

Utah Law Review

Volume 2019 | Number 5

Article 2

1-2020

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Recommended Citation

Fan, Jennifer S. (2020) "Employees as Regulators: The New Private Ordering in High Technology Companies," *Utah Law Review*. Vol. 2019 : No. 5 , Article 2.

Available at: <https://dc.law.utah.edu/ulr/vol2019/iss5/2>

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EMPLOYEES AS REGULATORS: THE NEW PRIVATE ORDERING IN HIGH TECHNOLOGY COMPANIES

Jennifer S. Fan*

Abstract

There is mounting public concern over the influence that high technology companies have in our society. In the past, these companies were lauded for their innovations, but now as one scandal after another has plagued them, from being a conduit in influencing elections (think Cambridge Analytica) to the development of weaponized artificial intelligence, to their own moment of reckoning with the #MeToo movement, these same companies are under scrutiny. Leaders in high technology companies created their own sets of norms through private ordering. Their work was largely unfettered by regulators, with the exception of the Securities and Exchange Commission's oversight of public companies. Now, however, white-collar employees at high technology companies are speaking out in protest about their respective employers' actions and changing private ordering as we know it. In essence, employees are holding companies accountable for the choices they make, whether it is what area to work (or not work) in or eliminating a practice that has systemic implications, such as mandatory arbitration provisions for sexual misconduct cases. This Article builds upon my prior work on the role of corporations and social movements, analyzing how employees in high technology companies have redefined the contours of private ordering and, in the process, have also reimagined what collective action looks like. Because these workers are in high demand and short supply, they are able to affect private ordering in a way that we have not seen before. As a result, they have the potential to be an important check on the high technology sector.

I. INTRODUCTION

Executives accused of sexual misconduct at Google received generous exit packages, unbeknownst to many at the company, until *The New York Times*

* © 2019 Jennifer S. Fan. Assistant Professor of Law and Director of the Entrepreneurial Law Clinic at the University of Washington School of Law. The author wishes to thank George Georgiev, Lisa Manheim, Xuan-Thao Nguyen, Jeff Schwartz, and the participants of the 2019 Junior Business Law Colloquium for their insightful comments. Also, special thanks to Blake Holbrook and Mary Whisner for their helpful research assistance.

published an explosive article in October 2018.¹ One of the most notable examples was Andy Rubin, the father of the Android and senior executive, who had received a \$90 million termination package even though the sexual harassment charges against him had proven credible.² Many blamed mandatory arbitration provisions³ in employment contracts and systemic problems with reporting mechanisms for sexual misconduct for creating an environment where lack of transparency was the norm. In response to the company's handling of sexual misconduct cases, over 20,000 Google employees across the globe walked out of their offices on November

¹ 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/2R7R-TA2W] (“The internet giant paid Mr. Rubin \$90 million and praised him, while keeping silent about a misconduct claim.”). Google’s parent company is Alphabet Inc. See Larry Page, *G Is for Google*, ALPHABET, <https://abc.xyz/> [https://perma.cc/2SYB-KWJ8] (last visited Jan. 17, 2019) (description of Alphabet’s business model related to Google by Google co-founder and Alphabet Chief Executive Officer (“CEO”) Larry Page).

² See Wakabayashi & Benner, *supra* note 1. Google’s payout to Rubin was part of the total \$135 million that Google agreed to pay to Rubin and former executive Amit Singhal after they left the company amid sexual harassment charges. Rob Copeland, *Google Agreed to Pay \$135 Million to Two Executives Accused of Sexual Harassment*, WALL ST. J. (Mar. 11, 2019, 8:52 PM), <https://www.wsj.com/articles/google-agreed-to-pay-135-million-to-two-executives-accused-of-sexual-harassment-11552334653> [https://perma.cc/WW9W-KSY4].

³ Mandatory arbitration provisions in employment agreements require employees to pursue their legal claims, such as those based on Title VII of the Civil Rights Act, the American Disabilities Act, the Family and Medical Leave Act, and the Fair Labor Standards Act, through the arbitration procedure set forth in the agreement, instead of through the courts; it involves employment laws set forth in statutes. ALEXANDER J.S. COLVIN, ECON. POL’Y INST., *THE GROWING USE OF MANDATORY ARBITRATION* 2–3 (Apr. 6, 2018), <https://www.epi.org/files/pdf/144131.pdf> [https://perma.cc/S77C-67CW] [hereinafter 2018 COLVIN STUDY]. This differs from the type of labor arbitration systems in disputes between labor unions and management, which is a bilateral system run by unions and management and involves the enforcement of a contract privately negotiated between a union and employer. *Id.* In a recent 5-4 ruling by the U.S. Supreme Court, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018), the Court ruled that employers can lawfully require workers to waive class and collective action waivers and settle employment disputes through individual arbitration; this effectively eliminates the right of an employee to file a class action.

According to a study by the Economic Policy Institute, approximately 60 million workers in the United States are subject to mandatory arbitration provisions with their employers. See 2018 COLVIN STUDY, *supra* note 3, at 5, 11; see also Jena McGregor, *‘A Nail in the Coffin’: What the Supreme Court’s Decision this Week Means for Workers*, WASH. POST (May 24, 2018), <https://www.washingtonpost.com/news/on-leadership/wp/2018/05/24/a-nail-in-the-coffin-what-the-supreme-courts-decision-this-week-means-for-workers/> [https://perma.cc/XW9D-BJ7C].

1, 2018.⁴ The organizers behind the walkout, known as the Google Walkout For Real Change (“Google Walkout”), had a list of demands.⁵ Ultimately, the company met the following of these demands: making arbitration optional for individual sexual harassment and sexual assault claims; overhauling the reporting process for harassment and assault; having consequences if employees did not complete sexual harassment training (i.e., it would affect employees’ performance reviews); ensuring that Google’s contractors were also subject to the company’s rights and responsibilities regarding sexual misconduct; and having increased transparency about reported incidents of sexual harassment and assault at the company.⁶

In fact, it is not only in the arena of sexual harassment that employees are forcing their companies to act. As high technology companies work in areas that increasingly have moral and ethical implications, such as the use of technology for military drones⁷ among other areas,⁸ employees who have become concerned with either the directions or current practices of their companies are taking action. The theoretical framework this Article proposes to describe this phenomenon is “employee-initiated private ordering.” The definition of private ordering⁹ historically has not included employees,¹⁰ but this Article will illustrate the

⁴ Kate Conger & Daisuke Wakabayashi, *Google Overhauls Sexual Misconduct Policy After Employee Walkout*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/technology/google-arbitration-sexual-harassment.html> [https://perma.cc/5PUT-EA5M]; see also Daisuke Wakabayashi et al., *Google Walkout: Employees Stage Protest over Handling of Sexual Harassment*, N.Y. TIMES (Nov. 1, 2018), <https://www.nytimes.com/2018/11/01/technology/google-walkout-sexual-harassment.html> [https://perma.cc/HES8-S69M].

⁵ The organizers used Google’s own collaborative tools to help organize the walkout. “Their demands reflect the comments and suggestions of more than 1,000 people who participated in internal conversations about the walkout. They include points of view of that have long been marginalized in tech” Farhad Manjoo, *Why the Google Walkout Was a Watershed Moment in Tech*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/technology/google-walkout-watershed-tech.html>. [https://perma.cc/2G89-8TGC].

⁶ BLOOMBERG, *Google Ends Forced Arbitration After Employee Walkout*, FORTUNE (Nov. 8, 2018, 12:49 PM), <http://fortune.com/2018/11/08/google-sexual-harassment-policy-walkout/> [https://perma.cc/5Y4G-5P9Q]. The group did not get an employee representative on the board. Instead, the chief diversity officer provides board recommendations to the Leadership Development and Compensation Committee. *Id.*

⁷ See *infra* Section III.A.

⁸ See *infra* Section III.E.

⁹ See, e.g., Steven L. Schwarcz, *Private Ordering*, 97 NW. U. L. REV. 319, 319 (2002) (defining commercial private ordering as the “sharing of regulatory authority with private actors”).

¹⁰ A body of legal scholarship has focused on boards, shareholders, and management in the private ordering context. See, e.g., James D. Cox, *Corporate Law and the Limits of Private Ordering*, 93 WASH. U. L. REV. 257, 269 (2015) (“In an environment where private ordering prevails, those in control—the board, officers, and controlling stockholders—enjoy important, and likely unerodable, strategic advantages.”); Lynn Stout & Sergio Gramitto, *Corporate Governance as Privately-Ordered Public Policy: A Proposal*, 41 SEATTLE U. L.

importance of employees' roles in private ordering as they seek change by challenging existing social norms.¹¹

Analyzing employee-initiated private ordering shows a broad spectrum of activity, ranging from letter writing to shareholder proposals to walkouts to resignations.¹² At their most effective, these activities result in companies implementing legal changes. But when employee-initiated private ordering fails, and companies do not acquiesce to employee demands, these companies still need to explain themselves in the court of public opinion.¹³ This Article intends to illustrate the various ways in which high technology employees have sought changes in their workplaces. The results of their efforts have been mixed. As alluded to earlier, employee-initiated private ordering does not always result in changes, but in some cases, these efforts have led to a modification of legal norms. By analyzing employee-initiated private ordering in the high technology sector, this Article will demonstrate the complexity and potentially far-reaching implications of employee-

REV. 551, 554 (2018) (suggests how to build democratic capitalism by relying “on the voluntary cooperation and private ordering of free individuals using modern individual technologies”); Jennifer G. Hill, *The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat*, 2019 U. ILL. L. REV. 507, 507 (2019) (looking at “growing use by institutional investors of private ordering as a ‘self-help’ mechanism to gain stronger participatory rights” in corporate governance which has “created a dynamic and shifting corporate governance terrain, where boards and shareholders are, increasingly engaged in ‘private ordering combat’”). There is also a substantial body of private ordering scholarship within the field of law and economics. See, e.g., Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1644–46 (1996); Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1697–98 (1996).

¹¹ See generally ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1994); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); David Charny, *Illusions of Spontaneous Order: Norms in Contractual Relationships*, 144 U. PA. L. REV. 1841 (1996); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

In the labor law context, employee-initiated private ordering could potentially be part of building social capital. Social capital is defined as “networks, norms, and trust . . . that enable participants to act together more effectively to pursue shared objectives.” Robert Putnam, *The Strange Disappearance of Civic America*, AM. PROSPECT (Dec. 19, 2001), <https://prospect.org/article/strange-disappearance-civic-america> [<https://perma.cc/7BMT-8FG3>]; see also ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 48–64 (2000). Although Professor Putnam did not view the workplace as a source of social capital, Professor Cynthia Estlund argues that it is. “At work, citizens acquire ‘social capital,’ participate in forms of democratic discourse, and develop ties of empathy and solidarity with their fellow citizens . . .” Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 4 (2000).

¹² See *infra* Section II.D.

¹³ See *infra* Part III.

initiated private ordering that have been largely overlooked by corporate law. The aim of this Article is to reveal how employees have the power to not only impose order on high technology companies in a way that current laws do not, but also to shape, revise, or upend existing legal norms.

This insight leads to other contributions to corporate law. First, the broad spectrum of employee-initiated private ordering illustrates the myriad ways employees can bring attention to issues that high technology companies may not believe merit employee input. By taking action, employees can force their companies to be more transparent and ultimately may have the ability to effect legal changes and implement different legal norms.

Second, analyzing the spectrum of employee-initiated private ordering also highlights the potential role of employees as a check on companies which, in trying to innovate quickly, may be operating in legal gray areas.¹⁴ Using case studies of private and public high technology companies, this Article will identify how the contours of private ordering have been redefined.

Lastly, the Article puts forth a conceptual framework of the various aspects of employee-initiated private ordering in high technology companies that may influence its normative assessment.¹⁵ There are many examples of how unionized employees have effected change or how employees have banded together in class-action lawsuits.¹⁶ But with both unions and class-action lawsuits diminishing in both

¹⁴ Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. 383, 390 (2017) (discussing high technology startups intentionally operating in areas of legal ambiguity and changing existing law through their business).

¹⁵ See *infra* Part IV.

¹⁶ See JOSH BIVENS ET AL., HOW TODAY'S UNIONS HELP WORKING PEOPLE, ECON. POL'Y INST. (Aug. 24, 2017), <https://www.epi.org/publication/how-todays-unions-help-working-people-giving-workers-the-power-to-improve-their-jobs-and-unrig-the-economy/> [<https://perma.cc/D3NN-RT4V>].

Union-related challenges are relatively uncommon in the high technology sector. In general, such lawsuits typically relate to wage and hour lawsuits for non-professional employees of the company. See, e.g., David Wiessner, *FedEx to Settle Driver Lawsuits in 20 States for \$240 Million*, REUTERS (June 16, 2016, 11:50 AM), <https://www.reuters.com/article/us-fedex-settlement/fedex-to-settle-driver-lawsuits-in-20-states-for-240-million-idUSKCN0Z229Q> [<https://perma.cc/J7M7-BX3P>] (employee class action for unpaid overtime wages); Jared Shelly, *Pa. Supreme Court Affirms \$151M Ruling Against Walmart, Sam's Club*, PHIL. BUS. J. (Dec. 16, 2014, 8:47 AM), https://www.bizjournals.com/philadelphia/morning_roundup/2014/12/pa-supreme-court-affirms-151-ruling-against.html [<https://perma.cc/5EDW-9VM9>] (employee class action alleging systemic wage-and-hour violations); Gail Marksjarvis, *Boeing Settles Excessive 401(k) Fee Case for \$57 Million*, CHI. TRIB. (Nov. 5, 2015, 4:19 PM), <https://www.chicagotribune.com/business/ct-boeing-401k-settlement-1106-20151105-story.html> [<https://perma.cc/9TJV-L4KT>] (employee class action for excessive fees in company 401(k) plans). But see Josh Eidelson, *Employees at Amazon's New NYC Warehouse Launch Union Push*, BLOOMBERG (Dec. 11, 2018, 8:12 PM), <https://www.bloomberg.com/news/articles/2018-12-12/employees-at-amazon-s-new-nyc-warehouse-launch-unionization-push> [<https://perm>

number and influence,¹⁷ employees seeking change at high technology companies may pressure companies through private ordering in a way that regulators have not been able to through existing legal structures. Specifically, this Article will articulate how the new wave of employee activism at high technology companies has changed legal scholars' current understanding of private ordering. This Article will refine our understanding of private ordering to include employees as agents of change in a way that prior scholarship has not adequately recognized. However, this rethinking of private ordering to include employees has both promise and limits.

This Article proceeds in three parts. Part I shows how private ordering has evolved due to the prominence of high technology companies and the unprecedented effect such corporations have on the fabric of American society, from our military¹⁸ to elections¹⁹ to the #MeToo Movement.²⁰ Some of the challenge is that high

a.cc/RVM7-QCJ8] (discussing an employee unionization campaign at Amazon New York fulfillment centers).

¹⁷ See Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 5 (2016) (discussing labor unions' decline). "While they once bargained for more than a third of American workers, unions now represent only about a tenth of the labor market and even less of the private sector." *Id.* at 5. See generally Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002) (describing factors within and outside the National Labor Relations Act ["NLRA"] acting as a barrier to labor law innovation).

¹⁸ See, e.g., Zachary Fryer-Biggs, *Inside the Pentagon's Plan to Win over Silicon Valley's AI Experts*, WIRED (Dec. 21, 2018, 7:26 AM), <https://www.wired.com/story/inside-the-pentagons-plan-to-win-over-silicon-valleys-ai-experts/> [<https://perma.cc/QRH9-84WE>] (discussing Google's withdrawal from Pentagon program to utilize artificial intelligence software in warfare); Jacob Silverman, *Tech's Military Dilemma: Silicon Valley's Emerging Role in America's Forever War*, NEW REPUBLIC (Aug. 7, 2018), <https://newrepublic.com/article/148870/techs-military-dilemma-silicon-valley> [<https://perma.cc/GX8M-UJR8>] (discussing military contracting—including drones, imagery data analytics, and artificial intelligence—among leading technology companies).

¹⁹ See, e.g., Daniel Funke, *Four Major Tech Companies Take New Steps to Combat Fake News*, POYNTER (July 12, 2018), <https://www.poynter.org/fact-checking/2018/four-major-tech-companies-take-new-steps-to-combat-fake-news/> [<https://perma.cc/G5T9-7V7V>]; Timothy B. Lee, *Google's Lobbying Spending Set New Records in 2018*, ARS TECHNICA (Jan. 23, 2019, 2:25 PM), <https://arstechnica.com/tech-policy/2019/01/technology-giants-spent-millions-on-lobbying-in-2018/> [<https://perma.cc/9HRD-VYQX>] (surveying corporations' filings on election spending made to the Federal Elections Commission in 2018); Craig Timberg, *Fake-News Ecosystem Still Thrives, Two Years After the 2016 Election*, NEW REPORT SAYS, WASH. POST (Oct. 4, 2018), <https://www.washingtonpost.com/technology/2018/10/04/fake-news-ecosystem-still-thrives-two-years-after-election-new-report-says/> [<https://perma.cc/JJR4-C2R5>].

