In his recent 2022 letter to CEOs, Larry Fink tried to defend stakeholder capitalism and ESG as nothing more than capitalism in action:

> Stakeholder capitalism is not about politics. It is not a social or ideological agenda. It is not "woke." *It is capitalism*, driven by mutually beneficial relationships between you and the employees, customers, suppliers, and communities your company relies on to *prosper*. This is the power of capitalism…. As stewards of our clients' capital, we ask businesses to demonstrate how they're going to deliver on their responsibility to shareholders, including through sound environmental,

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[12] Rebecca Ungarino, *Here are 9 fascinating facts to know about BlackRock, the world's largest asset manager*, BUS. INSIDER (Mar 10, 2022), available at https://www.businessinsider.com/what-to-know-about-blackrock-larry-fink-biden-cabinet-facts-2020-12.

[13] *Cf.* Charles Gasparino, *Larry Fink as Wall St. Dr. Evil?: 'Woke' within reason*, N. Y. POST (Feb. 19, 2022) (noting that Fink is "known for pushing for something called stakeholder capitalism … — a squishy concept in which corporations look to better the human race as opposed to churning out profits for shareholders. And his embrace of some woke policies through the investment fad known as ESG (Environmental, Social, Governance) standards."), available at https://nypost.com/2022/02/19/larry-fink-as-wall-st-dr-evil-woke-within-reason/.

> social, and governance practices and policies.[14]

Perhaps unsurprisingly, not everyone was convinced. The Wall Street Journal editorial board noted:

> In his annual letter this year, Mr. Fink did have some nice words about capitalism, which has been very, very good to him. But he also lectured CEOs that "employees are increasingly looking to their employer as the most trusted, competent, and ethical source of information," and "stakeholders" including employees, customers, communities, and regulators "need to know where we stand the societal issues intrinsic to our companies' long-term success." Mr. Fink will also tell you what stand to take on those issues.[15]

And Andrew Stuttaford added in the National Review that:

> In a democracy, broader decisions about the direction that society should adopt are (or ought to be) made either organically — as a consequence of how millions of people choose to live their own lives — politically, through the democratic process, or through a combination of both modes. The idea they should be made in the name of a country's "stakeholders" by a modest number of (unelected) businesspeople, working in conjunction

[14] *Larry Fink's 2022 Letter to CEOs: The Power of Capitalism*, BLACKROCK, available at https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter.

[15] The Editorial Board, *Calling Out 'Emperor' Larry Fink: Charlie Munger says what many CEOs think but decline to say.*, THE WALL ST. J. (Feb. 17, 2022), available at https://www.wsj.com/articles/calling-out-emperor-larry-fink-charlie-munger-financial-markets-berkshire-hathaway-11645136040.

> with (unelected) activists, (unelected) bureaucrats, (unelected) regulators, and, maybe, a faction within the government of the day, looks more like corporatism than democracy. Corporatism can be tolerably benign, but it should be remembered that, at its worst, it has provided a significant part of the theoretical underpinnings of fascism, a doctrine that, in practice, has tended to revolve around a single individual — an emperor, if you like, but with a title that sounds somewhat less antique, whether it's Mussolini's "Duce" or the various designations that Xi Jinping is trying on for size as he continues transforming China into a fascist state. That, mercifully, is not on the American horizon. But if we were to descend fully into corporatism, our emperor would probably be a composite, a coterie of the like-minded exercising powers that it should not have. And we are closer to that moment than we should be.[16]

Suffice it to say that the debate about the extent to which the use of ESG factors supports rather than opposes capitalism remains lively. The following subsections attempt to provide some relevant background to connect this debate to the anti-ESG legislation movement.

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[16] Andrew Stuttaford, *Larry Fink, 'Emperor'?*, NAT'L. REV. (Feb. 19, 2022), available at https://www.nationalreview.com/2022/02/larry-fink-emperor/.

A. What is Capitalism?

Having teed up the "ESG v. capitalism" debate, it may be worthwhile to dig a bit deeper into the relevant concepts – starting with capitalism. In simple terms, capitalism may be understood as a system for organizing a society's economic activity that relies on private ownership of property and price signals flowing from free market exchanges in order to drive the allocation of scarce resources. Understood this way, capitalism may be starkly contrasted with communism, which rejects private property and seeks to allocate resources via centralized planning. With capitalism and communism at the extremes, one may further break down economic systems into socialism and fascism. Socialism can be understood as seeking to maintain the innovation and growth that flows from free-market capitalism while at the same time seeking to ameliorate some of capitalism's inequality by subsequently redistributing the wealth.[17]

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[17] *Cf.* Alan Reynolds, *The Fundamental Fallacy of Redistribution*, CATO AT LIBERTY (Feb. 11, 2016), available at https://www.cato.org/blog/fundamental-fallacy-redistribution.

> Mill's distinction between production and distribution appears to encourage the view that any sort of government intervention in distribution is utterly harmless – a free lunch. But redistribution aims to take money from people who earned it and give it to those who did not. And that, of course, has adverse effects on the incentives of those who receive the government's benefits and on taxpayers who finance those benefits.

Id.

Fascism, meanwhile, may be understood as ostensibly keeping ownership and control of assets in private hands while in actuality utilizing authoritarian means to direct the economy via a combination of threats and bribes. In terms of comparing the outcomes of these competing systems of organizing economic activity, one may contrast the fact that capitalism has been credited with bringing us to the cusp of eradicating poverty[18] while communism/socialism has been blamed for causing 100 million deaths and destroying economies from Stalin's Soviet Union to modern-day Venezuela.[19]

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[18] *Cf.* Jesse Hathaway, *Want to end poverty? Promote capitalism, not socialism*, WASH. EXAM'R. (Oct. 28, 2018), available at https://www.washingtonexaminer.com/opinion/op-eds/want-to-end-poverty-promote-capitalism-not-socialism.

> In 1981, 44 percent of the world's population was classified as living in "extreme poverty" …. As of 2013, that number had declined to just 10.7 percent. This was the direct result of the transition by many large countries — including China, India, and Russia — to largely free-market economies and away from socialism.