²⁰ Emily Van Zandt, *Too Big to Ignore: How Social Movements Are Becoming Part of Corporate Life*, WASH. BUS. J. (May 17, 2018, 2:24 PM), <https://www.bizjournals.com/washington/news/2018/05/17/too-big-to-ignore-how-social-movements-are.html> [<https://perma.cc/43AF-G92R>]. See generally Jodi Kantor, *#MeToo Called for an Overhaul. Are Workplaces Really Changing?*, N.Y. TIMES (Mar. 23, 2018), <https://www.nytimes.com/2018/03/23/us/sexual-harassment-workplace-response.html> [<https://perma.cc/7VN8-GE4W>].

technology companies have innovated so quickly that laws have not been able to keep up.²¹ As a result, these companies may be publicly chastised, but little else has been done to curb potentially bad behavior.²² This is where employee-initiated private ordering may be helpful.

In particular, uniquely skilled employees who are in high demand and short supply—the lifeblood of these high technology companies—are pushing change through employee-initiated private ordering. This Article argues that the newly evolving role of these employees in corporations, both public and private, has changed private ordering in fundamental ways. Next, Part II uses case studies of select high technology companies to illustrate how employees have tried to influence companies through employee-initiated private ordering. In Part III, this Article then discusses the normative implications of this new private ordering. This Article concludes that employee-initiated private ordering has significantly impacted our

(explaining that a fear-based shift has taken place as harassment has become a serious reputational and business risk in addition to being a legal liability).

²¹ See generally Karl Manheim & Lyric Kaplan, *Artificial Intelligence: Risks to Privacy and Democracy*, 21 YALE J.L. & TECH. 106 (2019) (noting that many “attribute the [United States’] dominance in the international marketplace to the lack of a comprehensive federal regulation protecting personal data and informational privacy”); Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623 (2017) (explaining that the burgeoning legal literature around the sharing economy has scarcely engaged with consumer protection law); Molly McHugh, *Whistleblowers Are the Agents of Change in the Tech Industry*, RINGER (Dec. 4 2018, 5:40 AM), <https://www.theringer.com/tech/2018/12/4/18124379/google-protests-dragonfly-walkout-for-change-facebook-amazon-twitter-whistleblowers> [<https://perma.cc/XAA8-Z7GL>] (explaining that “the resistance against tech companies is being fueled by the exasperation and disillusionment of their own workforce. Employees might be the only hope for keeping technology corporations in check.”).

²² McHugh, *supra* note 21 (“[In 2018,] Facebook, Twitter, and Google were forced to sit before Congress and answer for their respective privacy and transparency failures. But these companies received mere slaps on the wrist, and the only real consequences were their representatives (and CEOs) getting publicly berated and shamed.”); see also William D. Eggers et al., *The Future of Regulation: Principles for Regulating Emerging Technologies*, DELOITTE: INSIGHTS (June 19, 2018), <https://www2.deloitte.com/insights/us/en/industry/public-sector/future-of-regulation/regulating-emerging-technology.html> [<https://perma.cc/V6J5-DDAK>] (identifying challenges that emerging technologies present to traditional regulatory models); Ganesh Sitaraman, *How to Regulate Tech Platforms*, AM. PROSPECT (Nov. 8, 2018), <https://prospect.org/article/how-regulate-tech-platforms> [<https://perma.cc/8NNU-EGQD>] (discussing potential harm to consumers from companies owning both a platform and business lines that operate on that platform). But see Larry Downes, *How More Regulation for U.S. Tech Could Backfire*, HARV. BUS. REV. (Feb. 9, 2018), <https://hbr.org/2018/02/how-more-regulation-for-u-s-tech-could-backfire> [<https://perma.cc/4U2E-KD6H>] (effective remedies for high technology company’s market power are hard to design).

previous understanding of private ordering in high technology companies and may be the harbinger of a new normal for private ordering which includes a role for employees.

II. HOW EMPLOYEE-INITIATED PRIVATE ORDERING FITS INTO LARGER THEORETICAL FRAMEWORKS

Before delving into employee-initiated private ordering, this Article will provide the backdrop against which it emerged: the debate between shareholder primacy and stakeholder theory. Part I will briefly discuss shareholder primacy and stakeholder theory. It will then turn to private ordering and discuss how employee-initiated private ordering fits into the private ordering framework. Lastly, this Part will illustrate how high technology employees influence (or attempt to influence) private ordering.

A. Shareholder Primacy vs. Stakeholder Theory

Under the shareholder primacy theory, the sole responsibility of a business is to maximize shareholder value.²³ “The debate over shareholder primacy is had over two broad matters: shareholder roles in governance and in corporate purpose. With respect to the latter, shareholder primacy instructs the board to manage the corporation for the purpose of maximizing shareholder wealth.”²⁴ This theory has been widely accepted despite its critics.²⁵

Over the years, other theories on the purpose of the corporation were developed, including stakeholder theory.²⁶ Pursuant to stakeholder theory, corporations should act in the interest of all stakeholders.²⁷ In effect, stakeholder theory “challenge[s] the

²³ See Lynn A. Stout, *On the Rise of Shareholder Primacy, Signs of Its Fall, and the Return of Managerialism (in the Closet)*, 36 SEATTLE U. L. REV. 1169, 1173 (2013).

²⁴ See Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951, 1952 (2018); see also Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1263 (1999) (“The process by which norms originate and are adopted as a result of changes in actors’ belief-systems is extremely important generally, and is of special importance in explaining the origin and adoption of many norms that are significant in corporate law.”) (citation omitted).

²⁵ See Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L. J. 439, 439 (2001) (“There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.”). See generally Jennifer S. Fan, *Woke Capital: The Role of Corporations in Social Movements*, 9 HARV. BUS. L. REV. (forthcoming 2019) (discussing shareholder primacy and stakeholder theory).

²⁶ See, e.g., Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 250–51 (1999) (directors serve as mediating hierarchs); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 561 (2003).

²⁷ Kent Greenfield, *Can Corporations Be Good Citizens?*, SYMPOSIUM MAG. (Nov. 3,

American corporation to broaden its role in society and enlarge the obligations it owes beyond the bottom line. These scholars have assailed the norm of shareholder primacy and called on corporations to recognize and act on the interests of all stakeholders.”²⁸

In its simplest terms, shareholder primacy takes into account economic maximization, whereas stakeholder theory considers the interests of various constituencies both within the corporation and outside of it. For purposes of the private ordering discussion that follows, this Article will examine how employee-initiated private ordering fits into the stakeholder theory framework.

B. *Private Ordering Defined*

Private ordering is broadly defined as “the use of rules systems that private actors conceive, observe, and often enforce through extra-legal means.”²⁹ Professor Steven Schwarcz observes that private ordering is prevalent in the commercial, financial, and business sectors³⁰ and offers other rationales in addition to efficiency. These additional rationales may undergird commercial private ordering and include promoting fairness,³¹ “protecting intellectual property and privacy, preventing fraud, fostering transparency, ensuring competition, and facilitating dispute resolution.”³²

2013), <http://www.symposium-magazine.com/can-corporations-be-good-citizens/> [https://perma.cc/3VBJ-PY3S]. The stakeholder theory has been around for decades.

These critics [of the shareholder primacy norm] call on corporations to act as if they were players not only in the private sphere but in the public one as well. To act, one might say, as citizens. To call on corporations to act as “good corporate citizens” means that they should act as if they have broader obligations to the polity and society that cannot be entirely satisfied by reference to their financial statements.

Id.

²⁸ *Id.*

²⁹ Jorge L. Contreras, *From Private Ordering to Public Law: The Legal Frameworks Governing Standards-Essential Patents*, 30 HARV. J.L. & TECH. 211, 213 (2017). The term rules system is not explicitly defined in Contreras’ article, but it can be inferred to be private rules and enforcement that are preferable to available state-sponsored enforcement mechanisms “because of the nature of the parties, commitments, and other circumstances.” *Id.* at 214.

³⁰ Schwarcz, *supra* note 9, at 320. Professor Schwarcz highlights the difference between traditional private ordering which “derives legitimacy from costly procedural safeguards . . . designed to ensure fair process and reasoned decisionmaking by the private actor” and commercial private ordering which “is to reduce the cost of regulation.” *Id.* at 321.

³¹ *Id.* at 322. “Private ordering exists for good (often economic) reasons, but perceptions of illegitimacy plague it; thus, it is important to inquire how to design cost-effective controls to reduce these perceptions even though the controls may be second best.” *Id.* at 324.

³² *Id.* at 345. Schwarcz views these non-efficiency goals as “constraints.” *Id.* at 324.

Professor Schwarz also provides a four-part taxonomy of private ordering; the one relevant to this Article is “rules adopted by private actors without government sanction or enforcement.”³³ Although the term “rules” is not defined, it would be reasonable to interpret rules as business practices or norms that evolve over time. For example, the norm at many high technology companies was to have employee contracts that included mandatory arbitration provisions in the event of sexual or racial discrimination. As this Article details in Part III below, however, employees changed the rules by publicly calling for the removal of mandatory arbitration provisions using extra-legal means such as walkouts and written advocacy.³⁴ Furthermore, as a general matter in the case of high technology companies, the government has generally not imposed laws that restrict newer technologies such as artificial intelligence and augmented reality. As a result, companies have navigated an environment with few laws and adopted their own rules with little oversight, which at times has had far-reaching implications.³⁵

This Article looks at private ordering from the perspective of both the broad definition set forth above and the corporate governance perspective where the

³³ *Id.* at 324. Schwarz cites Robert Ellickson’s study of cattlemen in Shasta County, California as exemplifying this type of private ordering, but focuses on a different part of the taxonomy for purposes of his article. *Id.* at 327.

³⁴ If viewed through the traditional law and economics lens of private ordering, the negotiation about mandatory arbitration provisions between employers and employees should lead to an efficient result, with employers competing for employees in part based on the presence or absence of such provisions. Interestingly, what occurred instead was that the employees who sought to change the rule (in this case the ubiquity of arbitration provisions) caused a ripple effect throughout the cohort of high technology companies. The employee-initiated private ordering led to a number of companies removing mandatory arbitration provisions in cases of sexual and racial discrimination. *See infra* Part III.

³⁵ For example, due to major missteps in how content was regulated on Facebook, there is credible evidence that Russia influenced the outcome of the 2016 U.S. presidential election. *See Exposing Russia’s Effort to Sow Discord Online: The Internet Research Agency and Advertisements*, U.S. HOUSE OF REPRESENTATIVES, PERMANENT SELECT COMMITTEE ON INTELLIGENCE, <https://intelligence.house.gov/social-media-content/> [<https://perma.cc/MTQ5-SN4A>] (last visited Sep. 12, 2019).

Cambridge Analytica, a political consulting firm that uses data to determine voter traits, mined private information from Facebook profiles of more than 50 million users without their permission during the 2016 U.S. presidential election. Matthew Rosenberg et al., *How Trump Consultants Exploited the Facebook Data of Millions*, N.Y. TIMES (Mar. 17, 2018), <https://www.nytimes.com/2018/03/17/us/politics/cambridge-analytica-trump-campaign.html> [<https://perma.cc/NV5D-MTHV>]. As a result of the scandal, politicians have called for more regulations—one example is Senator Elizabeth Warren’s plan to break up big tech by unwinding mergers that allegedly have stifled competition and prohibiting companies from having both a platform utility and a service using it (e.g., Amazon could have its merchandise distribution platform or its online store, but not be owners of both). *See* Michael Hiltzik, *Column: Sen. Warren’s Plan to Break up the Big Tech Companies is Good, but Too Narrow*, L.A. TIMES (Mar. 21, 2019, 6:00 AM), <https://www.latimes.com/business/hiltzik/la-fi-hiltzik-warren-tech-breakup-20190321-story.html> [<https://perma.cc/6AK6-6WDG>].

conventional wisdom dictates that the board of directors, management, and shareholders (specifically, the institutional investors) are the dominant players in corporate governance matters.³⁶ Typically, management and major investors make decisions, and employees implement the collective vision of a corporation.³⁷ While employees have long participated in other forms of social engagement in corporations (e.g., volunteer work), the issues that employees are involved with today may originate from their employer's—the corporation's—products, services, operations, or policies.³⁸

In the past, these high technology company employees lived in tech utopianism.³⁹ Today, in contrast, employees question the products and services that they build as well as the organizations that their employers contract with. They are focused on how their corporation's innovations affect stakeholders and not just the bottom line. This fundamental change in the belief system of employees has led to a shift in norms which affects “the fabric of corporate institutions and corporate law.”⁴⁰ Specifically, this Article will analyze how employee-initiated private ordering has changed the contours of private ordering to expand beyond an economic efficiency rationale; it now includes a social conscience aspect which impacts the decision-making process. It illuminates the important role that employees have played in instituting legal changes in the high technology industry.⁴¹

This Article focuses on high technology companies because this industry has arguably made the greatest innovations. Moreover, it is unclear if current laws are adequate and apply to them, which leads such companies to operate in legal gray areas.⁴² Employee-initiated private ordering could arguably take place in other types of industries, but the historical backdrop of how high technology companies developed made them especially ripe for employee influence.⁴³ Whether or not

³⁶ See Stout & Gramitto, *supra* note 10, at 554 (discussing how to build “democratic capitalism” through “voluntary cooperation and private ordering of free individuals using modern information technologies”); Schwarcz, *supra* note 9, at 321 (focusing on commercial private ordering which “is to reduce the cost of regulation,” although other regulatory goals such as fairness may be at play); see also Gillian K. Hadfield, *Privatizing Commercial Law*, 24 REG. MAG. 40, 40 (Spring 2001).

³⁷ See Stout & Gramitto, *supra* note 10, at 553. The board has a monitoring function and management—e.g., C suite level management—and major shareholders, such as institutional shareholders, make decisions.

³⁸ See *infra* Part III.

³⁹ See *infra* Section II.D.

⁴⁰ Eisenberg, *supra* note 24, at 1292.

⁴¹ In recent years, shareholders have played a larger role in corporate governance in corporations. “A preference for private ordering merely implies a preference for allowing opting out from whichever default is set, and does not imply that the ideal default is no-[proxy] access.” Lucian A. Bebchuk & Scott Hirst, *Private Ordering and the Proxy Access Debate*, 65 BUS. LAW. 329, 334 (2010); *id.* at 334–35 (arguing for private ordering in the proxy access context which does not disenfranchise the shareholder).

⁴² See Pollman & Barry, *supra* note 14, at 383.

⁴³ See *infra* Section II.D.

having employees in the role as the conscience of a corporation is a good or bad development, however, is a separate question. Some may be skeptical of who these white-collar employees represent. Are these employees attempting to advance their own vision of the world? Or are they taking others' viewpoints into account? Indeed, one could plausibly argue that society is trading one group of elites for another. On the other hand, there are signs that at least some of these white-collar employees have made efforts to consider interests other than their own since they are in relative positions of privilege compared to their counterparts.⁴⁴ One could also argue that if high technology employees do not speak out, who will? In the end, employee-initiated private ordering may be similar to social norms which "are not necessarily either good or efficient."⁴⁵ Nonetheless, if employee-initiated private ordering continues, corporations may want to consider ways to face the issues that it raises.

C. Foundations of Employee-Initiated Private Ordering

Employees are exerting their influence in various high technology companies to implement legal and ethical changes. By doing so, they are changing the dynamics of private ordering by attempting to influence the corporations that they work for

⁴⁴ The Google Walkout showcases how different viewpoints were taken into account by the walkout organizers. The organizers used Google tools to collaborate and obtain different viewpoints, talked to their colleagues, and took into account the concerns of other workers at Google in less secure positions, such as temporary workers, contractors or vendors. Shirin Ghaffary & Eric Johnson, *After 20,000 Workers Walked Out, Google Said It Got the Message. The Workers Disagree*, VOX (Nov. 21, 2018, 10:36 AM), <https://www.vox.com/2018/11/21/18105719/google-walkout-real-change-organizers-pro-test-discrimination-kara-swisher-recode-decode-podcast> [<https://perma.cc/KH4Z-PQ2R>]. Ultimately, some of these organizers left their jobs as they allegedly faced retaliation after their organizational efforts. Nitasha Tiku, *Most of Google Walkout Organizers Have Left the Company*, WIRED (July 16, 2019, 4:22 PM), <https://www.wired.com/story/most-google-walkout-organizers-left-company/> [<https://perma.cc/P9S5-H2C3>]; *see also* Catherine Shu, *Meredith Whittaker, AI Researcher and an Organizer of Last Year's Google Walkout, Is Leaving the Company*, TECHCRUNCH (July 15, 2019, 9:09 AM), <https://techcrunch.com/2019/07/15/meredith-whittaker-ai-researcher-and-an-organizer-of-last-years-google-walkout-is-leaving-the-company/> [<https://perma.cc/QDT2-LPQ3>]. In her blog post, Whittaker said that "Google is gaining significant and largely unchecked power to impact our world" through technology like artificial intelligence, or AI, and that deciding how this power is used "is one of the most urgent social and political (and yes, technical) questions of our time. And we have a lot of work to do." *Id.*; Mark Bergen & Joshua Brustein, *Google Protest Leader Leaves, Warns of Company's Unchecked Power*, BLOOMBERG (July 16, 2019, 3:23 PM), <https://www.bloomberg.com/news/articles/2019-07-16/google-protest-leader-meredith-whittaker-is-leaving-the-company> [<https://perma.cc/3KG5-LYCL>]; *see also* James Vincent, *Google Employee Who Helped Lead Protests Leaves Company*, THE VERGE (July 16, 2019, 5:18 AM), <https://www.theverge.com/2019/7/16/20695964/google-protest-leader-meredith-whittaker-leaves-company> [<https://perma.cc/YV73-LWWT>].

⁴⁵ Eisenberg, *supra* note 24, at 1271 (citing when Jim Crow South was the norm).

from the inside. “Historically, tech workers have rarely peeked out from the industry’s cone of silence—a cultural norm often invoked as a sign of trust in leadership but enforced by a layer of nondisclosure agreements and investigations into leaks.”⁴⁶

What makes these employees unique is that their skill set is in high demand and cannot be easily duplicated—companies cannot simply replace them. As a result, they have the freedom to act within companies that, for example, low wage workers could not. In this manner, high technology employees are uniquely positioned to make change. In the sections that follow, this Article will discuss both the business and legal reasons that employees in high technology companies are able to engage in employee-initiated private ordering.

1. The Business Reasons for Employee-Initiated Private Ordering

Employees of high technology companies are difficult to replace from a skills and cost perspective. One meta-analysis estimated that, on average, companies spend approximately one-fifth of an employee’s annual salary on replacing that worker.⁴⁷ However, jobs that require higher levels of education and specialized training, such as engineering jobs in high technology companies, tend to have significantly higher turnover costs.⁴⁸ In very highly paid jobs, which are common among high technology employees, turnover costs can be as high as 213 percent of salary for senior or executive positions.⁴⁹ Therefore, although high technology employees are technically employees “at will,” which means that a company can

⁴⁶ Nitasha Tiku, *Why Tech Worker Dissent Is Going Viral*, WIRED (June 29, 2018, 7:00 AM), <https://www.wired.com/story/why-tech-worker-dissent-is-going-viral/> [<https://perma.cc/E7B8-ZKGQ>].

⁴⁷ HEATHER BOUSHEY & SARAH JANE GLYNN, THERE ARE SIGNIFICANT BUSINESS COSTS TO REPLACING EMPLOYEES, CTR. FOR AM. PROGRESS (Nov 16, 2012), <https://wwwcdn.americanprogress.org/issues/economy/reports/wp-content/uploads/2012/11/16/44464/there-are-significant-business-costs-to-replacing-employees/16084443/CostofTurnover0815.pdf> [<https://perma.cc/KRA7-UKYP>] (meta-analysis of thirty case studies across eleven research papers on employee turnover costs).

⁴⁸ Another study observed that employee turnover costs for “Professional” roles were 75–125% of an employee’s annual salary, and that employee turnover costs for “Technical” roles were 100–150% of an employee’s annual salary. *Calculating the Cost of Employee Turnover*, G&A PARTNERS, <https://www.gnapartners.com/article/how-much-does-employee-turnover-really-cost-your-business/> [<https://perma.cc/29FS-6S9S>] (last visited July 31, 2019).

⁴⁹ BOUSHEY & GLYNN, *supra* note 47, at 2 (citing EILEEN APPELBAUM & RUTH MILKMAN, ACHIEVING A WORKABLE BALANCE: NEW JERSEY EMPLOYERS’ EXPERIENCES MANAGING EMPLOYEE LEAVES AND TURNOVER 20–21 (2006), <https://smlr.rutgers.edu/sites/default/files/images/achieving%20a%20workable%20balance%202006%20Appelbaum.pdf> [<https://perma.cc/QF4W-6S8W>] (estimating turnover costs for professional employees from case studies of thirteen employers in the State of New Jersey).

terminate their employment at its discretion,⁵⁰ high technology companies may be reluctant to terminate these highly skilled employees because of the costs associated with turnover. Furthermore, there are very few individuals who have the technical skills that a high technology company requires. So even if such a company wanted to terminate an outspoken employee, it would likely consider the chilling effect of termination on future hires as well. James Baron, a professor at the Yale School of Management, stated, “These tech companies are all extremely dependent on scarce talent[.] It would not serve companies well that are struggling mightily to attract top talent, to engage in actions that would antagonize employees and have them feel that their ability to express themselves would be forfeited upon their employment there.”⁵¹

Additionally, these employees are integral to the functioning of the company itself. High technology companies recognize the importance of retaining highly skilled employees, including intense competition for such employees. In fact, companies may discuss the importance of such employees in the “Risk Factors”⁵² section of their Form 10-K (annual report).⁵³ For example, in Alphabet’s Form 10-K for the fiscal year ended December 31, 2018, the “Risk Factors” section stated as follows:

We rely on highly skilled personnel and, if we are unable to retain or motivate key personnel, hire qualified personnel, or maintain our corporate culture, we may not be able to grow effectively.

Our performance largely depends on the talents and efforts of highly skilled individuals. Our future success depends on our continuing ability to identify, hire, develop, motivate, and retain highly skilled personnel for all areas of our organization. Competition in our industry for qualified employees is intense, and certain of our competitors have directly targeted our employees. In addition, our compensation arrangements, such as our equity award programs, may not always be successful in attracting new

⁵⁰ See *Employment at Will*, BLACK’S LAW DICTIONARY 641 (10th ed. 2014).

⁵¹ Matt Laviates, *Silicon Valley Firms Are Facing a Rise in Anger from a New Source: Their Own Employees*, CNBC (July 8, 2018, 8:57 AM), <https://www.cnn.com/2018/07/05/tech-ceos-are-losing-unilateral-power-rapidly-in-a-new-unexpected-way.html> [<https://perma.cc/J8VA-QXTG>].

⁵² See *infra* Section IV.A.

⁵³ Alphabet Inc., Annual Report (Form 10-K) 7–20 (Feb. 5, 2019) [hereinafter Alphabet Form 10-K]. Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, public companies are required to provide an annual report on Form 10-K within a specified time period after the end of the fiscal year covered by the report which provides a comprehensive overview of the company’s business and financial condition; it also includes audited financial statements. Will Kenton, *10-K*, INVESTOPEDIA (June 1, 2019), <https://www.investopedia.com/terms/1/10-k.asp> [<https://perma.cc/8XMB-7CMY>]; see also U.S. SEC. & EXCH. COMM’N, FORM 10-K: GENERAL INSTRUCTIONS (2019), <https://www.sec.gov/about/forms/form10-k.pdf> [<https://perma.cc/4FL4-CNQ4>].

employees and retaining and motivating our existing employees. Our continued ability to compete effectively depends on our ability to attract new employees and to retain and motivate our existing employees.⁵⁴

In the past, the fierce competition for high technology employees led to no-poaching arrangements between various high technology companies.⁵⁵ In 2010, the U.S. Department of Justice (“DOJ”) initiated an antitrust investigation into the practices of certain high technology companies that allegedly had bilateral agreements agreeing not to “cold call” each other’s employees.⁵⁶ This matter was settled with the DOJ in 2010 by the companies agreeing not to enter into no solicitation agreements with one another.⁵⁷ A class-action lawsuit by nearly 65,000 former employees of Adobe, Apple, Google, Intel, Intuit, Lucasfilm, and Pixar followed in 2011.⁵⁸ Lucasfilm, Pixar, and Intuit settled with plaintiffs in 2014 for

⁵⁴ Alphabet Form 10-K, *supra* note 53, at 17.

⁵⁵ See Josh Lowensohn, *Job’s E-mail to Schmidt Suggests No-Poaching Deal in Play*, CNET (Jan. 27, 2012, 3:59 PM), <https://www.cnet.com/news/jobs-e-mail-to-schmidt-suggests-no-poaching-deal-in-play/> [<https://perma.cc/8857-JZK8>].

In an instance of these companies self-policing their arrangement, Steve Jobs, then-CEO of Apple e-mailed then-CEO of Google, Eric Schmidt, asking him to stop Google’s recruiting department from trying to hire one of Apple’s engineers. *Id.* “I would be very pleased if your recruiting department would stop doing this,” to which Schmidt then forwarded to Google’s recruiting department, stating, “I believe we have a policy of no recruiting from Apple and this is a direct inbound request. Can you get this stopped and let me know why this is happening? I will need to send a response back to Apple quickly so please let me know as soon as you can.” *Id.* The recruiter who tried to hire the engineer was fired and Google’s staffing director wrote back, “please extend my apologies as appropriate to Steve Jobs . . . [it was] an isolated incident.” *Id.*

⁵⁶ Complaint, *United States v. Adobe Sys. Inc.*, No. 1:10-cv-01629 (D.D.C. Sept. 24, 2010), <https://www.justice.gov/atr/case-document/complaint-0>. [<https://perma.cc/5D9E-N2WU>]. The DOJ described “cold calling” as “communicating directly ‘solicit[ing] employees at other high tech companies to fill employment openings’ in any manner . . . with another firm’s employee who has not otherwise applied for a job opening.” *Id.* at ¶ 213; see also Sean Hollister, *Steve Jobs Personally Asked Eric Schmidt to Stop Poaching Employees, and Other Unredacted Statements in a Silicon Valley Scandal*, VERGE (Jan. 27, 2012, 11:19 PM), <https://www.theverge.com/2012/1/27/2753701/no-poach-scandal-unredacted-steve-jobs-eric-schmidt-paul-otellini> [<https://perma.cc/JAJ8-E8ZR>] (quoting Intel’s CEO referring to the company’s “global gentleman’s agreement” with Google, and describing the existence of written do-not-poach agreements and formal “Do Not Call” lists between defendants).

⁵⁷ See *Press Release, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements*, U.S. DEP’T OF JUST. (Sept. 24, 2010), <https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee> [<https://perma.cc/BVY6-8F7B>].

⁵⁸ *In re High-Tech Employee Antitrust Litigation*, 856 F. Supp. 2d 1103 (N.D. Cal. 2012) (consolidating putative class actions filed in multiple state courts).

\$20 million divided amongst them; in 2015, Adobe, Apple, Google, and Intel reached a \$415 million settlement.⁵⁹

In sum, the business reasons why high technology employees can engage in “concerted activities”⁶⁰ in the context of employee-initiated private ordering are: the value of these employees (and the corresponding cost to replace him or her should they leave), the difficulty companies have in replacing them, and the limited number of these employees in the workforce. The next section articulates the legal basis for employee-initiated private ordering.

2. *The Legal Foundation for Employee-Initiated Private Ordering*

Not only is there a business rationale for employee-initiated private ordering, but there is also a legal basis: the National Labor Relations Act (“NLRA”). The NLRA is a federal law that covers most private-sector employees⁶¹ and employers.⁶² Section 7 of the NLRA provides that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]”⁶³ Concerted activity is defined as “when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment.”⁶⁴ The National Labor Relations Board (“NLRB”) classifies an employee’s action as “concerted” if the employee engaged in the activity “with or

⁵⁹ “[T]he lawsuit shed a light on the practice of some major tech industry players of allegedly working together to agree not to poach employees from each other. The affected employees had argued that such agreements limited their ability to rise up in the industry and stifled their attempts to earn higher salaries.” Lance Whitney, *Apple, Google, Others Settle Antipoaching Lawsuit for \$415 Million*, CNET (Sept. 3, 2015), <https://www.cnet.com/news/apple-google-others-settle-anti-poaching-lawsuit-for-415-million/> [<https://perma.cc/2TSC-46QC>].

⁶⁰ See *infra* text accompanying notes 66–67.

⁶¹ “The law does *not* cover government employees, agricultural laborers, independent contractors, and supervisors (with limited exceptions).” *Frequently Asked Questions - NLRB*, NAT’L LAB. & REL. BOARD, <https://www.nlr.gov/resources/faq/nlr#faq-expand-all-link> [<https://perma.cc/TXR4-TX5E>] (last visited January 18, 2019); see National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169 (2012)).

⁶² “Congress enacted the National Labor Relations Act (‘NLRA’) in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy.” *National Labor Relations Act*, NAT’L LAB. & REL. BOARD, <https://www.nlr.gov/how-we-work/national-labor-relations-act> [<https://perma.cc/3VYG-LRTA>] (last visited July 31, 2019).

⁶³ 29 U.S.C. § 157 (2012).

⁶⁴ *Employee Rights*, NAT’L LAB. & REL. BOARD, <https://www.nlr.gov/rights-we-protect/rights/employee-rights> [<https://perma.cc/RP2X-9SPU>] (last visited July 31, 2019).

on the authority of other employees”⁶⁵ or “it had some relation to group action in the interest of employees.”⁶⁶ The concerted activity must also have the purpose of “mutual aid or protection.”⁶⁷ When the issue pertains to terms and conditions of employment, it fits within the definition of mutual aid or protection. As an example, putting an end to mandatory arbitration provisions has a direct correlation to workplace conditions and conditions of employment.⁶⁸ The NLRB also has held that political activity by employees can be protected under certain circumstances.⁶⁹ Whether an employer’s interference is lawful depends on Section 8(a)(1) of the NLRA, which provides as follows: “It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7].”⁷⁰ As an example, in employee-initiated private ordering, communication may take place via company email.⁷¹ The NLRB has recognized employees’ rights to use company email for purposes of Section 7,⁷² but employers may still be able to monitor employees’ electronic communications.⁷³

⁶⁵ *Meyers Indus., Inc., (Meyers I)*, 268 N.L.R.B. 493, 497 (1984), *remanded sub nom Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985) (discharging employee, after employee refused to drive allegedly unsafe truck, did not violate Section 7 because individual safety complaints do not qualify as concerted activity solely because they are carried out in the presence of other employees).

⁶⁶ *Mushroom Transp. Co. v. N.L.R.B.*, 330 F.2d 683, 685 (3d Cir. 1964) (finding conversations between driver employees as to wages, vacations, and assignment of trips are not concerted activity because conversations did not amount to “action” under Section 7).

⁶⁷ *Id.* at 684.

⁶⁸ *See infra* Section III.D.1.

⁶⁹ *Eastex, Inc. v. NLRB*, 437 U.S. 556, 556–57 (1978) (distributing union newsletter protesting incorporation of state right-to-work statute into revised state constitution and criticizing presidential veto of federal minimum wage increase protected under the “mutual aid or protection” clause of Section 7 because it was sufficiently related to employees’ interests); *cf.* *NLRB v. Local Union No. 1229, Int’l Bhd. of Elec. Workers (Jefferson Standard)*, 346 U.S. 464, 468 (1953) (discharging unionized technicians for distributing handbills that disparaged employer did not violate Section 7 because handbills made no reference to “the union, to a labor controversy, or to collective bargaining”).

⁷⁰ 29 U.S.C. § 158(a)(1) (2012).

⁷¹ *See infra* Section II.D.1. Google’s employees’ use of Google tools to organize the Walkout for Real Change falls within this right. *See supra* text accompanying notes 44–55.

⁷² *Register Guard*, 351 NLRB 1110 (2007), *overruled by Purple Commc’ns*, 361 NLRB 1050 (2014) (holding that employees with access to company email are presumptively permitted to use company email for statutorily protected communications). Note that the NLRB stated that the condition to employees’ right to communicate at work is limited to nonwork time, but given that high technology workers are exempt employees this suggests that the line between work and non-work time is unclear.

⁷³ *Id.* at 1064–65. Employer monitoring of employee electronic communications may be limited in some circumstances. *Compare Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650 (N.J. 2010) (finding employee did not waive attorney-client privilege by sending her attorney emails from her personal, password-protect web-based email account accessed on a computer belonging to her employer), *with Aventa Learning, Inc., v. K12, Inc.*, 830 F.