Id.; *Cf.* Steven Kaplan, *The Enduring Wisdom of Milton Friedman*, HARVARD L. SCH. F. ON CORP. GOVERNANCE (Sep. 30, 2020) ("People living in extreme poverty fell from 42 percent of the world's population in 1981 to below 10 percent today…. Absolute poverty declined substantially in the US, from 13 percent in 1980 to 3 percent today…. So, I believe … shareholder value maximization has been extremely successful …."), *available at* https://corpgov.law.harvard.edu/2020/09/30/the-enduring-wisdom-of-milton-friedman/.

[19] *Cf.* Temba Nolutshungu, *Venezuela Is an Irrefutable Indictment of Socialist Ideology*, FOUND. FOR ECON. EDUC. (May 5, 2019), available at https://fee.org/articles/venezuela-is-an-irrefutable-indictment-of-socialist-ideology/.

> Venezuela is not an exception. It is an extreme example of the damage inflicted wherever and

B. What is ESG?

In light of the foregoing, one may further argue that in the context of corporate governance, capitalism manifests as corporate managers taking only those actions calculated to result in net gains in terms of share value. When one then asks what environmental, social, and governance (ESG) factors add to this, two broad answers can usefully serve to advance the discussion. On the one hand, it can be argued that ESG factors merely allow corporate managers to do a better job of calculating expected value by, for example, adding climate change risk factors into the analysis. On the other hand, it can be argued that ESG distorts expected value calculations in myriad ways large and small. One concern is that adding ESG factors to the decision-making process creates problematic opportunities for self-dealing by providing cover for such conduct by

> whenever socialist or communist programs have been implemented. Besides the inevitable socio-economic impoverishment, history bears witness to the tragedy that is exacted in terms of human misery and horrific killings. As in Venezuela, it has universally been the case that the ruling socialist/communist Nomenklatura remain the only ones to be spared these miserable consequences. The bloody trail of death under communist leadership is objectively verifiable: in his book *Unnatural Deaths in the USSR*, I.G. Dyadkin arrives at a figure of between 56 and 62 million unnatural deaths under the rule of Josef Stalin, with between 34 and 49 million directly linked to him.

Id.

inserting too many factors that allegedly can't be quantified, thereby giving too much discretion to managers. When one expands the forms of self-dealing beyond the taking of financial gains and includes the satisfaction of political ambitions, the problem is magnified.[20]

C. Are ESG and Capitalism in Conflict?

At this point, we can turn to some of the complaints emanating directly from Heartland concerning the conflict between ESG and capitalism. A good place to start is with their model "Resolution on ESG," which states in part:

> Whereas, ESG standards are designed to create a great reset of capitalism and to revamp all aspects of our societies and economies, from education to social contracts and working conditions; and Whereas, ESG supporters intend to alter how businesses and investments are evaluated, so that instead of focusing on the quality of goods and services, profits, and other traditional economic metrics, companies are evaluated largely on their commitment to social justice, environmental justice, and environmental causes, and then assigned scores so that companies can be compared, rewarded, or potentially punished; and … Whereas, Larry Fink, CEO of Blackrock, the world's largest asset management company, and

[20] *Cf.* Stefan J. Padfield, *Corporate Governance and the Omnipresent Specter of Political Bias*, 104 MARQ. L. REV. 47, 50 (2020) ("this Essay argues that we now confront an omnipresent specter of political bias in at least some instances of corporate decision-making").

> most powerful person on Wall Street, promises to use ESG scores as a way to alter society…. Therefore, Be It Resolved that the "state" Legislature acknowledges the proper rights and freedoms of the people and businesses of [state]; and … Be It Further Resolved, that a Bill shall be prepared and presented at the convening of the 2023 legislative session to address the findings as determined.[21]

In addition to the foregoing, the model resolution identifies the two main types of legislative responses recommended by Heartland. First, "divestment" initiatives that call for state divestment "from financial institutions and other business that discriminate against vital State sectors."[22] Second, ESG "bans" that "aim to eliminate the use of ESG, social credit, or similar metrics … to discriminate in providing goods and services to individuals and businesses."[23] The next section will examine these two initiatives in more detail.

III. Types of Anti-ESG Legislation

The following subsections discuss the primary forms of anti-ESG legislation promoted by Heartland: Divestment bills and ESG bans. Divestment bills include both bills that prohibit covered governmental entities from entering into contracts with businesses that boycott covered

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[21] On file with author.
[22] *Id.*
[23] *Id.*

industries/activities, and bills that direct fiduciaries of public funds to avoid political or social issues when managing those public funds. ESG bans, meanwhile, prohibit covered entities from denying services on the basis of non-financial factors.

A. Divestment Bills

Heartland's model divestment bill focuses on two items.[24] First, prohibiting covered governmental entities from entering into contracts with businesses that boycott covered industries/activities.[25] For example, state actors in West Virginia might be barred from contracting with businesses that boycott mining.[26] Second, directing "fiduciaries of public

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[24] On file with author.
[25] *Cf.* Eugene Volokh, *Anti-BDS Laws' Certification Requirements*, THE VOLOKH CONSPIRACY (July 29, 2022) ("Michael Dorf, Andrew Koppelman, and I have written elsewhere about why we think laws banning government contractors from refusing to deal with Israeli companies are generally constitutional…. Refusals to deal are unprotected conduct, not protected speech."), available at https://reason.com/volokh/2022/07/29/anti-bds-laws-certification-requirement/.
[26] *Cf.* Robert Eccles, Shivaram Rajgopal, & Jing Xie, *Does ESG Negative Screening Work?*, HARVARD L. SCH. F. ON CORP. GOVERNANCE (Aug. 8, 2022), available at https://corpgov.law.harvard.edu/2022/08/08/does-esg-negative-screening-work/.

> A popular version of negative screening, that is widely practiced by institutional investors sensitive to ESG considerations, is to exclude stocks of firms involved in the production of alcohol, tobacco, and gaming, and fossil-fuels such as coal and gas or oil (labeled as "sin stocks" or "excluded industries"). Reasons for exclusion vary and include moral values, the belief that this will put pressure on them to change or even put them out of business, or the conviction that the industry's prospects are grim.

funds to focus on traditional long-term investment criteria (financial risk, rate of return) and to avoid political or social issues when managing public funds."[27] This latter directive may be likened to the Trump administration's rule limiting the use of ESG factors in capital allocation by investment advisors.[28]

Id.