D. How High Technology Employees Affect Private Ordering

Thus far, this Article has articulated both the business and legal bases for employee-initiated private ordering. Now, this Article will shift to explain the different methods high technology employees utilize to change their respective corporations through private ordering. High technology employees have not always spoken out about the actions of their employers.⁷⁴ One especially noteworthy example of this is IBM's participation in information gathering for the Third Reich during World War II. During World War II, IBM developed customized punch-card technology for the Third Reich that was used in Holocaust record-keeping.⁷⁵ In 2018, 2,843 engineers, designers, and other workers at various companies, including Amazon, Apple, Facebook, Google, and Microsoft, signed the Never Again pledge decrying the creation of any similarly targeted databases for the U.S. government.⁷⁶ They also created a blueprint for worker-led resistance: "whistle-blow, protest, and—as a last resort—resign."⁷⁷

Supp. 2d 1083 (W.D. Wash. 2011) (holding waiver of attorney-client privilege where employee sent his attorney emails from employee's web-based email account, where employer's policy reserved the employer's right "to access, search, . . . or disclose any file or stored communication" on employee's company-provided computer).

⁷⁴ See generally EDWIN BLACK, *IBM AND THE HOLOCAUST: THE STRATEGIC ALLIANCE BETWEEN NAZI GERMANY AND AMERICA'S MOST POWERFUL CORPORATION* (2001).

⁷⁵ *Id.* at 8.

[T]he IBM punch card and card sorting system [was] a precursor to the computer. IBM, primarily through its German subsidiary, made Hitler's program of Jewish destruction a technologic mission the company pursued with chilling success. IBM Germany, using its own staff and equipment, designed, executed, and supplied the indispensable technologic assistance Hitler's Third Reich needed to accomplish what had never been done before—the automation of human destruction. More than 2,000 such multi-machine sets were dispatched throughout Germany, and thousands more throughout German-dominated Europe. Card sorting operations were established in every major concentration camp. People were moved from place to place, systematically worked to death, and their remains cataloged with icy automation.

IBM Germany, known in those days as Deutsche Hollerith Maschinen Gesellschaft, or Dehomag, did not simply sell the Reich machines and then walk away. IBM's subsidiary, with the knowledge of its New York headquarters, enthusiastically custom-designed the complex devices and specialized applications as an official corporate undertaking.

Id.

⁷⁶ Sean Captain, *How Tech Workers Became Activists, Leading a Resistance Movement that Is Shaking Up Silicon Valley*, FAST COMPANY (Oct. 15, 2018), <https://www.fastcompany.com/90244860/silicon-valleys-new-playbook-for-tech-worker-led-resistance15>, 2018) [<https://perma.cc/8BMR-APYP>].

⁷⁷ *Id.*

Only more recently, employees in high technology companies began to question the policies of their respective employers and take action where they believed it was warranted.⁷⁸ “[T]here is a growing concern among tech workers that the cutting-edge tools they create can be used in immoral ways.”⁷⁹ There has always been a sense of idealism that imbues the high technology scene on the West Coast.⁸⁰ This “tech-utopianism” came out of the hippie movement in the 1960s and 1970s and is reflected in the mottos of high technology companies.⁸¹ Jennifer Chatman, a professor at the Haas School of Business at the University of California, Berkeley opines that employees of high technology companies are speaking out because “[t]he organizations [they work for] encourage responsibility by having generally flatter hierarchies . . . They encourage people to challenge and debate. They encourage people to test the status quo.”⁸² Furthermore, the recruiting pitch for Silicon Valley has been: “Work with us to change the world. Employees are encouraged to make their work life synonymous with their social identity, and many internalize those utopian ideals.”⁸³

Interestingly, the rise of employee activism coincided with the awareness of the greater population regarding the role of high technology companies in a variety of issues. These issues range from the rise of artificial intelligence to privacy breaches to the dissemination of fake news—all of which have potentially immense societal implications.⁸⁴ In March 2019, Senator Elizabeth Warren proposed breaking up big

⁷⁸ See Nitasha Tiku, *The Year Tech Workers Realized They Were Workers*, WIRED (Dec. 24, 2018, 7:00 AM), <https://www.wired.com/story/why-hotel-workers-strike-reverberated-through-tech/> [<https://perma.cc/XYV9-GRY3>] (highlighting the recent “collective action[s]” happening in the tech industry).

⁷⁹ Laura Sydell, *Tech Workers Demand CEOs Stop Doing Business with ICE, Other U.S. Agencies*, NPR (July 14, 2018, 7:47 AM), <https://www.npr.org/2018/07/14/628765208/tech-workers-demand-ceos-stop-doing-business-with-ice-other-u-s-agencies> [<https://perma.cc/M83H-W48W>].

⁸⁰ *Id.*

⁸¹ *Id.* (noting as an example, Google’s original motto was “Don’t be evil.”).

⁸² *Id.*

⁸³ Tiku, *supra* note 46, at 14.

⁸⁴ *Can Employees Change the Ethics of Tech Firms*, KNOWLEDGE@WHARTON (Nov. 13, 2018), <http://knowledge.wharton.upenn.edu/article/can-tech-employees-change-the-ethics-of-their-firms/> [<https://perma.cc/ZR8N-WN7V>] (“‘Skilled developers and engineers have always placed value on aspects of work beyond monetary compensation, like the skills they can learn, the technologies they use, or the work environment itself,’ said Prasanna Tambe, Wharton professor of operations, information and decisions. ‘Increasingly—and especially given the political environment—a key part of this consideration for workers has become the moral and ethical implications of the choices made by their employers, ranging from the treatment of employees or customers to the ethical implications of the projects on which they work. This is especially true given the central role of “big tech” in new fears about information, rights, and privacy and the growing feeling that a lack of oversight in this sector has been harmful.’”) (quoting Prasanna Tambe, Wharton professor of operations, information and decisions).

high technology companies like Alphabet, Amazon, and Facebook, arguing that their concentrated power has adverse societal implications.⁸⁵ Instead of high technology companies being lauded for their innovations, the implications of these innovations themselves and their potential impacts on society are now being scrutinized to a greater degree.⁸⁶ Employees of high technology companies have begun to employ a number of different ways to both raise awareness and call for change in response to long-standing problems brought to light, as through the #MeToo Movement, and potentially problematic uses of technology being developed. The most frequently used methods are discussed below.

1. *Written Advocacy*

In general, electronic communication is becoming more prevalent as a part of worker collective action.⁸⁷ Typically, as groups increase in size, there is a corresponding decrease in their ability to act together—it is considered one of the main barriers to collective action.⁸⁸ However, in the case of high technology companies, electronic communications have proven to be an effective means of communication for employees. News outlets and social media then amplify their message by making the email public. Employees at high technology companies have often turned to writing open letters via email to executives at their companies.⁸⁹ In turn, the media typically gets a copy of the email and publishes it more broadly.⁹⁰ What is originally a communication between employees and executives becomes something much more widespread. In other situations, employees may post a letter online and bypass the internal posting entirely.⁹¹ For example, two of the leaders of

⁸⁵ Troy Wolverton, *Elizabeth Warren Pulled a Ninja Move to Turn Tech Angst into a Crackdown with Real Teeth, and Tech Is Going to Suffer Even If She's Not President*, BUS. INSIDER (Mar. 8, 2019, 6:25 PM), <https://www.businessinsider.com/elizabeth-warren-call-to-break-up-amazon-google-is-a-real-threat-2019-3> [<https://perma.cc/33X8-8A94>].

⁸⁶ See Kim Hart, David McCabe & Mike Allen, *Google CEO: BigTech Scrutiny Is "Here to Stay,"* AXIOS (Dec. 12, 2018), <https://www.axios.com/google-sundar-pichai-interview-big-tech-scrutiny-40d655a7-25f2-4414-b8fb-ac4f65ab62e4.html> [<https://perma.cc/2UNQ-AEHE>] (discussing how technology issues, such as privacy and artificial intelligence, are driving the “scrutiny and skepticism” affecting technology companies).

⁸⁷ See generally Jeffrey M. Hirsch, *Worker Collective Action in the Digital Age*, 117 W. VA. L. REV. 921 (2015) (focusing on the impact of electronic communication on the ability of low-wage workers to take collective action).

⁸⁸ MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 2, 11–12 (1965).

⁸⁹ See *infra text* accompanying notes 210–212.

⁹⁰ See *infra* notes 221–222 (Salesforce); 226–231 (Microsoft); 121 (Alphabet); 147–148 (Amazon).

⁹¹ This was the direction taken by Google employees protesting Project Dragonfly, a search engine application designed by Google to be compliant with China’s state censorship provisions. See *infra* Section III.C.

the Google Walkout, Claire Stapleton and Meredith Whittaker, wrote an internal open e-mail detailing how the company reacted to their organization of employees.⁹²

2. *Collecting Information from Colleagues*

Collecting objective information can also be valuable to employees in their attempt to change the status quo.⁹³ By emailing their vast network of connections across different companies, individuals can ask for information to help make a case for a change in a company's practice. This type of information can be collected through Google docs or stored in the cloud.⁹⁴ It could also be done via an app.⁹⁵ For example, having information about salaries and benefits across different high technology companies (or any industry) may be useful in proving that women make less than men. In turn, employees can use this information to illustrate the discrepancy in salary and initiate a conversation about how a company intends to correct the disparity. For example, at Google, a now-former employee took the lead in putting together a spreadsheet which documented salaries across different positions with the goal of helping colleagues negotiate better salaries.⁹⁶ This focus

⁹² Claire Stapleton & Meredith Whittaker, Post to Google internal mailing list (Apr. 22, 2019), in Nitasha Tiku, *Google Walkout Organizers Say They're Facing Retaliation*, WIRED (Apr. 22, 2019, 1:01 PM), <https://www.wired.com/story/google-walkout-organizers-say-theyre-facing-retaliation/> [<https://perma.cc/D2WG-99ZG>]. Claire Stapleton resigned from Google in June 2019. Google Walkout for Real Change, *Why a #GoogleWalkout Organizer Left Google*, MEDIUM (June 7, 2019), <https://medium.com/@GoogleWalkout/why-a-googlewalkout-organizer-left-google-26d1e3fbc317> [<https://perma.cc/J6YP-6BXV>]. Meredith Whittaker resigned in July 2019. Nitasha Tiku, *Most of the Google Walkout Organizers Have Left the Company*, WIRED (July 16, 2019, 4:22 PM), <https://www.wired.com/story/most-google-walkout-organizers-left-company/>.

⁹³ As Professor Hirsch notes in his article, "the next area of significant growth for workers' use of electronic communications is likely to be in the information-collection area." Hirsch, *supra* note 87, at 931.

⁹⁴ See MICHELLE MILLER, *THE UNION OF THE FUTURE*, ROOSEVELT INST. 21 (2015), <http://rooseveltinstitute.org/wp-content/uploads/2015/10/Miller-The-Union-of-the-Future.pdf> [<https://perma.cc/ER2S-PQMB>] (noting cloud technology has enabled management of and coordination among independent contractors); Manjoo, *supra* note 5 (employees used Google Docs to orchestrate 20,000 employee walkout); Briefing, *Technology May Help to Revive Organised Labour*, ECONOMIST (Nov. 15, 2018), <https://www.economist.com/briefing/2018/11/15/technology-may-help-to-revive-organised-labour> [<https://perma.cc/96SG-RY2K>] (explaining that online forums, chat groups, and messaging services allow labor groups to collect information, coordinate workers, and broadcast campaigns).

⁹⁵ Curie Kim, *52 Percent of Tech Employees Believe Their Work Environment Is Toxic*, BLIND (Nov. 28, 2018), <https://blog.teambind.com/index.php/2018/11/28/52-percent-of-tech-employees-believe-their-work-environment-is-toxic/> [<https://perma.cc/9D3E-52D9>] (citing example of anonymous app that collected information that 52% of high technology employees believe that their work environment is toxic).

⁹⁶ See *infra* Section III.D.2. There is also salary information about salaries through sites like Glassdoor.com and Comparably.com that are posted on an anonymous basis. The

on unequal pay has already led to changes in some companies' practices.⁹⁷ Some companies have begun to do blogs on Equal Pay Day, which was started by the National Committee on Pay Equity in 1996; on this day, these companies spotlight how different industries address pay inequities.⁹⁸

3. *Shareholder Proposals*

In many high technology companies, employees are also likely to be shareholders. When a high technology company is a private company, employees are granted either restricted stock or options to purchase stock.⁹⁹ By the time a company goes public, nearly all of its white-collar employees are likely shareholders.¹⁰⁰ Due to their status as shareholders, shareholder proposals are yet another way for employee-initiated private ordering to occur. Under Rule 14a-8 of the Securities Exchange Act of 1934,¹⁰¹ an employee of a public company can exercise his or her right as a shareholder as long as he or she has continuously held \$2,000 in stock for a year, as of the date the employee submits the proposal.¹⁰² For the first time in 2018, employees at a high technology company led their own shareholder proposal. Over a dozen employees at Amazon.com, Inc., an e-commerce company, filed shareholder petitions requesting that the company release a

accuracy of the information generated from such sites is unclear, though. *See* RPark, *Glassdoor: Potentially Littered with Inaccurate and Fabricated Information?*, HBS DIGITAL INITIATIVE (Mar. 24, 2018), <https://digit.hbs.org/submission/glassdoor-potentially-littered-with-inaccurate-and-fabricated-information/> [<https://perma.cc/HA57-FLMK>] (noting some of the inaccuracy in Glassdoor.com results). Note, too, that there may be company-specific limits (e.g., company social media policy which prohibits an employee from posting confidential information about a company), but these may be mitigated by the NLRA, which protects workers' rights to discuss wages and working conditions with other workers. *See* 29 U.S.C. §§ 157, 158(a)(1) (2012) (discussing rights of employees and unfair labor practices of employers).

⁹⁷ Daisuke Wakabayashi, *At Google, Employee-Led Effort Finds Men Are Paid More Than Women*, N.Y. TIMES (Sept. 8, 2017), <https://www.nytimes.com/2017/09/08/technology/google-salaries-gender-disparity.html> [<https://perma.cc/DVT8-E6YW>] [hereinafter Wakabayashi, *Employee-Led Effort*].

⁹⁸ *See, e.g.*, Justin Bariso, *It's "Equal Pay Day," and Facebook and Microsoft Say They've Wiped Out the Gender Pay Gap*, INC. (Apr. 12, 2016), <https://www.inc.com/justin-bariso/its-equal-pay-day-and-facebook-and-microsoft-say-theyve-wiped-out-the-gender-pay.html> [<https://perma.cc/9XF9-N73W>] (noting Facebook and Microsoft's efforts to mitigate the gender pay gap).

⁹⁹ Elizabeth Pollman, *Startup Governance*, 167 U. PA. L. REV. (forthcoming 2019).

¹⁰⁰ *Id.*

¹⁰¹ Exchange Act Rule 14a-8(b)(1), 17 C.F.R. 240.14a-8(b)(1) (2019).

¹⁰² For more details on the procedural aspects of proving ownership and other matters related to Rule 14a-8, see SEC Staff Legal Bulletin No. 14G(CF), *Shareholder Proposals* (Oct. 16, 2012), <https://www.sec.gov/interps/legal/cfs1b14g.htm> [<https://perma.cc/Z566-7XZN>].

comprehensive plan addressing climate change, which was voted on at Amazon's annual shareholder meeting in the spring of 2019.¹⁰³ The vote failed.¹⁰⁴ Earlier in 2018, employees at Google took part in a shareholder petition, led by Zevin Asset Management, which aimed to link executive compensation to diversity and inclusion goals.¹⁰⁵ Although they did not file the petition themselves, the employees did help Zevin present on it at the annual shareholder meeting of its parent company, Alphabet.¹⁰⁶ Because the proposal failed, Zevin collaborated with Google employees again and resubmitted the proposal for the 2019 annual shareholder meeting.¹⁰⁷ It is important to note, however, that employee shareholder proposals may not be an especially effective avenue for change where company founders own a significant voting portion of outstanding shares.¹⁰⁸

¹⁰³ See Kate Conger, *Tech Workers Got Paid in Company Stock. They Used It to Agitate for Change*, N.Y. TIMES (Dec. 16, 2018), <https://www.nytimes.com/2018/12/16/technology/tech-workers-company-stock-shareholder-activism.html> [<https://perma.cc/YSB2-LWA2>] [hereinafter Conger, *Tech Workers*].

¹⁰⁴ Emily Stewart & Alexia Fernández Campbell, *8,000 Amazon Employees Asked the Company to Do More on Climate Change. Shareholders Just Said No.*, VOX (May 22, 2019, 1:45 PM), <https://www.vox.com/recode/2019/5/22/18635604/amazon-shareholder-meeting-2019-climate-change-proposal> [<https://perma.cc/E4C3-JBBK>].

¹⁰⁵ Alphabet Inc., Notice of 2018 Annual Meeting of Stockholders and Proxy Statement, Proposal No. 8: Shareholder Proposal Regarding a Sustainability Metrics Report (Form 10-K) (Apr. 27, 2018), <https://www.sec.gov/Archives/edgar/data/1652044/000130817918000222/lgoog2018-def14a.htm> [<https://perma.cc/92BE-8MLS>]; Pat Miguel Tomaino, *Impact Brief: Skin in the Game*, MEDIUM (Aug. 21, 2018), <https://medium.com/zevin-views/inclusion-b5dc2baa794d> [<https://perma.cc/92BE-8MLS>].

¹⁰⁶ Conger, *Tech Workers*, *supra* note 103.

¹⁰⁷ *Id.* See Alicia Ritcey & Alistair Barr, *Googlers Miffed Over Pay Link Take Stage in Rare Annual Meeting Move*, BLOOMBERG (June 6, 2018 10:17 AM), <https://www.bloomberg.com/news/articles/2018-06-06/googlers-miffed-over-pay-take-stage-in-rare-annual-meeting-move> [<https://perma.cc/8QEQ-3DW5>]; ALPHABET INC., NOTICE OF 2018 ANNUAL MEETING OF STOCKHOLDERS AND PROXY STATEMENT (Apr. 27, 2018); ALPHABET INC., NOTICE OF 2017 ANNUAL MEETING OF STOCKHOLDERS AND PROXY STATEMENT (Apr. 28, 2017); ALPHABET INC., NOTICE OF 2016 ANNUAL MEETING OF STOCKHOLDERS AND PROXY STATEMENT (Apr. 29, 2016). The resubmitted diversity and inclusion proposal also failed. ALPHABET INC., NOTICE OF 2019 ANNUAL MEETING OF STOCKHOLDERS AND PROXY STATEMENT (June 19, 2019), <https://abc.xyz/investor/other/annual-meeting/> [<http://perma.cc/A6Y8-SKNM>].

¹⁰⁸ Amazon founder, Jeff Bezos, Google founders, Larry Page and Sergey Brin, and Facebook founder, Mark Zuckerberg, not only own a significant number of shares in the companies they founded, but the shares they own have more voting power (e.g., 10 votes for every one share they hold); only founders and company executives own voting shares in Snapchat (“Snap”). See Albert H. Choi, *Concentrated Ownership and Long-Term Shareholder Value*, 8 HARV. BUS. L. REV. 53, 57–61 (2018) (noting and modeling founder de facto or de jure control at leading technology companies); Kristy Wiehe, *Oh, Snap! Do Multi-Class Offerings Signal the Decline of Shareholder Democracy and the Normalization*

4. *Nonprofit Organizations and Coalitions*

There are also nonprofit organizations, such as Coworker.org,¹⁰⁹ which help colleagues start campaigns together. As another example, Gig Workers Rising brings together app and platform workers to advocate for better wages, among other things.¹¹⁰

High technology workers are also spearheading the formation of coalitions. One such example is the Tech Workers Coalition, which began in 2014 with the purpose of building relationships between tech workers and the Bay Area communities in which they worked.¹¹¹ It now has chapters across the country.¹¹² The Tech Workers Coalition has been involved in protesting military contracts at technology companies and supporting service worker unionizing campaigns.¹¹³ As an example, they were involved in unionizing Facebook cafeteria workers.¹¹⁴ In a Tech Workers Coalition meeting in July 2018, over 100 tech workers from small startups to major companies like Google and Facebook “talked about how to organize, challenge their powerful employers and stop the companies they work for from creating products and services they find unethical.”¹¹⁵

of Founder Primacy?, 12 VA. L. & BUS. REV. 175, 178–79, 181–84 (2017) (describing distribution of voting shares and founder control at Google, Facebook, and Snap).

¹⁰⁹ COWORKER.ORG, <https://home.coworker.org/> [<https://perma.cc/7SDB-VYJU>] (last visited Jan. 18, 2019).

¹¹⁰ GIG WORKERS RISING, <https://www.gigworkersrising.org/about> [<https://perma.cc/TYQ6-WBML>] (last visited May 15, 2019).

¹¹¹ TECH WORKERS COALITION, <https://techworkerscoalition.org/> [<https://perma.cc/959V-L2MB>] (last visited Jan. 18, 2019).

¹¹² *Id.* (Tech Workers Coalition has meetings in cities around the United States including San Francisco, Seattle, Boston, and D.C.).

¹¹³ *Id.* It is likely that service workers do not command the same type of influence that high tech employees do.

¹¹⁴ April Glaser & Will Oremus, “A Collective Aghastness”: *Why Silicon Valley Workers Are Demanding Their Employers Stop Doing Business with the Trump Administration*, SLATE (June 28, 2018, 4:02 PM), <https://slate.com/technology/2018/06/the-tech-workers-coalition-explains-how-silicon-valley-employees-are-forcing-companies-to-stop-doing-business-with-trump.html> [<https://perma.cc/6X3J-49R7>].

¹¹⁵ Sam Harnett, *Google Employees Quit in Protest Over Military Artificial Intelligence Program*, KQED NEWS (May 17, 2018), <https://www.kqed.org/news/11668872/google-employees-quit-in-protest-over-military-artificial-intelligence-program> [<https://perma.cc/P3MM-7C9Y>] [hereinafter Harnett, *Google Employees Quit*]. Sam Harnett, *In a Direct Challenge to Their Employers, Tech Workers Begin to Organize*, KQED NEWS (July 6, 2018), <https://www.kqed.org/news/11679302/in-a-direct-challenge-to-their-employers-tech-workers-begin-to-organize> [<https://perma.cc/72CB-5XV3>].

5. Walkouts

Employees at high technology companies also have the ability to organize protests and walkouts, much like their unionized counterparts.¹¹⁶ Google employees successfully orchestrated a more than 20,000-person walkout in various offices across the globe in 2018. The walkout was a response to the company's alleged mishandling of sexual misconduct-related matters.¹¹⁷ Similar to walkouts organized by unions, walkouts for high technology companies tend to have specific goals in mind. In the case of the organizers of the Google Walkout, they had five demands listed on their Instagram page.¹¹⁸ By walking out, the employees shined a spotlight on issues in their company. Through this walkout, they were attempting to get Google "to take real steps toward being more accountable and fair . . . with better processes and accountability."¹¹⁹ Google's CEO responded to the walkout by acknowledging the merit of some of the ideas on how to improve company policies in the future.¹²⁰

¹¹⁶ Dana Goldstein, *Teacher Walkouts: What to Know and What to Expect*, N.Y. TIMES (Apr. 3, 2018), <https://www.nytimes.com/2018/04/03/us/teacher-walkouts-strikes.html>. [<https://perma.cc/S9BU-CFKM>].

¹¹⁷ See Conger & Wakabayashi, *supra* note 4; Wakabayashi et al., *supra* note 4; Manjoo, *supra* note 5.

¹¹⁸ Google Walkout for Change (@googlewalkout), INSTAGRAM (Oct. 31, 2018), <https://www.instagram.com/p/BpnoQ3DBRZ1/> [<https://perma.cc/8ECC-NR75>]. The five demands were:

1. An end to Forced Arbitration in cases of harassment and discrimination.
2. A commitment to end pay and opportunity inequity.
3. A publicly disclosed sexual harassment transparency report.
4. A clear, uniform, globally inclusive process for reporting sexual misconduct safely and anonymously.
5. Elevate the Chief Diversity Officer to answer directly to the CEO and make recommendations directly to the Board of Directors. In addition, appoint an Employee Representative to the Board.

Id.

¹¹⁹ Cale Guthrie Weissman, *Google Walkout: Why Employees Are Making these 5 Demands*, FAST COMPANY (Nov. 1, 2018), <https://www.fastcompany.com/90261033/google-walkout-heres-the-list-of-5-employee-demands> [<https://perma.cc/73W4-H34Q>].

¹²⁰ See Cale Guthrie Weissman, *Google Employees Around the World Have Already Begun Walking Out in Protest*, FAST COMPANY (Nov. 1, 2018), <https://www.fastcompany.com/90260818/google-walkout-here-are-the-latest-updates-from-the-employee-led-protest> [<https://perma.cc/6FPC-R9JQ>]. CEO Sundar Pichair stated:

Earlier this week, we let Googlers know that we are aware of the activities planned for today and that employees will have the support they need if they wish to participate. Employees have raised constructive ideas for how we can improve our policies and our processes going forward. We are taking in all their feedback so we can turn these ideas into action.

6. Resignations

In some cases, employees resign from their companies. If an especially sought-after recruit resigns, such as an artificial intelligence expert, it brings unwanted headlines that could potentially affect hiring in critical areas.¹²¹ For example, some employees resigned from Google over Project Maven, a drone technology partnership between Google and the U.S. military, because they did not believe that Google was listening to or addressing their concerns.¹²²

III. CASE STUDIES OF HIGH TECHNOLOGY COMPANIES

Some recent rules adopted by private and public high technology companies in light of employee pressure, but without governmental interference, include

Id.

As illustrated in the case studies that follow, Google did take action to address their employees' concerns. *See infra* Section III.D.1. Some observers even went so far as to claim that employees are more powerful than management when they act collectively as Google employees did when they participated in a walkout. *See* Geoffrey James, *Why the Google Walkout Terrifies the Tech Moguls*, INC. (Nov. 8, 2018), <https://www.inc.com/geoffrey-james/why-google-walkout-terrifies-tech-moguls.html> [<https://perma.cc/V3R8-D6RP>].

¹²¹ *See, e.g.*, Janet Burns, *Google Employees Resign Over Company's Pentagon Contract, Ethical Habits*, FORBES (May 14, 2018 12:46 PM), <https://www.forbes.com/sites/janetburns/2018/05/14/google-employees-resign-over-firms-pentagon-contract-ethical-habits/#7dd6f2a54169> [<https://perma.cc/E2GF-K9CC>]. The “mass resignations . . . speak to the strongly felt ethical concerns of the employees who are departing.” Kate Conger, *Google Employees Resign in Protest Against Pentagon Contract*, GIZMODO (May 14, 2018, 6:00 AM), <https://gizmodo.com/google-employees-resign-in-protest-against-pentagon-con-1825729300> [<https://perma.cc/6Y5D-TJHU>] [hereinafter Conger, *Google Employees Resign*] (citing reasons why employees resigned from Google over Project Maven, including being at odds with what they understood the company to stand for and feeling as though their concerns were unaddressed by management, to name a few).

Over ninety academics in artificial intelligence, ethics, and computer science also released an open letter to urge Google to end its work on Project Maven. The letter reads in part:

If ethical action on the part of tech companies requires consideration of who might benefit from a technology and who might be harmed, then we can say with certainty that no topic deserves more sober reflection—no technology has higher stakes—than algorithms meant to target and kill at a distance and without public accountability.

Id. The letter continued, “While Google regularly decides the future of technology without democratic public engagement, its entry into military technologies casts the problems of private control of information infrastructure into high relief.” *Id.*

¹²² *See infra* Section III.A.

eliminating mandatory arbitration agreements for sexual misconduct,¹²³ retreating from military-related work,¹²⁴ and entering (or choosing not to enter) the lucrative Chinese market due to censorship of content by the Chinese government.¹²⁵

In the case studies of high technology companies that follow in this Part, this Article will provide a more detailed account with respect to how employees have initiated actions through private ordering. It also discusses the extent to which employees have successfully (or not successfully) convinced their companies to institute legal changes. These companies were selected based on the following characteristics: (1) they are standard-bearers in their industry and provide good examples of employee-initiated private ordering; (2) their innovation(s) impact our society in a number of ways; and (3) their headquarters are located in the United States.

It is important to note, however, that not every employee demand has been, or will be, met through private ordering. The success of a high technology employee demand becoming a reality hinges on several different factors: cultural climate, how widespread the problem is, media coverage, and the employer's receptivity regarding the issue. In the Part that follows, this Article analyzes how employee-initiated private ordering has impacted the legal or business courses that high technology companies (their employers) have taken going forward. Five areas of particular significance and impact are discussed: artificial intelligence, augmented reality, censorship, gender issues (related to mandatory arbitration provisions and disparity in salaries between men and women), and immigration. With the exception of gender issues, these areas generally involve proposed or existing government-related contracts.

A. Artificial Intelligence

Fei-Fei Li, the chief scientist of Google's cloud-computing division until the end of 2018, is one of the foremost experts in the field of artificial intelligence.¹²⁶ While she was at Google, Li touted "democratizing AI" by allowing more software developers and academic researchers access to the advanced artificial intelligence tools that had been developed.¹²⁷ During her two-year tenure at Google, Li worked on creating applications that Google could use for businesses that purchased its

¹²³ See *infra* Section III.D.

¹²⁴ See *infra* Section III.A.

¹²⁵ See *infra* Section III.C.

¹²⁶ Luke Stangel, *Google AI Executive at the Center of Project Maven Is Quitting*, SILICON VALLEY BUS. J. (Sept. 11, 2018), <https://www.bizjournals.com/sanjose/news/2018/09/11/google-ai-fei-fei-li-andrew-moore-goog-maven.html> [https://perma.cc/YXX5-Z9XK].

¹²⁷ Bloomberg News, *Google's AI Cloud Star Leaves After Pentagon Deal Protests*, BLOOMBERG (Sept. 10, 2018, 5:49 PM), <https://www.bloomberg.com/news/articles/2018-09-10/google-s-ai-cloud-star-leaves-after-pentagon-deal-protests> [https://perma.cc/7P5M-X5LT].

cloud services.¹²⁸ When the Pentagon wanted to enter into a cloud contract to use Google's artificial intelligence-powered image recognition software, Li supported the contract but cautioned colleagues to avoid discussing the artificial intelligence part of the deal because she feared that the public would be concerned about "weaponized" artificial intelligence.¹²⁹ Li's words proved prescient. In 2018, over 3,000 Google employees signed a petition protesting the initiative, dubbed "Project Maven"—Google's partnership with the U.S. military to deploy artificial intelligence that assists drones in distinguishing between people and objects.¹³⁰ "The government said it would 'leverage advanced commercial technologies to provide advantage to the warfighter in contested environments.'"¹³¹ About a dozen employees also resigned in the wake of the protest.¹³² According to one former Google employee, "[t]here's a division between those who answer to shareholders, who want to get access to Defense Department contracts worth multimillions of dollars, and the rank and file who have to build the things and who feel morally complicit for things they don't agree with . . ."¹³³ Ultimately, Google did not renew its contract with the U.S. Department of Defense.¹³⁴ After Google said it would not

¹²⁸ *Id.*

¹²⁹ *Id.* In an email, Professor Li encouraged the project to be kept under wraps and suggested that press releases on the project not be focused on artificial intelligence. Kate Conger, *Google Plans Not to Renew Its Contract for Project Maven, a Controversial Pentagon Drone AI Imaging Program*, GIZMODO (June 1, 2018, 2:38 PM), <https://gizmodo.com/google-plans-not-to-renew-its-contract-for-project-mave-1826488620>. [<https://perma.cc/4RXA-PJB5>]. Li wrote, "I think we should do a good PR story on the story of [Department of Defense] collaborating with [Google Cloud Platform] from a vanilla cloud technology angle (storage, network, security, etc.), but avoid at ALL COSTS any mention or implication of [artificial intelligence]." *Id.*

¹³⁰ Harnett, *Google Employees Quit*, *supra* note 115.

¹³¹ Joshua Brustein, *How One AI Startup Decided to Embrace Military Work, Despite Controversy*, BLOOMBERG (Dec. 6, 2018, 8:00 AM), <https://www.bloomberg.com/news/articles/2018-12-06/how-one-ai-startup-decided-to-embrace-military-work-despite-controversy> [<https://perma.cc/WHM8-2SKE>].

¹³² *Id.* Conger, *Google Employees Resign*, *supra* note 121. "Historically, Google has promoted an open culture that encourages employees to challenge and debate product decisions. But some employees feel that their leadership [is] no longer as attentive to their concerns, leaving them to face the fallout." Conger, *Tech Workers*, *supra* note 103. Employees who left Google also cited other reputational concerns as factoring into their decision to leave, such as the company's sponsorship of the Conservative Political Action Conference and its challenges in addressing diversity concerns within the company. *Id.*

¹³³ Fryer-Biggs, *supra* note 18.