[27] *Cf.* The News Service of Florida, *Gov. DeSantis takes aim at 'woke' corporations and ideology in Florida's investments*, WFSU (July 28, 2022) ("DeSantis plans to have the State Board of Administration … direct pension-fund managers against 'using political factors when investing the state's money.' So-called ESG policies have drawn criticism from Republicans …. DeSantis said ESG is a being used by 'upper echelons of our society' to impose a 'woke ideology ….'"), available at https://news.wfsu.org/state-news/2022-07-28/gov-desantis-takes-aim-at-woke-corporations-and-ideology-in-floridas-investments.

[28] *Cf.* Vivek Ramaswamy and Alex Acosta, *Biden's ESG Tax on Your Retirement Fund*, WALL ST. J. (July 19, 2022), available at https://www.wsj.com/articles/bidens-esg-tax-on-your-retirement-fund-pension-planning-regulation-climate-change-investment-returns-portfolios-11658245467.

> Trump-era regulations allowed ESG factors to be used as a tiebreaker when a fund manager chooses between two equal investments. This is itself a dubious notion. Law professors Robert Sitkoff and Max Schanzenbach argue that in cases of a tie, fund managers should split available capital between the investments to increase portfolio diversification. Kentucky Attorney General Daniel Cameron in May formally issued a legal opinion that investing with "mixed motives" breaches fiduciary duties , suggesting that ties likely can't be legally broken this way. Amid these concerns, Trump-era regulations applied safeguards against ESG expansionism. Investment managers could call a tie only if they are "unable to distinguish investment alternatives on the basis of pecuniary factors alone." Investment managers must document the basis for such a tie and for selecting particular ESG factors as the tiebreaker. The Biden administration seeks to remove those limits, allowing fund managers to consider ESG factors whenever they deem two investments "equally serve the financial interests of the plan." Fiduciaries need not document the

B. ESG Bans

ESG bans are statutes that prohibit covered entities from denying services on the basis of non-financial factors. The following relevant excerpt is from Heartland's model statute:

> STATEMENT OF PURPOSE. The legislature recognizes the rights of [insert state] citizens to the freedom of speech and association. That these rights may be infringed when Financial Institutions limit access to financial services for any reason other than objective financial criteria. The financial freedom and the protection of the rights of [insert state] citizens and businesses is a matter of state concern and any limitations on access to financial services based on non-traditional criteria would not only threaten the rights and proper privileges of [insert state] citizens and businesses but would also be a menace to the institutions and foundation of a free democratic state and a threat to the peace, order, health, safety, and general welfare of the state and its inhabitants.[29]

> reason for the tie or how they broke it, the Labor Department explains in announcing the rule, so as to not "chill investments based on climate change or other ESG factors."

Id.

[29] On file with author.

The substance of the model statute includes (1) a description of what it means to provide fair access to financial services, and (2) disclosure requirements to ensure such fair access:

> FAIR ACCESS TO FINANCIAL SERVICES. To provide fair access to financial services, a financial institution shall:
>
> (a) Make each financial service it offers available to all persons in the geographic market served by the financial institution on a non-discriminatory basis;
>
> (b) Not deny any person a financial service the financial institution offers except to the extent justified by such person's documented failure to meet quantitative impartial risk- based financial standards established in advance by the financial institution.
>
> (c) Not deny any person a financial service the financial institution offers, other than as provided in (b) above, when the effect of the denial is to prevent, limit, or otherwise disadvantage the person:
>
> (i) From entering or competing in a market or business segment; or
>
> (ii) In such a way that benefits another person or business activity in which the financial institution has a financial interest; and
>
> (d) Not deny, in coordination with others, any person a financial service the financial institution offers.

> DISCLOURE OF NON-TRADITIONAL EVALUATION CRITERIA. To provide financial services in this State a financial institution that utilizes standards or guidelines based on non-financial, non-traditional, and subjective criteria such as environmental, social, and governance scores or diversity, equity, and inclusion policies shall:
>
> (a) Disclose to the state authority that oversees the financial institution the specific standards, guidelines, and criteria used by the financial institution to determine access or denial of a financial service to a person in this state.
>
> (b) Comply with any rules promulgated by the state authority that oversees the financial institution this Act.
>
> (c) Disclose to any person denied a financial service with the specific data, information, criteria, and standard used to support such denial. This disclosure shall be in bold 14 point font.[30]

In terms of an example of the type of conduct such statutes are designed to prohibit, one might look to the refusal of payment processor WePay (owned by JP Morgan Chase) to serve a conservative group hosting an event featuring Donald Trump Jr., as set forth in a Newsweek article

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[30] *Id.*

on November 18, 2021.[31] The denial of service caused the group to cancel the event.[32] The explanation provided by WePay stated that: "we are unable to process for hate, violence, racial intolerance, terrorism, the financial exploitation of a crime, or items or activities that encourage, promote, facilitate, or instruct others regarding the same."[33] However, no specifics were provided, and the group's founder stated that: "I can't think of a single instance where anything we have done at any one of these events violates one of their terms of service."[34] While an update to the Newsweek piece reported that the decision to deny service was subsequently reversed by JP Morgan Chase,[35] the concerns raised by the initial denial of service linger.[36]

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31 Aila Slisco, *Largest U.S. Bank Cuts Ties to Conservative Group, Canceling Donald Trump Jr. Event*, NEWSWEEK (Nov. 18, 2021), available at https://www.newsweek.com/largest-us-bank-cuts-ties-conservative-group-canceling-donald-trump-jr-event-1650599.

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id. Cf.* Justin Haskins, *Are Financial Institutions Using ESG Social Credit Scores to Coerce Individuals, Small Businesses?*, THE HEARTLAND INST. (Feb. 27, 2022) ("Chase later reversed the decision, but only after 'Missouri treasurer Scott Fitzpatrick threatened to have the state stop doing business with the bank.'"), available at https://www.heartland.org/publications-resources/publications/financial-institutions-are-expanding-esg-social-credit-scores-to-target-individuals-small-businesses.