¹³⁴ Harnett, *Google Employees Quit*, *supra* note 115.

Decades ago it was the U.S. military that spurred innovations like the personal computer and the internet. Today, the capabilities of digital technology, especially artificial intelligence, machine learning and data analysis, are being driven by private companies serving our consumption habits — companies like Amazon and Google.

renew its contract with the Pentagon, it put forth a list of ethical principles governing its use of artificial intelligence.¹³⁵ These principles stated that Google would utilize artificial intelligence “only in ‘socially beneficial’ ways that would not cause harm and promised to develop its capabilities in accordance with human rights law.”¹³⁶

The controversy was not limited to public companies. Clarifai, Inc., a private company focused on artificial intelligence and machine learning,¹³⁷ faced criticism from its own employees about taking on work with the military.¹³⁸ As a result, it created a subsidiary, Neural Net One after the Department of Defense hired it to work on Project Maven. It was a controversial decision among employees. “Four former employees said Zeiler’s [the CEO’s] lack of candor about the project damaged morale, complicated recruitment, and undermined trust within the company.”¹³⁹ At least two employees left Clarifai due to concerns about the company’s focus on military work.¹⁴⁰ Although startups can ill afford to lose employees, especially ones with highly sought-after technical expertise, it appears that the financial rewards outweighed any ethical concerns raised through employee-initiated private ordering.¹⁴¹

Alphabet acknowledged in its “Risk Factors” section of its Form 10-K for the year, which ended on December 31, 2018, that the implementation of artificial intelligence software in many of its products could bring “ethical, technological,

Id. Harnett, *Google Employees Quit*, *supra* note 115. The Department of Defense undertook two initiatives in 2018 to address opposition from AI engineers: (1) creating a Joint Artificial Intelligence Center to oversee all of the military’s AI efforts, with an initial focus on humanitarian missions; and (2) instituting the Defense Innovation Board, which is comprised of an advisory panel of tech experts, including former Google CEO, Eric Schmidt, and LinkedIn co-founder, Reid Hoffman, to oversee a new review of AI ethics. Fryer-Biggs, *supra* note 18.

¹³⁵ Kate Conger & Daisuke Wakabayashi, *Google Employees Protest Secret Work on Censored Search Engine for China*, N.Y. TIMES (Aug. 16, 2018), <https://www.nytimes.com/2018/08/16/technology/google-employees-protest-search-censored-china.html> [<https://perma.cc/7AGX-UW6Z>] [hereinafter Conger & Wakabayashi, *Google Employees Protest*] (discussing Google’s promulgation of internal AI Principles following termination of Project Maven).

¹³⁶ *Artificial Intelligence at Google: Our Principles*, GOOGLE, <https://ai.google/principles/> [<https://perma.cc/U22Z-T7CN>] (last visited Feb. 23, 2019). It is unclear who would determine what is socially beneficial, making the policy potentially fraught with loopholes.

¹³⁷ See Brustein, *supra* note 131.

¹³⁸ Clarifai states that it uses “machine learning and artificial intelligence to analyze and return the content in images and videos.” Jared Lerner, *General FAQ*, CLARIFAI, <http://help.clarifai.com/general/general-faq> [<https://perma.cc/5C5J-6CF8>] (last visited Feb. 25, 2019).

¹³⁹ See Brustein, *supra* note 131.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

legal, and other challenges”¹⁴² Likewise, Microsoft, in its Form 10-K for the fiscal year, which ended on June 30, 2019, had cautionary language regarding its use of artificial intelligence in its business offerings: “If we enable or offer [artificial intelligence] solutions that are controversial because of their impact on human rights, privacy, employment, or other social issues, we may experience brand or reputational harm.”¹⁴³ There may be a correlation between this language being placed in “Risk Factors” and the backlash from employees that Alphabet and Microsoft witnessed in 2018 due to their interactions with the Department of Defense¹⁴⁴ and Immigration and Customs Enforcement (“ICE”).¹⁴⁵ Over time, it may become commonplace for other high technology companies to make similar disclosures.

Amazon provided a study that contrasts with Google’s findings. When Amazon decided to sell its facial recognition software, Rekognition, to law enforcement,¹⁴⁶ over 450 Amazon employees signed an open letter to CEO Jeff Bezos and other Amazon executives on a mailing list called “We Won’t Build It,” “demanding that the company Palantir be banned from Amazon Web Services and that Amazon implement employee oversight for ethical decisions.”¹⁴⁷ The letter asked Amazon to cease selling Rekognition to police, stating, “[o]ur company should not be in the surveillance business; we should not be in the policing business; we should not be in the business of supporting those who monitor and oppress marginalized populations.”¹⁴⁸ In November 2018, Amazon addressed its relationship with law

¹⁴² Alphabet Form 10-K, *supra* note 53, at 7.

¹⁴³ Microsoft Corp., Annual Report (Form 10-K) 22 (Aug. 1, 2019).

¹⁴⁴ See Harnett, *Google Employees Quit*, *supra* note 115.

¹⁴⁵ Tom Warren, *Microsoft CEO Plays Down ICE Contract in Internal Memo to Employees*, VERGE (June 20, 2018, 4:49 AM), <https://www.theverge.com/2018/6/20/17482500/microsoft-ceo-satya-nadella-ice-contract-memo> [<https://perma.cc/4Y2M-BPBV>]; see also *infra* Section III.E.

¹⁴⁶ Alexa Lardieri, *Amazon Employees Protesting Sale of Facial Recognition Software*, U.S. NEWS & WORLD REP. (Oct. 18, 2018, 2:57 PM), <https://www.usnews.com/news/politics/articles/2018-10-18/amazon-employees-protesting-sale-of-facial-recognition-software> [<https://perma.cc/R9YB-W6C8>].

¹⁴⁷ *Id.* (“Palantir is the software firm that operates much of Immigration and Customs Enforcement’s deportation and tracking program.”).

¹⁴⁸ James Vincent, *Amazon Employees Protest Sale of Facial Recognition Software to Police*, THE VERGE (June 22, 2018, 5:29 AM), <https://www.theverge.com/2018/6/22/17492106/amazon-ice-facial-recognition-internal-letter-protest> [<https://perma.cc/FP8H-JJ38>] (setting forth full letter to Mr. Bezos). The American Civil Liberties Union also voiced concerns about the software’s inaccuracies in racial profiling, finding that it “incorrectly matched 28 members of Congress, identifying them as other people who have been arrested for a crime and that the false matches disproportionately involved people of color, including six members of the Congressional Black Caucus.” Savia Lobo, *Amazon Addresses Employees Dissent Regarding the Company’s Law Enforcement Policies at an All-staff Meeting, in a First*, PACKET (Nov. 9, 2018, 9:16 AM), <https://hub.packtpub.com/amazon->

enforcement at an all-staff meeting that was live-streamed,¹⁴⁹ but none of the employee demands were met. Although employee actions did not result in the hoped-for employee-initiated private ordering—a stop in Amazon’s sale of the controversial software—the issue became relevant and publicized again in early 2019. In January 2019, through a resolution organized by Open MIC, a nonprofit organization focused on corporate development, and filed by the Sisters of St. Joseph of Brentwood, a member of the Tri-State Coalition for Responsible Investment, shareholders of Amazon filed a letter with the company demanding that Amazon cease sales of facial recognition software to government agencies.¹⁵⁰ According to Open MIC, “[t]he shareholder resolution echoes concerns of over 70 civil rights and civil liberties groups, hundreds of Amazon’s own employees, and 150,000 people who signed a petition—all seeking to end sales of Rekognition to government agencies.”¹⁵¹ Furthermore, an employee anonymously posted a letter online, outlining his or her concerns about Rekognition.¹⁵²

Amazon was also considered the front-runner for the Joint Enterprise Defense Initiative (“JEDI”) after Google decided not to submit a bid because it “‘couldn’t be assured’ that the work in connection with the JEDI contract ‘would align with

addresses-employees-dissent-regarding-the-companys-law-enforcement-policies-at-an-all-staff-meeting-in-a-first/ [https://perma.cc/UUP8-UUK6].

¹⁴⁹ Lobo, *supra* note 148. Questions were pre-screened. Andy Jassy, CEO of Amazon Web Services, stated:

There’s a lot of value being enjoyed from Amazon Rekognition. Now now, of course, with any kind of technology, you have to make sure that it’s being used responsibly, and that’s true with new and existing technology. Just think about all the evil that could be done with computers or servers and has been done, and you think about what a different place our world would be if we didn’t allow people to have computers.

Id. But cf. Erin Corbett, *Tech Companies Are Profiting Off ICE Deportations, Report Shows*, FORTUNE (Oct. 23, 2018, 11:06 AM), <http://fortune.com/2018/10/23/tech-companies-surveillance-ice-immigrants/> [https://perma.cc/WW8T-QE6U] (“Amazon receives millions of dollars to host Palantir, as well as backups of DHS’s vast database of biometric information on its web servers The two companies are dominating the market to meet the federal government’s data storage needs, building an increasingly effective deportation and incarceration infrastructure for the Trump administration, activists say.”).

¹⁵⁰ *Shareholders Press Amazon to Stop Selling Racially Biased Surveillance Tech to Government*, OPEN MIC (Jan. 17, 2019), <https://www.openmic.org/news/2019/1/16/halt-rekognition> [https://perma.cc/2VVD-C7VQ].

¹⁵¹ *Id.* (“In one test, Rekognition technology disproportionately misidentified African-American and Latino members of the U.S. Congress as people in criminal mug shots”).

¹⁵² The letter argues that “Amazon is designing, marketing, and selling a system for dangerous mass surveillance *right now*.” An Amazon Employee, *I’m an Amazon Employee. My Company Shouldn’t Sell Facial Recognition Tech to Police*, MEDIUM (Oct. 16, 2018), <https://medium.com/s/powertrip/im-an-amazon-employee-my-company-shouldn-t-sell-facial-recognition-tech-to-police-36b5fde934ac> [https://perma.cc/6LQS-HVQE].

[Google’s artificial intelligence] Principles,’ among other things.”¹⁵³ The contract was worth \$10 billion over ten years.¹⁵⁴ Amazon employees did not write an open letter of protest when Amazon’s bid was submitted, but Microsoft employees did when Microsoft submitted its JEDI bid.¹⁵⁵

¹⁵³ Paris Martineau, *How the Pentagon’s Move to the Cloud Landed in the Mud*, WIRED (Oct. 10, 2018), <https://www.wired.com/story/how-pentagons-move-to-cloud-landed-in-mud/> [<https://perma.cc/VE2N-759M>]; see also *Artificial Intelligence at Google*, *supra* note 136. Google’s objectives for artificial intelligence include:

Be socially beneficial. . . . Avoid creating or reinforcing unfair bias. . . . Be built and tested for safety. . . . Be accountable to people. . . . Incorporate privacy design principles. . . . Uphold high standards of scientific excellence. . . . Be made available for uses that accord with these principles.

Id.

¹⁵⁴ Ron Miller, *New Conflict Evidence Surfaces in JEDI Cloud Contract Procurement Process*, TECHCRUNCH (Feb. 20, 2019), <https://techcrunch.com/2019/02/20/new-conflict-evidence-surfaces-in-jedi-cloud-contract-procurement-process/> [<https://perma.cc/SLH5-EPFJ>].

Oracle filed a court case alleging that the Department of Defense procurement process which would only be awarded to one vendor was flawed and unfairly favored Amazon, citing an ex-employee of Amazon who had influence over the process. Complaint, Oracle America, Inc. v. United States, No. 1:18-cv-01880-EGB -1880C, 2019 BL 276759 (Fed. Cl. July 19, 2019) (complaint sealed); see Ron Miller, *Oracle Is Suing the US Government Over \$10B Pentagon JEDI Cloud Contract Process*, TECHCRUNCH (Dec. 12, 2018), <https://techcrunch.com/2018/12/12/oracle-is-suing-the-u-s-government-over-10b-pentagon-jedi-cloud-contract-process/> [<https://perma.cc/24H4-8KWS>]; Christian Davenport & Aaron Gregg, *Pentagon to Review Amazon Employee’s Influence over \$10 Billion Government Contract*, SEATTLE TIMES (Jan. 24, 2019, 2:20 PM), <https://www.seattletimes.com/business/pentagon-to-review-amazon-employees-influence-over-10-billion-government-contract/> [<https://perma.cc/N7HG-FJKX>].

¹⁵⁵ Employees of Microsoft, *An Open Letter to Microsoft: Don’t Bid on the US Military’s Project JEDI*, MEDIUM (Oct. 12, 2018), <https://medium.com/s/story/an-open-letter-to-microsoft-dont-bid-on-the-us-military-s-project-jedi-7279338b7132> [<https://perma.cc/HX4D-Y78E>] (Microsoft employee letter posted to Medium); Frank Konkel, *Microsoft, Amazon CEOs Stand By Defense Work After Google Bails on JEDI*, NEXTGOV (Oct. 15, 2018), <https://www.nextgov.com/it-modernization/2018/10/microsoft-amazon-ceos-stand-by-defense-work-after-google-bails-jedi/152047/> [<https://perma.cc/UFT3-JWQL>] (“‘One of the jobs of a senior leadership team is to make the right decision even when [it] is unpopular,’ Amazon CEO Jeff Bezos said Monday at the WIRED25 summit. ‘If big tech companies are going to turn their back on the Department of Defense, then this country is going to be in trouble.’”); Brad Smith, *Technology and the U.S. Military*, MICROSOFT (Oct. 26, 2018), <https://blogs.microsoft.com/on-the-issues/2018/10/26/technology-and-the-us-military/> [<https://perma.cc/W2X7-7X8G>] (responding to employees’ concerns about Microsoft’s work with the military); Mark Wycislik-Wilson, *Microsoft Employees Use Open Letter to Urge Company Not to Get Involved in JEDI Military Project*, BETANEWS (Oct. 15, 2018), <https://betanews.com/2018/10/15/microsoft-do-not-bid-on-jedi/> [<https://perma.cc/2Z3W->

B. Augmented Reality

In November 2018, Microsoft won a \$480 million contract for the United States Army to supply prototypes for augmented reality systems (the HoloLens) that would be utilized on combat missions and in training.¹⁵⁶ “The contract, which could eventually lead to the military purchasing over 100,000 headsets, is intended to ‘increase lethality by enhancing the ability to detect, decide and engage before the enemy,’ according to a government description of the program.”¹⁵⁷ The number of headsets that the Army intended to purchase would have been more than the number of HoloLens sold to date.¹⁵⁸

On February 22, 2019, a few days before the introduction of the second version of the HoloLens, which Microsoft described “as a productivity tool for professionals in fields like architecture and engineering, or as an entertainment device,”¹⁵⁹ Microsoft employees circulated a letter addressed to Microsoft CEO, Satya Nadella and Microsoft President and Chief Legal Officer, Brad Smith.¹⁶⁰ The letter stated, “We are alarmed that Microsoft is working to provide weapons technology to the U.S. Military, helping one country’s government ‘increase lethality’ using tools we built . . . We did not sign up to develop weapons, and we demand a say in how our work is used.”¹⁶¹ The letter called for Microsoft to cancel the contract, publish a policy that set out the acceptable uses for its products, appoint an independent ethics board to enforce such a policy.¹⁶²

In response, a Microsoft spokesman emailed a statement that said, “We always appreciate feedback from employees and have many avenues for employee voices to be heard[.]”¹⁶³ In a blog post on October 2018, Brad Smith stated that Microsoft would continue to sell software to the U.S. military as it had in the past; employees

9QP5]. Microsoft was awarded the JEDI contract and Amazon is protesting the decision. Wayne Rash, *Amazon’s Protest of Microsoft JEDI Award is No Surprise*, FORBES (Nov. 15, 2019), <https://www.forbes.com/sites/waynerash/2019/11/15/amazon-announces-protest-to-microsoft-jedi-award/#6b0ebd7a4342> [https://perma.cc/JRJ2-QDH9].

¹⁵⁶ Joshua Brustein, *Microsoft Wins \$480 Million Army Battlefield Contract*, BLOOMBERG (Nov. 28, 2018, 1:53 PM), <https://www.bloomberg.com/news/articles/2018-11-28/microsoft-wins-480-million-army-battlefield-contract> [https://perma.cc/UH65-M8YN].

¹⁵⁷ *Id.*

¹⁵⁸ Joshua Brustein & Dina Bass, *Microsoft Workers Call on Company to Cancel Military Contract*, BLOOMBERG (Feb. 22, 2019, 2:00 PM), <https://www.bloomberg.com/news/articles/2019-02-22/microsoft-workers-call-on-company-to-cancel-military-contract> [https://perma.cc/LLS4-5WLW].