36 *Cf.* Michelle Malkin, *Why Airbnb Banned Me (and My Hubby, Too!)*, PRESCOTT ENEWS (Feb. 6, 2022), available at https://prescottenews.com/index.php/2022/02/06/opinion-why-airbnb-banned-me-and-my-hubby-too-michelle-malkin/.

> It's not enough that I — a "woman of color" (the left's own descriptive label, not mine) and mother of two multiracial children — was pronounced guilty of "hate" crimes and "promotion" of "white supremacist" ideas for delivering a speech whose

IV. Deeper Into Heartland's "Stopping ESG" Project: ESG v. the U.S.

Having thus provided a general overview, the following portion of this Essay will examine some of the underlying narratives motivating the anti-ESG movement in more detail. For the reasons set forth above, this section will focus on the relevant narratives from the perspective of the Heartland Institute. This section is broadly broken down into two sub-parts. The first touches on concerns related to the use of ESG as a social credit system that undermines free-market capitalism and pushes our society in a totalitarian direction. The second addresses concerns related to a movement among powerful elites to institute a "Great Reset" of capitalism. It may be tempting to dismiss these concerns as conspiracy theories. However, proponents of ESG and stakeholder capitalism will likely need to do more than simply smear these concerns as conspiracy theories if they wish to change minds.[37] It is important to remember that

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> full content Airbnb didn't even bother to obtain from me. The Airbnb bullies also banned my equally nonviolent, nonhateful husband — who did not attend the conference and who is not a public figure or activist. Welcome to Guilt By Secondary Association.

Id.

[37] *Compare* "Conspire," MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/conspire,("To act in harmony toward a common end.") *with*

there is a vigorous debate taking place about ESG and stakeholder capitalism on platforms such as the Harvard Law School Forum on Corporate Governance and between scholars and practitioners as esteemed as Lucian Bebchuk of Harvard and Martin Lipton of Wachtell, Lipton, Rosen & Katz, among many others.[38]

"Conspiracy," MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/conspiracy ("The act of conspiring together."). On the one hand, we likely should avoid conspiracy theories that are akin to encouraging us to wear tinfoil hats to protect against having our thoughts read by extraterrestrials. On the other hand, simply labeling concerns a conspiracy theory should not be enough to end relevant inquiry. *Cf.* Glenn Beck & Justin Haskins, THE GREAT RESET: JOE BIDEN AND THE RISE OF TWENTY-FIRST-CENTURY FASCISM 12 (Forefront Books) ("I don't want you to take my word for anything that's in this book, which is why I have included several hundred citations and mountains of direct quotes from important sources."); *UN Declares War on 'Dangerous' Conspiracy Theories: 'The World Is NOT Secretly Manipulated By Global Elite'*, MAGS PRESS (Aug. 2, 2022), available at https://magspress.com/un-declares-war-on-dangerous-conspiracy-theories-the-world-is-not-secretly-manipulated-by-global-elite/.

[38] *See, e.g.*, Martin Lipton, *More Myths from Lucian Bebchuk*, HARVARD L. SCH.F. ON CORP. GOVERNANCE (Aug. 24, 2021), available at https://corpgov.law.harvard.edu/2021/08/24/MORE-MYTHS-FROM-LUCIAN-BEBCHUK/ .

> Two years ago, the Business Roundtable (BRT) issued a "Statement on the Purpose of a Corporation," signed by the CEOs of 184 major U.S. corporations, that rejected shareholder primacy, declared "a fundamental commitment to all [corporate] stakeholders" and linked corporate purpose to advancing and protecting the interests not just of shareholders, but of all corporate stakeholders…. This month, however, Lucian Bebchuk of the Harvard Law School published and then publicized an article claiming to demonstrate that the entire BRT exercise, and all the efforts that preceded and followed it to advance stakeholder governance, were "mostly for show."

Id. Cf. Stephen Bainbridge, *The Business Lawyer's Symposium "The ESG Movement: Law, Economics and Values," includes my paper "Don't Compound the Caremark Mistake by Extending It to ESG Oversight"*, PROFESSORBAINBRIDGE.COM (July 30, 2022), available at https://www.professorbainbridge.com/professorbainbridgecom/2022/07/the-

A. ESG as Social Credit System

Many people have heard of China's implementation of a social credit system, along with arguments for how that system serves authoritarian and totalitarian ends at the expense of individual liberty. According to a Business Insider article, "many have compared it to some level of dystopian governance, such as in George Orwell's '1984' in which the state heavily controls every aspect of a citizen's life…. Human Rights Watch called the system 'chilling,' while Botsman called it 'a futuristic vision of Big Brother out of control.'"[39] Justin Haskins argues that ESG scores can serve a similar nefarious purpose:

> Unlike many corporations, which spend substantial time and resources self-reporting ESG, individual investors and most small businesses typically do not

business-lawyers-symposium-the-esg-movement-law-economics-and-values-includes-my-paper-dont-comp.html; Joan Heminway, *Corporations as Political Actors - SEALS 2022*, BUSI. L. PROF. BLOG (Aug. 8, 2022) ("I was invited to participate in a discussion group entitled 'Pressure on and Backlash against Corporations as Political Actors' at the 2022 Southeastern Association of Law Schools (SEALS) annual conference last week…. As you might guess from the program description, the discussion generated broadly (and, in cases, deeply) divergent viewpoints and engaging conversation."), available at https://lawprofessors.typepad.com/business_law/2022/08/corporations-as-political-actors-seals-2022.html.

[39] Katie Canales, *China's 'social credit' system ranks citizens and punishes them with throttled internet speeds and flight bans if the Communist Party deems them untrustworthy*, BUSI. INSIDER (Dec. 24, 2021) ("A 2016 government notice encourages companies to consult the blacklist before hiring people or giving them contracts…. Li Xiaolin, a lawyer who was deemed 'untrustworthy' …, was placed on the list and was unable to purchase plane tickets home while on a work trip, Human Rights Watch reported. He also couldn't apply for credit cards."), available at https://www.businessinsider.com/china-social-credit-system-punishments-and-rewards-explained-2018-4.