¹⁵⁹ *Id.* The military version would include night vision, thermal sensing, and technology that could be used to monitor for concussions. *Id.*

¹⁶⁰ *Id.* “Internal opposition has become a persistent issue for consumer technology companies looking to sell products for military and law enforcement use.” *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

with ethical concerns could move to a different team or project.¹⁶⁴ However, employees did not believe that this option of “talent mobility”¹⁶⁵ was sufficient as it “ignore[d] the problem that workers [were] not properly informed of the use of their work.”¹⁶⁶ Nadella said that Microsoft would continue its military contract with HoloLens. “We made a principled decision that we’re not going to withhold technology from institutions that we have elected in democracies to protect the freedoms we enjoy. We were very transparent about that decision and we’ll continue to have that dialogue [with employees].”¹⁶⁷ It is likely the case that Microsoft’s management team made its decision based on a business calculation of how much influence this particular subset of employees had.¹⁶⁸ Perhaps Microsoft, and other companies that find themselves in similar situations, can more effectively address controversial projects by engaging in a dialogue with their employees about their concerns. For example, Microsoft could consider employee feedback or implementing a policy that would be enforced by an independent ethics board.

C. Censorship

In 2010, Google left China. Sergey Brin, one of the co-founders of Google, explained at the time that Google withdrew from China because it “objected to the country’s ‘totalitarian’ policies when it came to censorship, political speech and internet communications.”¹⁶⁹ In August 2018, however, employees discovered that Google planned to return to China under Project Dragonfly.¹⁷⁰ In response, over one

¹⁶⁴ See Smith, *supra* note 155. (“As is always the case, if our employees want to work on a different project or team—for whatever reason—we want them to know we support talent mobility.”).

¹⁶⁵ See Brustein & Bass, *supra* note 158.

¹⁶⁶ *Id.*

¹⁶⁷ Nick Bastone, *Despite Internal Uproar, Microsoft CEO Satya Nadella Says the Company Is Not Cancelling Its Contract with the US Army*, BUS. INSIDER (Feb. 25, 2019, 4:37 PM), <https://www.businessinsider.com/nadella-says-microsoft-will-not-withdraw-from-us-army-hololens-contract-2019-2> [<https://perma.cc/QV7N-8ZRT>].

¹⁶⁸ *Id.*

¹⁶⁹ Conger & Wakabayashi, *Google Employees Protest*, *supra* note 135; Ben Worthen, *Soviet-Born Brin Has Shaped Google’s Stand on China*, WALL ST. J. (Mar. 12, 2010, 12:01 AM), <https://www.wsj.com/articles/SB10001424052748703447104575118092158730502> [<https://perma.cc/V3TK-JERY>] (explaining that Sergey Brin, one of the co-founders of Google, who was greatly influenced by his time living in a “totalitarian” regime in the Soviet Union, played a role in Google pulling out of China); Steve Lohr, *Interview: Sergey Brin on Google’s China Move*, N.Y. TIMES: BITS (Mar. 22, 2010, 5:37 PM), <https://bits.blogs.nytimes.com/2010/03/22/interview-sergey-brin-on-googles-china-gambit>. [<https://perma.cc/3ZBV-GSJS>].

¹⁷⁰ Conger & Wakabayashi, *Google Employees Protest*, *supra* note 135; see generally Shannon Liao, *China Is Making the Internet Less Free, and US Tech Companies Are Helping*, VERGE (Nov. 2, 2018, 9:00 AM), <https://www.theverge.com/2018/11/2/18053142/china-internet-privacy-censorship-apple-microsoft-google-democracy-report> [<https://perm>

thousand Google employees signed a letter “protesting the company’s efforts to build a censored version of its search engine in China.”¹⁷¹ More specifically, the letter cited the need “for more transparency and consideration of the human rights issues involved, as internet monitoring and collaboration with the Chinese government is used to stifle dissident voices and even put activists’ personal information at risk.”¹⁷² The letter continued, “currently we do not have the information required to make ethically-informed decisions about our work, our projects, and our employment . . . Google employees need to know what we’re building.”¹⁷³ This letter also outlined several steps Google could take to address employee concerns by: allowing employees to take part in ethical reviews of the company’s products, giving employees the ability to appoint external representatives for the purpose of transparency, and publishing an ethical assessment of controversial projects.¹⁷⁴ Ultimately, Google employees resigned.¹⁷⁵ Jack Poulson, who was previously an assistant professor of mathematics at Stanford and worked at Google in their research and machine intelligence department, was one of them.¹⁷⁶ He wrote in his resignation letter, “I view our intent to capitulate to censorship and surveillance demands in exchange for access to the Chinese market as a forfeiture of our values and governmental negotiating position across the globe”¹⁷⁷

In November 2018, over three hundred employees posted an online letter with Amnesty International calling for Google to stop its work on Project Dragonfly.¹⁷⁸

a.cc/ZBR6-9D6B]; Julie Makinen, *Chinese Censorship Costing U.S. Tech Firms Billions in Revenue*, L.A. TIMES (Sept. 22, 2015, 2:00 AM), <https://www.latimes.com/business/la-fi-china-tech-20150922-story.html> [<https://perma.cc/A3RR-734P>].

¹⁷¹ Shannon Liao, *Google Employees Are Protesting the Company’s Secrecy Over Censored Search Engine in China*, VERGE (Aug. 16, 2018, 3:50 PM EDT), <https://www.theverge.com/2018/8/16/17702464/google-search-censorship-china-protest-project-dragonfly>; [<https://perma.cc/CH7N-ZVHQ>]; Julia Carrie Wong, *Google Employees Sign Letter Against Censored Search Engine for China*, GUARDIAN (Nov. 27, 2018, 9:00 AM), <https://www.theguardian.com/technology/2018/nov/27/google-employees-letter-censored-search-engine-china-project-dragonfly> [<https://perma.cc/ZAY7-YTA6>] (“Project Dragonfly . . . would reportedly allow the Chinese government to blacklist certain search terms and control air quality data More than 1,400 Google employees signed an internal petition criticizing the lack of transparency around the project, and at least one employee resigned in protest.”).

¹⁷² Liao, *supra* note 171.

¹⁷³ *Id.*

¹⁷⁴ Conger & Wakabayashi, *Google Employees Protest*, *supra* note 135.

¹⁷⁵ Ryan Gallagher, *Senior Google Scientist Resigns over “Forfeiture of Our Values” in China*, INTERCEPT (Sept. 13, 2018, 9:15 AM), <https://theintercept.com/2018/09/13/google-china-search-engine-employee-resigns/> [<https://perma.cc/WEC9-PLVD>].

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Google Employees Against Dragonfly, *We Are Google Employees. Google Must Drop Dragonfly*, MEDIUM (Nov. 27, 2018), <https://medium.com/@googlersagainstdragonfly/we-are-google-employees-google-must-drop-dragonfly-4c8a30c5e5eb> [<https://perma.cc>

Google is known as a company that “prizes internal transparency but considers leaking information to be not ‘Googley.’”¹⁷⁹ The letter reads in part:

Many of us accepted employment at Google with the company’s values in mind, including its previous position on Chinese censorship and surveillance, and an understanding that Google was a company willing to place its values above its profits. After a year of disappointments including Project Maven, Dragonfly, and Google’s support for abusers, we no longer believe this is the case. This is why we’re taking a stand.

We join with Amnesty International in demanding that Google cancel Dragonfly. We also demand that leadership commit to transparency, clear communication, and real accountability. Google is too powerful not to be held accountable. We deserve to know what we’re building and we deserve a say in these significant decisions.¹⁸⁰

In the end, Google suspended its work on Project Dragonfly.¹⁸¹

D. Gender-Related Issues

Buoyed by the #MeToo Movement, gender issues came to the forefront of the national collective consciousness.¹⁸² Below, this Section discusses the impact of employee-initiated private ordering for mandatory arbitration provisions and salaries.

1. Mandatory Arbitration Provisions

Since 1991, a series of U.S. Supreme Court decisions have increasingly upheld the enforceability of mandatory arbitration agreements as a condition of employment.¹⁸³ In *Gilmer v. Interstate/Johnson Lane*,¹⁸⁴ the U.S. Supreme Court

/P8BH-4XWX].

¹⁷⁹ Wong, *supra* note 171.

¹⁸⁰ Google Employees Against Dragonfly, *supra* note 178.

¹⁸¹ Jen Copestake, *Google China: Has Search Firm Put Project Dragonfly on Hold*, BBC (Dec. 18, 2018), <https://www.bbc.com/news/technology-46604085> [<https://perma.cc/U7AU-UKWZ>]. In contrast to Google, Facebook employees have stayed largely silent in the wake of criticism that has been leveled against the company regarding its censorship. Will Oremus, *Where’s the Facebook Walkout?*, SLATE (Nov. 28, 2018, 11:52 PM), <https://slate.com/technology/2018/11/facebook-workers-should-speak-up-about-their-company-right-now.html> [<https://perma.cc/2NRV-2VBF>].

¹⁸² Jennifer S. Fan, *Innovating Inclusion: The Impact of Women on Private Company Boards*, 46 FLA. ST. U. L. REV. 345, 347–48 (2019).

¹⁸³ 2018 COLVIN STUDY, *supra* note 3, at 3.

¹⁸⁴ 500 U.S. 20, 26–27 (1991) (holding that age discrimination claim was subject to compulsory arbitration pursuant to arbitration agreement).

held that mandatory arbitration agreements were enforceable. Then, in 2011 and 2013, respectively in *AT&T Mobility LLC v. Concepcion*¹⁸⁵ and *American Express Co. v. Italian Colors Restaurant*,¹⁸⁶ the U.S. Supreme Court held that class action waivers in mandatory arbitration agreements were enforceable in a broad manner. The practical implication of these cases is that businesses can use mandatory arbitration agreements to shield themselves from court cases for both individual and class action claims.

Research related to mandatory arbitration provisions demonstrates the correlation between these decisions and the increase in such provisions.¹⁸⁷ Workers subject to mandatory arbitration agreements increased from a little over 2 percent in 1992 to nearly a quarter of the workforce by the early 2000s.¹⁸⁸ A recent survey of nonunion, private-sector employers regarding mandatory employment arbitration found that the number of workers subject to mandatory arbitration has risen to over 55%—nearly doubling in less than two decades.¹⁸⁹ Of that number, 30.1% are also subject to class action waivers.¹⁹⁰ For companies that have 1,000 or more employees, the number of workers required to sign mandatory arbitration provisions is even higher—65.1%.¹⁹¹ Of those who sign these mandatory arbitration provisions, 41.1% have also waived their right to class action claims.¹⁹² “Research has found that employees are less likely to win arbitration cases and are more likely to recover

¹⁸⁵ 563 U.S. 333, 352 (2011) (holding that Federal Arbitration Act preempted judicial rule concerning unconscionability of class arbitration waivers in consumer contracts).

¹⁸⁶ 570 U.S. 228, 233, 235–36 (2013) (holding that exception to enforcement of arbitration agreements under Federal Arbitration Act did not apply to merchants’ contractual waiver of class arbitration).

¹⁸⁷ See 2018 COLVIN STUDY, *supra* note 3, at 3–4. A 1995 GAO survey found that 7.6% of employers had used mandatory arbitration agreements and that it “was mandatory for all covered employees for about one-fourth to one-half of the employers using this approach.” U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-95-150, EMPLOYER DISCRIMINATION: MOST PRIVATE SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION 227, 21 (1995), <http://www.gao.gov/archive/1995/he95150.pdf> [<https://perma.cc/8H3Z-8P8Z>]. The actual percentage of employers using arbitration according to the original report was 9.9%, but that number was later revised to 7.6% upon adjustment for erroneous responses. See 2018 COLVIN STUDY, *supra* note 3, at 14 n.7.

¹⁸⁸ 2018 COLVIN STUDY, *supra* note 3, at 4.

¹⁸⁹ *Id.* at 2 (“Extrapolating to the overall workforce, this means that 60.1 million American workers no longer have access to the courts to protect their legal employment rights and instead must go to arbitration.”). Of nonunion private sector employers, 53.9% have a mandatory arbitration agreement, representing a 600% increase between 1994 and 2017. See Heidi Shierholz & Celine McNicholas, *The Supreme Court Is Poised to Make Forced Arbitration Nearly Inescapable*, ECON. POL’Y INST., WORKING ECON. BLOG (May 7, 2018, 1:24 PM), <https://www.epi.org/blog/the-supreme-court-is-poised-to-make-forced-arbitration-nearly-inescapable> [<https://perma.cc/QNT8-KSMU>].

¹⁹⁰ 2018 COLVIN STUDY, *supra* note 3, at 11.

¹⁹¹ *Id.* at 6.

¹⁹² *Id.* at 11.

lower damages in arbitration than in the courts.”¹⁹³ In addition, only one in 10,400 employees who were subject to mandatory arbitration procedures filed a claim each year.¹⁹⁴ As Professor Cynthia Estlund observed, “The private and contractual nature of arbitration makes it relatively easy for firms to prevent disclosure of just about anything concerning allegations, evidence, disposition, or settlement of the disputes, not just by parties but by the tribunals themselves.”¹⁹⁵

The elimination of mandatory arbitration for sexual misconduct claims became a lightning rod for action in the wake of the #MeToo Movement.¹⁹⁶ In December 2017, Microsoft ended its practice of mandatory arbitration for sexual harassment claims.¹⁹⁷ Uber and Lyft, both unicorns (private companies valued at \$1 billion or more),¹⁹⁸ did the same in May 2018.¹⁹⁹ Ultimately, it was not the boards of high

¹⁹³ *Id.* at 3.

¹⁹⁴ *Id.* at 11–2 (“Mandatory employment arbitration has expanded to the point where it has now surpassed court litigation as the most common process through which the rights of American workers are adjudicated and enforced.”).

¹⁹⁵ Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 680–81 (2018).

¹⁹⁶ See Kate Gibson, *Tech Signals End of Forced Arbitration for Sexual Misconduct Claims*, CBS NEWS: MONEYWATCH (Nov. 16, 2018, 7:29 AM), <https://www.cbsnews.com/news/tech-signals-end-of-forced-arbitration-for-sexual-misconduct-claims/> [<https://perma.cc/4PPF-389U>].

¹⁹⁷ Nick Wingfield & Jessica Silver-Greenberg, *Microsoft Moves to End Secrecy in Sexual Harassment Claims*, N.Y. TIMES (Dec. 19, 2017), <https://www.nytimes.com/2017/12/19/technology/microsoft-sexual-harassment-arbitration.html> [<https://perma.cc/87U5-GFG8>]. Microsoft also supported a proposed federal law that would eliminate such agreements. *Id.*; see Restoring Justice for Workers Act, H.R. 7109, 115th Cong. (2018). Professor Alexander J.S. Colvin, who specializes in industrial and labor relations at Cornell University, analyzed 3,945 employment cases decided by arbitrators from one of the largest arbitration firms in the United States and found that in cases where companies had only one case before an arbitrator, plaintiffs prevailed in 31% of arbitration cases; the rate of plaintiff success was significantly lower when companies had multiple cases before the same arbitrator. Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEG. STUDIES 1, 1, 19 (2011); see also Alexander J. S. Colvin & Mark D. Gough, *Individual Employment Rights Arbitration in the United States*, 68 INDUS. & LAB. REL. REV. 1019 (2015) (finding arbitration win rates for employers are positively correlated with employer size, repeated use of the same arbitrator, female arbitrators, and arbitrators with more professional arbitration experience); Alexander J. S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71 (2014) (examining the operation of mandatory arbitration agreements with respect to employees’ access to legal recourse).

¹⁹⁸ Jennifer S. Fan, *Regulating Unicorns: Disclosure and the New Private Economy*, 57 B.C. L. REV. 583, 584 (2016).