> produce their own ESG reports. Instead, large financial services companies and banks have produced them for these groups, often without individuals or businesses asking for the reports. For instance, Merrill Lynch, a division of Bank of America, produces ESG scores for all or nearly all of its individual investment accounts, even for those whose value is $1,000 or less. Moody's has created an "ESG Score Predictor" that offers users with ESG reports for 100,000 businesses, many of which have never produced their own ESG metrics. Moody's algorithm predicts scores by using "company size, location, and industry as inputs." When individuals and small businesses have raised concerns about the use of ESG and how it could be used against them—as opposed to merely being applied to corporations for the benefit of investors—banks, investment groups, and their lobbyists have claimed that concerns over ESG are nothing but "conspiracy theories." However, the evidence shows that there are very good reasons to believe that financial institutions and banks plan to dramatically expand the use of ESG soon for individuals, families, and small businesses, a move that would dramatically change the U.S. economy and society.[40]

Haskins goes on to cite five reasons for concern: (1) "There Are Already Many Examples of Individuals and Businesses Being Denied

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[40] Justin Haskins, *Are Financial Institutions Using ESG Social Credit Scores to Coerce Individuals, Small Businesses?*, THE HEARTLAND INST. (Feb. 27, 2022), available at https://www.heartland.org/publications-resources/publications/financial-institutions-are-expanding-esg-social-credit-scores-to-target-individuals-small-businesses.

Access to Financial Services or Capital Based on Subjective Criteria,"[41] (2) "Credit Agencies Have Started to Alter Businesses' Credit Ratings Based on ESG Scores," (3) "Analysts Predict Individual Credit Scores Could Soon Have an ESG Component," (4) "Large Investment Management Firms and Banks Are Using ESG to Coerce Corporations,"[42] and (5) "Banks Have Promised to Use ESG to Fight Climate Change Throughout All of Their Portfolios and Business Activities."[43]

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[41] See *id.* (citing numerous relevant examples, including "Deutsche Bank AG and Signature Bank announc[ing] in early 2021 that would no longer provide services to former President Donald Trump or his business, the Trump Organization, purely for ideological reasons.").

[42] *See id.*

> If you're looking for specific examples of this, … a good place to start is Larry Fink's 2022 "Letter to CEOs," in which Fink sings the praises of "stakeholder capitalism" and promises to use ESG scores as a way to alter society. Fink is the head of Blackrock, the world's largest asset management company, and is widely considered one of the most powerful people on Wall Street, if not the most powerful person. Of course, Fink attempts to put a happy face on ESG and stakeholder capitalism throughout his letter, but even he can't help himself when discussing climate change, making it clear that companies must choose between being leaders or being dragged into a net-zero economy against their will. "Every company and every industry will be transformed by the transition to a net zero world," Fink wrote. "The question is, will you lead, or will you be led?"

Id. ("If investors and banks are willing to utilize ESG to control corporations, why wouldn't they use ESG to manipulate individual and small business behavior as well?").

[43] *Cf.* Eamon Barrett, *Wells Fargo is the last of the Big Six banks to issue a net-zero climate pledge. Now comes the hard part*, FORTUNE (Mar. 9, 2021) ("On Monday, Wells Fargo

B. The Great Reset of Capitalism as Anti-Capitalism (with ESG as the Reset Lever)

One may argue that capitalism rests in part on decentralized private market exchanges that create price signals able to direct the allocation of scarce resources in a way far more productive than utopian forms of centralized planning. Thus, centralization – particularly in a globalist form that holds nationalism in disdain – may be viewed as a threat to capitalism. In addition, one may argue that capitalism further rests on profit-seeking, which drives entrepreneurs to create the most value for society possible.[44] Accordingly, systems that seek to undermine profit-seeking – again, preferring utopian "equitable distribution" schemes managed by "expert" bureaucrats – ultimately lead to Venezuelan-type impoverishment. Some argue that if you lean heavily into globalized central planning that rejects free-market profit-seeking, you get the Great Reset. And ESG is one of the primary levers for implementing the Great Reset.

became the last of the U.S.'s six largest banks to commit to a carbon neutral future, pledging that all the bank's operations—including projects and companies it finances—will achieve net-zero carbon emissions by 2050."), available at https://fortune.com/2021/03/09/wells-fargo-climate-carbon-neutral-net-zero/.

[44] *Cf. Adam Smith on the Butcher, the Brewer, and the Baker*, ONLINE LIBR. OF LIBERTY ("Market action, like morality, requires us to be other-regarding. To get what we want, we must anticipate what others want."), available at https://oll.libertyfund.org/quote/adam-smith-butcher-brewer-baker.

The themes here include Covid and climate change as serving as both rationales and opportunities for "resetting" capitalism. The rationale is that both Covid and climate change are too complex and too existentially threatening to leave things to the free market.[45] The opportunity stems from that fact that, at least in the case of Covid lockdowns, an example has been set for globalized state action that would previously have been thought impossible. In terms of motives, one must of course include the true believers (i.e., those who truly believe that only a reset of capitalism will allow us to deal with the existential threats we are facing). To ask whether these true believers will ultimately turn out to be

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45 A couple of relevant arguments one hears in defense of ESG and stakeholder capitalism are that (1) they are in fact expressions of the free market, and (2) they are necessary to bypass legislative gridlock on the part of government. The first argument raises a number of interesting questions touched on elsewhere in this Essay, including whether actions by private actors that are driven by threats of increased regulation deserve to be deemed free market actions. Similarly, private actors responding to market-distorting incentives offered by government are subject to a similar critique. And this does not even address the concerns raised by conflicts of interest that arguably corrupt the free-market efficiency of private action (e.g., if institutional investors push ESG not because they believe it will improve the performance of companies they are stakeholders in but rather because it will help them sell more of "green" funds). The second defense ignores the fact that legislative deadlock may be appropriately reflecting the divided views of voters. For example, a recent survey found that while 82% of Democrats view climate change as a critical threat, only 16% of Republicans reported a similar level of concern. Additionally, while 71% of Democrats and Democratic-leaning Independents "place a higher priority on protecting the environment than on economic growth," nearly as many "Republicans and Republican-leaning independents (68%) emphasize economic growth over environmental protection." Survey, *Republicans and Democrats in Different Worlds on Climate Change*, THE CHI. COUNCIL ON GLOB. AFF., (2021), https://www.thechicagocouncil.org/research/public-opinion-survey/republicans-and-democrats-different-worlds-climate-change.

horrifically wrong like the true believers in Stalin's Russia, Mao's China, and modern-day Venezuela may be dismissed as fearmongering.[46] However, it would arguably take an extreme amount of naivete to dismiss the myriad forms of opportunistic temptations inherent in the Great Reset. Here, pursuit of greater wealth and power may explain as much, if not more, than faith in being on the right side of history – driving everyone from governmental actors to wealthy elites to corporate insiders (whether they be CEOs, board members, institutional investors, or proxy advisors) – to play along. What follows are some relevant quotes from some of the key players in the Great Reset.

- **Klaus Schwab, Founder and Executive Chairman, World Economic Forum**: *To achieve a better outcome, the world must act jointly*

[46] *Cf.* Thomas Catenacci, *Dutch farmer revolt against harsh climate law just the beginning, experts say: 'There will be unrest all over': Global green agenda 'causing huge burdens,' British energy expert tells Fox News Digital*, FOX NEWS (July 17, 2022) (linking uprisings in the Netherlands and Sri Lanka to imposition of draconian climate regulation), available at https://www.foxnews.com/world/dutch-farmer-revolt-harsh-climate-law-beginning-experts-say-there-will-be-unrest-all-over; *id.* ("Experts also argued that the farmers' actions in the Netherlands mimicked previous protests around the world and could foreshadow similar uprisings against government overreach. For example, the so-called 'yellow vest' movement in France began as a protest against increased nationwide fuel taxes."); *id.* ("[D]espite this growing energy crisis in Europe, some governments still prioritize the climate agenda which makes energy ever more expensive, or which forces farmers to close their farms because that is the top priority .... This whole green agenda is causing huge burdens."); Micaela Burrow, *Governing Elites Pushing To Slash Emissions Are Disconnected From Reality, Experts Say*, DAILY CALLER (Aug. 14, 2022) ("Governments have adopted sweeping emissions-reduction legislation in recent months that could have devastating consequences on the agricultural sector, as elites' ignorance of economic realities fuels a myopic pursuit of the climate agenda, according to experts."), available at https://dailycaller.com/2022/08/14/elites-climate-action-emissions-food/.

and swiftly to revamp all aspects of our societies and economies, from education to social contracts and working conditions. Every country, from the United States to China, must participate, and every industry, from oil and gas to tech, must be transformed. In short, we need a "Great Reset" of capitalism.[47]

- **Jennifer Morgan, International Executive Director of Greenpeace**: *We set up a new world order after World War II. We're now in a different world than we were then. I've been encouraged by the Secretary-General's leadership in a number of ways, but we need to step back and look at the 75th anniversary of the United Nations, and ask what can we be doing differently? The World Economic Forum has a big responsibility in that as well to be pushing the reset button and looking at how to create well-being for people and for the earth.*[48]

- **Prince Charles**: *"We have a golden opportunity to seize something good from this crisis — its unprecedented shockwaves may well make people more receptive to big visions of change," he said. "As we move from rescue to recovery,*

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[47] Klause Schwab, *Now is the Time for a Great Reset*, WORLD ECON. F. (June 3, 2020), available at https://www.weforum.org/agenda/2020/06/now-is-the-time-for-a-great-reset/

[48] Anna Bruce-Lockhart, *'Vested interests want their health to come first' – Greenpeace chief Jennifer Morgan on whether climate action can survive COVID-19*, WORLD ECON. F. (Apr. 22, 2020), https://www.weforum.org/agenda/2020/04/covid19-climate-change-greenpeace-jennifer-morgan/. *Cf. Greenpeace International Executive Director steps down to become German Government Climate Envoy,* GREENPEACE (Feb. 9, 2022), available at https://www.greenpeace.org/international/press-release/52210/greenpeace-international-executive-director-leaves-german-government-climate-envoy/.

we have a unique but rapidly shrinking window of opportunity to learn lessons and reset ourselves on a more sustainable path. It is an opportunity we have never had before and may never have again."[49]

- **Former Vice President Al Gore**: *"So, I think this is a time for a 'Great Reset,'" Gore said, after describing the alleged economic benefits of renewable energy sources and electric cars. "We've got to fix a lot of these problems that have been allowed to fester for way too long. And the climate crisis is an opportunity to create tens of millions of new jobs, clean up the air, and reduce the death rate from pandemics, by the way, because the air pollution from burning fossil fuels heightens the death rates from coronavirus."*[50]

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[49] Chloe Taylor, *Corona Virus Crisis Presents a 'Golden Opportunity' to Reboot the Economy, Prince Charles Says,* CNBC (June 3, 2020), available at https://www.cnbc.com/2020/06/03/prince-charles-covid-19-a-golden-opportunity-to-reboot-the-economy.html.

[50] Justin Haskins, *Al Gore Joins Global Elites Calling for Eco-Socialist 'Great Reset' Proposal*, THE HEARTLAND INST. (July 10, 2020), https://www.heartland.org/news-opinion/news/al-gore-joins-global-elites-calling-for-eco-socialist-great-reset-proposal *Cf.*

> There are literally dozens of other leaders who have come out and supported the Great Reset. We have Boris Johnson … Justin Trudeau … Antonio Guterres, the head of the United Nations. The head of the IMF. The [head of the] European Central Bank. The president of Microsoft. Brian Moynihan, the CEO of Bank of America, he's a huge player in all of this. John Kerry, the u.s climate czar … and there are many, many others. This isn't isolated to just a few fringe … activist groups. This isn't limited to just a few world leaders or international institutions. The elites from all over the world have openly come out in support of the Great Reset.

https://youtu.be/iDanVgrRnJw?t=4068.

In addition to the foregoing, the Biden administration in particular is seen as advancing the Great Reset agenda.[51] As Heartland's Justin Haskins put it during a presentation in October 2021:

> Biden's … Build Back Better slogan has been used for years … by people involved with the Great Reset both at the World Economic Forum and at the World Bank [as well as] at other institutions…. Boris Johnson, Justin Trudeau, [and] other people have used the very same language. In fact, as soon as the Great Reset launched – or even right before the Great Reset launched – you started seeing world

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[51] *Cf.* Stephen Bainbridge, *My opening remarks at yet another corporate social responsibility panel discussion*, PROFESSORBAINBRIDGE.COM (Jan. 8, 2021), available at https://www.professorbainbridge.com/professorbainbridgecom/2021/01/my-opening-remarks-at-yet-another-corporate-social-responsibility-panel-discussion.html

> Some speculated that the [Business Roundtable] might have been trying to head off regulation by progressive politicians [in adopting stakeholder capitalism]. As Wall Street Journal columnist David Benoit has observed back during the 2020 primaries, "Democratic presidential candidate Elizabeth Warren has argued that the primacy of shareholder returns has worsened economic inequality, enriching wealthy investors at the expense of workers." With the mainstream of the Democratic Party seemingly moving in Warren's direction on business and finance issues, the BRT's members may have hoped that a voluntary—and perhaps intentionally ambiguous—embrace of corporate social responsibility platitudes would help them fend off more intrusive regulation in the event of a Democratic presidential victory in 2020. If so, it was a good bet, since they now have to deal with Democrats running both ends of Pennsylvania Avenue.

Id.

> leaders all using Build Back Better together in unison almost as though it was a coordinated plan.[52]

Expanding on the Biden-Reset connection, Haskins continued:

> John Kerry, the climate czar in the Biden administration, said when asked by the president of the World Economic Forum during a meeting in November of 2020 – right after the November election [but] prior to John Kerry being named the climate czar publicly – he was asked about Joe Biden and the Great Reset and what we can expect of Joe Biden's involvement in the Great Reset. [H]e said … the Great Reset will happen and … it will happen with greater speed and with greater intensity than a lot of people might imagine. [H]e specifically said that Joe Biden supports the Great Reset and is 100% behind this agenda.[53]

During this same presentation, Haskins also fleshed out some connections between the Great Reset, stakeholder capitalism, and ESG. Perhaps the most charitable reading of the point Haskins is making here

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52 *Friday Opening Keynote, 10/15/21 - Heartland's 14th International Conference on Climate Change.*, THE HEARTLAND INST., ("Joe Biden has created … [a] climate and ESG task force [at] the division of enforcement of the SEC."), available at https://youtu.be/iDanVgrRnJw?t=4174.

53 *Id.* at https://youtu.be/iDanVgrRnJw?t=4215. *Cf.* Paul H. Kupiec, *The Progressive Left and the Push to Reset the Federal Reserve's Legal Mandates*, AM. INST. FOR ECON. RSCH. (Aug. 8, 2022) ("instead of probing the causes and possible remedies for the Fed's recent disappointing performance, the administration and House Democrats are crafting executive orders, passing bills, and proposing new legislation that will remake the Fed by expanding its mandates to include 'Great Reset,' climate-change, and 'stakeholder capitalism' agendas"), available at https://www.aier.org/article/the-progressive-left-and-the-push-to-reset-the-federal-reserves-legal-mandates/.

is to understand his point to be that proponents of the Great Reset want to push us further towards an economy rooted in centralized planning and further away from an economy rooted in free-market-exchange price-signaling. He starts by focusing on stakeholder capitalism:

> "Stakeholder capitalism." That's the name of this complete transformation of society. Now what is stakeholder capitalism? … Well, as soon as you start looking into the Great Reset, you'll find people … using those words "stakeholder capitalism," and they often contrast it with something called "shareholder capitalism." Shareholder capitalism in their minds is our modern economic system. It's this broken system that puts customers of businesses and the owners – the shareholders of businesses – and the employees of those businesses before all else. You see, we shouldn't have an economy that focuses on customers and shareholders and employees. We should have a system that focuses on the stakeholders. The stakeholders … are everybody. Everyone's a stakeholder. You see, "stakeholder" is essentially just another way of saying collectivist. So, when you hear people start talking about stakeholder capitalism what they're really saying is collectivist capitalism. They're saying we need to change our economic system so that businesses in society – all businesses – are required to focus on the collective…. Not on customer service. Not on providing the best goods and services. But on the collective as a whole. What's good for the collective -- that's the

> main focus and that's what they're trying to do with this transformation.[54]

Subsequently, Haskins connects stakeholder capitalism to ESG, and argues – as previously alluded to herein – that ESG scores have the potential to be employed in ways akin to China's social credit system.

> So … what does a stakeholder capitalist system look like? Well, it's heavily focused on something called environmental social and governance [ESG] standards. You may have heard about this a little bit…. ESG … is a completely new framework for evaluating businesses. So, again, instead of looking at profits and losses and traditional business metrics … we want to add … a whole new focus – and that focus is the collective. So how do we go about doing that? We provide a scoring system for companies. We actually award -- under this ESG model -- credit scores for companies. For those of you who are familiar with the Chinese social credit scoring system, it's very similar to that. It's essentially a social credit score for companies. In China they're actually rolling out a social credit scoring system for individuals. So the government's actually going to provide scores to individual Chinese citizens based on how good they are, how bad they are, what kind of a citizen [you] are … and they're going to base it on … how well you drive, what your education is, [whether you] are you committing crimes [or] are you engaging in in activities that the government thinks are wrong. And they're using a mass

[54] *Friday Opening Keynote, 10/15/21 - Heartland's 14th International Conference on Climate Change.*, THE HEARTLAND INST., available at https://youtu.be/iDanVgrRnJw?t=4491 .

> surveillance state to … evaluate citizens and determine who the good citizens are and who the bad citizens are. [They] provide people with scores and then award them [privileges] based on how well they're performing in line with the communist party standards. Terrifying, right? Well that's exactly what this ESG score is except for businesses. And it's for businesses here in the United States and in Europe primarily. So it's a social credit score for companies. That's the best way to think about it. Again, not focused on profit, debt, customer satisfaction….[55]

Finally, Haskins digs into some specific ESG metrics, which he argues effectuate left-of-center social engineering.[56]

> Dozens of metrics [are] used, so I wanted to provide a couple of examples of this from actual ESG scoring systems. The first is racial quotas…. There are ESG scoring systems that have already been adopted -- that are widely adopted in fact -- that look at racial quotas of the people that exist at a business.[57] So what they'll do is they'll say: Do you have … the right ratio of say Asian

[55] *Id.*.

[56] *Cf.* Stefan J. Padfield, *Does Stakeholder Capitalism Have A (Viewpoint) Diversity Problem?*, 13 U. P. R. BUS. L.J. 1, 21 (2022) ("In this Essay, a foundation has been laid for concern about a lack of viewpoint diversity in stakeholder capitalism.").

[57] *Cf.* Nicole *Goodkind Today marks an important day for diversity on Wall Street. Here's why*, CNN Business (Aug. 8, 2022), available at https://www.cnn.com/2022/08/08/investing/premarket-stocks-trading/index.html ("the single most important attribute being prioritized in corporate board director searches is racial and ethnic diversity according to PwC's 2021 Annual Corporate Directors Survey"); *id.* ("all Nasdaq-listed companies … must fill out a board diversity matrix that includes the total number of company board members and how those board members self-identify regarding gender, race, ethnicity and LGBTQ+ status").

> to Hispanic workers at your company. Because you know we already have plenty of Asians but][-- we don't need more of them -- we need more Hispanics and you don't have enough Hispanics so you're going to have a lower ESG score. That's how this works. CO2 footprint -- that's another one…. I your CO2 footprint too large? How large are your your facilities? How much land do they consume? Do you use too much plastic? What's the air quality in your supply chain? Who are you doing business with and what countries are you doing business [with]? These are the things that they're going to look at. What's the pay gap between your CEO and lower level employees -- between your managers and your lower level employees? What's the gender ratio of your management? What's the gender ratio of the people who are in your management programs? Again, these are all real-life examples from things that we see in ESG scores or we see in in programs related to ESG at actual businesses…. It's a way of evaluating companies to see how woke they are.[58]

As we began to discuss earlier, the motives of the individuals pushing for a Great Reset of capitalism can initially be divided into: (1) true believers, (2) individuals driven by fear of excessive regulation or worse government overreach to see the Great Reset as a less destructive alternative,[59] and (3) individuals seeking profit. These are obviously not

[58] *Friday Opening Keynote, 10/15/21 - Heartland's 14th International Conference on Climate Change.*, THE HEARTLAND INST., available at https://youtu.be/iDanVgrRnJw?t=4491.
[59] Michael R. Strain and Glenn Hubbard, *Was Milton Friedman right about shareholder capitalism?* AM. ENTER. INSTI., (Oct. 6, 2020) (statement of Martin Liption) ("[W]e're

mutually exclusive. In fact, a person could truly believe stakeholder capitalism offers our best path forward while also believing that failure to implement ESG practices will trigger coercive imposition of these practices by government (at a greater cost), and that there's money to be made in the process. Having said all that, however, it doesn't take too much reflection to realize all three of these motives could also be inefficient at best. As mentioned before, the true believers could be horribly wrong, and the government-incentivized profiteering could be nothing more than anti-capitalist cronyism. Haskins addresses both these latter points.

> Why are so many banks and corporations agreeing to go along with a Great Reset?... There are several reasons, but the first is fear of government….[60] [Second,] Principles of … Responsible Investment have been very clear that if you go along with this ESG system, you're going to make a whole lot of money. In fact, they have whole presentations on their website talking about all this money you're going to make because government's going to pump all this money and central banks

now running the risks of state corporatism imposed through new legislation and regulation—and that in my view would be very bad, the worst possible outcome…. My view is the only way to preserve capitalism and a flexible economy is for the investors who have voting control over companies to work closely with management, eliminate activist pressure for short-term performance, and continue to have open competitive markets."), available at https://www.aei.org/events/was-milton-friedman-right-about-shareholder-capitalism/ (linking to transcript).

[60] *Id.* at https://youtu.be/iDanVgrRnJw?t=4933.

> [are] going to pump all this money into ESG-related causes, sustainable investment, fighting climate change, all of this. So, if you invest in these causes, you're going to make lots of money. In other words, cronyism[61]

V. Conclusion

The purpose of this Essay is to provide a brief introduction to anti-ESG legislation and related actions. These actions are being driven by a perception that the insertion of ESG metrics into corporate governance has the potential to create serious problems, including (1) thwarting the growth, innovation, and prosperity associated with free-market capitalism, and (2) undermining liberty interests at the individual, institutional, and national level. In addition to the actions discussed above, I'd like to conclude by noting some additional potential responses I've advanced in other work. In my most recent paper, *Crony Stakeholder Capitalism* (forthcoming in the Kentucky Law Journal), I review Senator Marco Rubio's "Mind Your Own Business Act," which seeks to leverage listing standards and private ordering mechanisms to shift the burden of proof in derivative actions challenging "woke" corporate actions.[62] I previously advanced a common-law version of this approach in *Corporate*

61 *Id.*
62 *Crony Stakeholder Capitalism*, supra note 3.

Governance and the Omnipresent Specter of Political Bias.[63] Finally, I have also discussed the potential relevance and utility of viewpoint diversity shareholder proposals.[64] All these proposals have their shortcomings. But our debates about stakeholder capitalism, ESG, and the Great Reset are in pursuit not of perfection but rather the least worst way forward.[65]

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63 *Corporate Governance and the Omnipresent Specter of Political Bias*, supra note 20.

64 Stefan J. Padfield, An Introduction to Viewpoint Diversity Shareholder Proposals, 22 TRANSACTIONS: TENN. J. BUS. L. 271 (2021).

65 *Cf.*, Carmel McCoubrey, *Don't Quote Them on It*, N. Y. TIMES (Feb. 14, 2017) (statement of Winston Churchill) ("Democracy is the worst form of government except for all those other forms that have been tried.").