¹⁹⁹ Uber eliminated mandatory arbitration agreements for employees, riders, and drivers who make harassment or sexual assault claims against it. Furthermore, Uber committed to a safety transparency report for rides, deliveries, as well as incidents before pickup and after drop-off; it is collaborating with eighty women’s groups to develop the incident reporting

technology companies that took the initiative to address sexual harassment, but rather it was the employees who prodded the companies to action.²⁰⁰ In the case of Uber, Susan Fowler, a former employee of the company, brought attention to the culture of rampant sexual misconduct at the company when she wrote a blog post that went viral.²⁰¹ In the blog post, she dispassionately but effectively discussed the difficult work environment she faced.²⁰² Coupled with other issues at Uber and in the wake of the #MeToo Movement, Uber ultimately made the decision to discontinue its customary legal practice of mandatory arbitration provisions in the context of sexual harassment allegations.²⁰³

At Google, alleged sexual misconduct allegations against prominent leaders of the company culminated in the Google Walkout, which was described as “an unprecedented event in the tech industry, where workers historically refrain from protesting against their employers—let alone in such a visceral and public

system that will generate data for the report. Daisuke Wakabayashi, *Uber Eliminates Forced Arbitration for Sexual Misconduct Claims*, N.Y. TIMES (May 15, 2018), <https://www.nytimes.com/2018/05/15/technology/uber-sex-misconduct.html>. [<https://perma.cc/WJ9X-SPJP>] [hereinafter Wakabayashi, *Uber Eliminates Forced Arbitration*]. A few hours after Uber’s announcement that it would no longer require mandatory arbitration agreements, Uber’s rival, Lyft, also announced that it would waive mandatory arbitration agreements for sexual misconduct claims against Lyft. Like Uber, Lyft waived the confidentiality requirements for those who settled such claims with it. Sara Ashley O’Brien, *Lyft Joins Uber to End Forced Arbitration for Sexual Assault Victims*, CNN BUS. (May 15, 2018, 3:03 PM), <https://money.cnn.com/2018/05/15/technology/lyft-forced-arbitration/index.html> [<https://perma.cc/XSY3-2S84>].

²⁰⁰ See, e.g., Johana Bhuiyan, *With Just Her Words, Susan Fowler Brought Uber to Its Knees*, RECODE (Dec. 6, 2017, 5:16 PM), <https://www.recode.net/2017/12/6/16680602/susan-fowler-uber-engineer-recode-100-diversity-sexual-harassment> [<https://perma.cc/89KU-NUU5>] (Uber employee first shed light on rampant culture of sexual harassment at Uber, eventually leading to a report by former U.S. Attorney General Eric Holder and ouster of then-CEO Travis Kalanick). Microsoft’s announcement that it was ending its policy of having harassment victims’ claims heard in arbitration came five days after Bloomberg reported on Microsoft’s mishandling of an intern’s rape case. Susan Antilla, *Google and Facebook Ended Mandatory Arbitration for Sexual Harassment Claims. Will Workers Outside the Tech Industry Benefit?*, THE INTERCEPT (Nov. 21, 2018, 9:59 AM), <https://theintercept.com/2018/11/21/google-sexual-harassment-arbitration/> [<https://perma.cc/Z7RD-MLZR>]; Karen Weise et al., *Microsoft Intern’s Rape Claim Highlights Struggle to Combat Sex Discrimination*, BLOOMBERG (Dec. 14, 2017, 9:58 AM), <https://www.bloomberg.com/news/articles/2017-12-14/microsoft-intern-s-rape-claim-highlights-struggle-to-combat-sex-discrimination> [<https://perma.cc/2CJT-JR9E>].

²⁰¹ Susan Fowler, *Reflecting on One Very, Very Strange Year at Uber*, SUSAN FOWLER BLOG (Feb. 19, 2017), <https://www.susanjowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber> [<https://perma.cc/X44B-D5LZ>].

²⁰² *Id.*

²⁰³ Wakabayashi, *Uber Eliminates Forced Arbitration*, *supra* note 199.

display.”²⁰⁴ It may even serve as a playbook for other high technology companies. Professor Paul Saffo of Stanford University noted, “[t]his is a watershed moment . . . It’s not going to calm down. If anything, it’s going to get more intense.”²⁰⁵ Although a causal link cannot be proved between the walkout and Google’s decision to eliminate its mandatory arbitration provisions for sexual misconduct, there is a correlation between the growing market power of highly skilled technology employees and the rate at which corporate policies align with such employees’ values.²⁰⁶

These actions by Google reverberated throughout the technology industry.²⁰⁷ Facebook followed suit the day after, eliminating its mandatory arbitration provisions.²⁰⁸ Square, Airbnb, and eBay soon added their names to the list of companies that took similar action.²⁰⁹

²⁰⁴ Richard Nieva, *Google Workers Found Voice in Protest this Year. There’ll Likely Be More of That*, CNET (Dec. 23, 2018, 5:00 AM), <https://www.cnet.com/news/google-workers-found-voice-in-protest-this-year-there-will-likely-be-more/> [<https://perma.cc/MT8H-BSDE>].

²⁰⁵ *Id.*

²⁰⁶ *See supra* notes 18–60 and accompanying text.

²⁰⁷ Kate Clark, *Airbnb Ends Forced Arbitration Days After Google, Facebook Did the Same*, TECHCRUNCH (Nov. 12, 2018, 2:49 PM), <https://techcrunch.com/2018/11/12/airbnb-ends-forced-arbitration-days-after-google-facebook-did-the-same/> [<https://perma.cc/3LW3-254A>]. Note that in the United States, the majority of low-wage workers are women; however, the changes that tech workers advocated for did not reach low- to middle-income workers. Celine McNicholas, *Ending Individual Mandatory Arbitration Alone Fails Most Workers: For Real Worker Power, End the Ban on Class and Collective Action Lawsuits*, ECON. POL’Y INST. WORKING ECON. BLOG (May 16, 2018, 2:11 PM), <https://www.epi.org/blog/ending-individual-mandatory-arbitration-alone-fails-most-workers-for-real-worker-power-end-the-ban-on-class-and-collective-action-lawsuits/> [<https://perma.cc/2QH5-ZGWL>].

²⁰⁸ Douglas MacMillan, *Facebook to End Forced Arbitration for Sexual-Harassment Claims*, WALL ST. J. (Nov. 9, 2018, 4:35 PM), <https://www.wsj.com/articles/facebook-to-end-forced-arbitration-for-sexual-harassment-claims-1541799129> [<https://perma.cc/HA8B-NP6Z>].

²⁰⁹ Davey Alba & Caroline O’Donovan, *Square, Airbnb, and eBay Just Said They Would End Forced Arbitration for Sexual Harassment Claims*, BUZZFEED NEWS (Nov. 15, 2018, 5:51 PM), <https://www.buzzfeednews.com/article/daveyalba/tech-companies-end-forced-arbitration-airbnb-ebay> [<https://perma.cc/6AYY-XMAF>]. Square is a payment processing company. *See* SQUARE, <https://squareup.com/> [<https://perma.cc/QL7M-8TKD>] (last visited Jan. 17, 2019). Airbnb is a platform company that allows people to rent out their properties or spare rooms. *See* AIRBNB, <https://www.airbnb.com> [<https://perma.cc/H2VY-6YE4>] (last visited Jan. 17, 2019). eBay is an online marketplace. *See* EBAY, <https://www.ebay.com/> [<https://perma.cc/59EL-35MK>] (last visited Jan. 17, 2019). Airbnb also stated that the company would also “not require our employees to use arbitration in cases involving discrimination in the workplace” Gibson, *supra* note 196. Notably, other than Square, all of the companies mentioned in this section are consumer-facing (rather than business-to-business). This may be entirely a coincidence or perhaps reputational concerns

Employees have also been instrumental in extending the battle against mandatory arbitration provisions to discrimination claims.²¹⁰ Under pressure from

raised by these employee movements where the company is more consumer-facing amplifies the negotiating power of the employees.

Not all companies responded similarly. Slack stated that it was “‘undertaking a careful review’ of its policies” but “did not commit to stop require[ed] arbitration for sexual harassment claims”; Netflix and Tesla declined to comment; and Snap, Spotify, and Palantir did not respond to survey reporters’ inquiries regarding mandatory arbitration agreements. Alba & O’Donovan, *supra* note 209. Slack is a cloud-based team collaboration company. SLACK, <https://slack.com/> [<https://perma.cc/QXW6-GZJH>] (last visited Feb. 16, 2019). Netflix is a technology-driven media services company. See NETFLIX, <https://www.netflix.com/> [<https://perma.cc/3D6H-7QSP>] (last visited Feb. 16, 2019). Tesla is an automotive, renewable energy, and power storage company. See TESLA, <https://www.tesla.com/> [<https://perma.cc/ZX2H-THBD>] (last visited Feb. 16, 2019). Snap is a social media platform and camera company. See SNAP, <https://www.snap.com/en-US/> [<https://perma.cc/2TMC-MLRN>] (last visited Feb. 16, 2019). Spotify is a music and podcast streaming platform. See SPOTIFY, <https://www.spotify.com/us/> [<https://perma.cc/4P7J-744G>] (last visited Feb. 16, 2019). Palantir is a software and data analytics company. See PALANTIR, <https://www.palantir.com/> [<https://perma.cc/F6YU-P2M5>] (last visited Feb. 16, 2019).

Apple issued a statement that it had ended its arbitration requirement earlier in 2018; Pinterest, Reddit, Twitter, Salesforce, Amazon, Intel, IBM, and Oath (parent company of Yahoo, Tumblr, AOL, and HuffPost) said they had never required arbitration for harassment claims. Alba & O’Donovan, *supra* note 209. Apple is a consumer electronic device and technology company. See APPLE, <https://www.apple.com/> [<https://perma.cc/W47S-K6WL>] (last visited Feb. 16, 2019). Pinterest is a social media and image-based web surfing company. See PINTEREST, <https://help.pinterest.com/en/guide/all-about-pinterest> [<https://perma.cc/CM4A-3VSN>] (last visited Dec. 3, 2019). Reddit is a user-driven news and discussion website. See REDDIT, <https://www.reddit.com/> [<https://perma.cc/HUR9-N8K2>] (last visited Feb. 16, 2019). Twitter is a user-driven news and social networking service. See TWITTER, <https://twitter.com/> [<https://perma.cc/UJ5P-8MBM>] (last visited Feb. 16, 2019). Salesforce is a cloud-based software and enterprise customer relation management company. See SALESFORCE, <https://www.salesforce.com/> [<https://perma.cc/E566-3NVC>] (last visited Feb. 16, 2019). Amazon is an e-commerce, cloud computing, and artificial intelligence company. See AMAZON, <https://www.amazon.com/> [<https://perma.cc/7E92-LBWV>] (last visited Feb. 16, 2019). Intel is a semiconductor and precision computing device company. See INTEL, <https://www.intel.com/content/www/us/en/homepage.html> [<https://perma.cc/X6QC-V9BZ>] (last visited Feb. 16, 2019). IBM is an information technology company. See IBM, <https://www.ibm.com/us-en/?lnk=m> [<https://perma.cc/X2XS-4UEH>] (last visited Feb. 16, 2019). Oath (renamed “Verizon Media” in January 2019) is a subsidiary of Verizon Communications and an umbrella company to various digital news and social media platforms. See OATH, <https://www.oath.com/> [<https://perma.cc/E925-LHLS>] (last visited Feb. 16, 2019).

²¹⁰ See Michelle Cheng, *Google Workers Launch Social Media Campaign to Pressure Employers to Drop Forced Arbitration*, INC. (Feb. 3, 2019), <https://www.inc.com/michelle-cheng/google-employees-social-media-campaign-protest-forced-arbitration.html> [<https://>

employees, Google announced in February 2019 that it was ending all mandatory arbitration for cases of harassment as well as discrimination, effective March 21, 2019.²¹¹ Google joined Airbnb and Microsoft as one of the few high technology companies that have eliminated forced arbitration for discrimination cases as well as those involving sexual misconduct.²¹²

2. Salaries

In 2015, a now-former employee of Google started a self-reported Google salary spreadsheet to help co-workers negotiate better salaries.²¹³ The spreadsheet included levels one through six of Google's job hierarchy, which would include entry-level data center workers to experienced engineers; it did not include top-level engineers or company executives.²¹⁴ The spreadsheet indicated that female employees were paid less than male employees with the disparity continuing as women are promoted.²¹⁵

Eventually, Google's alleged gender disparities in pay came to the attention of the U.S. Department of Labor. In a routine audit of Google to check if the company complied with nondiscrimination and affirmative action statutes, Google turned over a "snapshot" of employment data for approximately 21,000 workers at its Mountain View, California headquarters. The U.S. Department of Labor found "systemic compensation disparities against women pretty much across the entire

perma.cc/6K9X-TUJK] ("The group called on Google and other tech companies—including Netflix, Uber, and Adecco—to change their policies in three ways: make arbitration optional for all types of disputes, not just for employees but also for contractors and vendors; end all class-action waivers that prohibit employees from filing lawsuits together; and eliminate gag rules on arbitration policies.").

²¹¹ See David McCabe, *Under Pressure, Google to End Mandatory Arbitration for Employees*, AXIOS (Feb. 21, 2019), <https://www.axios.com/google-ends-forced-arbitration-1550776687-85b148b6-1469-4c1c-b76e-de774b248e40.html> [https://perma.cc/68W6-M48Q]; Sara Ashley O'Brien, *Google Eliminating Controversial Forced Arbitration Practice*, CNN (Feb. 21, 2019, 8:10 PM), <https://www.cnn.com/2019/02/21/tech/google-mandatory-arbitration/index.html> [https://perma.cc/7HJG-3TY3].

Eighty Google employees signed and published a public letter calling for Google to end all mandatory agreements. See *End Forced Arbitration, 2019 Must Be the Year to End Forced Arbitration*, MEDIUM (Dec. 10, 2018), <https://medium.com/@endforcedarbitration/2019-must-be-the-year-to-end-forced-arbitration-f4f6833abef7> [https://perma.cc/7EKU-QGZY].

²¹² See Melanie Ehrenkranz, *After Google's Historic Walkout, One of Tech's Big Problems Is Still Being Ignored*, GIZMODO (Nov. 21, 2018, 1:12 PM), <https://gizmodo.com/after-googles-historic-walkout-one-of-techs-big-proble-1830475605> [https://perma.cc/SP6K-77XT].

²¹³ Wakabayashi, *Employee-Led Effort*, *supra* note 97.

²¹⁴ *Id.*

²¹⁵ *Id.* Note that this spreadsheet is not comprehensive; it is a snapshot of salary information at Google. *Id.* Through shareholder efforts, Apple, Amazon.com, and Microsoft already disclose what women earn compared with their male counterparts. *Id.*

workforce.”²¹⁶ In 2017, Google claimed that the salary records the U.S. Department of Labor had requested in connection with the government’s discrimination case were “too financially burdensome and logistically challenging to compile and hand over.”²¹⁷

Google stated that it had spent \$270,000 to correct “minor pay discrepancies.”²¹⁸ However, eleven percent of Google employees were left out of the analysis.²¹⁹ The company was also continuously dogged by claims of unequal pay related to gender. Four former Google employees, who had various roles in the company, filed a lawsuit alleging gender-based pay disparities.²²⁰ Although it remains to be seen what the direct effect of gathering this information will be on employee-initiated private ordering, a decrease in information asymmetries and the availability of hard data may make it easier for workers to organize for and demand change.

E. Immigration

On March 6, 2018, Salesforce.com, Inc. (“Salesforce”) announced that its cloud computing and analytics platform was selected by the U.S. Customs and Border Protection (“CBP”)—“the largest federal law enforcement agency of the U.S. Department of Homeland Security”—“to modernize its recruiting process, from hire to retire, and manage border activities and digital engagement with citizens.”²²¹ Following this selection, 650 Salesforce employees signed a letter criticizing the

²¹⁶ Nitasha Tiku, *Google Deliberately Confuses Its Employees, Fed Says*, WIRED (July 25, 2017, 3:21 PM), <https://www.wired.com/story/google-department-of-labor-gender-pay-lawsuit/> [<https://perma.cc/E5W4-X333>].

²¹⁷ Sam Levin, *Accused of Underpaying Women, Google Says it’s Too Expensive to Get Wage Data*, GUARDIAN (May 26, 2017, 5:49 PM), <https://www.theguardian.com/technology/2017/may/26/google-gender-discrimination-case-salary-records> [<https://perma.cc/VGW5-RUEN>]. “As a federal contractor, Google is required to comply with equal opportunity laws and allow investigators to review records.” *Id.*; see also *Complaint for Denial of Access to Records*, at 2–4, *Office of Fed. Contract Compliance Programs v. Google*, OFCCP No. R00197955 (Jan. 4, 2017).

²¹⁸ Eva Short, *Google Claims to Have Closed Its Gender Pay Gap, but There’s a Twist*, SILICON REPUBLIC (Mar. 16, 2018), <https://www.siliconrepublic.com/careers/google-gender-pay-gap> [<https://perma.cc/4VBD-JBCA>].

²¹⁹ The individuals in this eleven percent may be some of the most highly compensated individuals in the company making them statistically relevant according to some. *Id.*

²²⁰ First Amended Class Action Complaint, *Ellis v. Google*, No. CGC 17561299, 2018 WL 1858814 (Cal. Super. Ct. Jan. 3, 2018); see also Sara Ashley O’Brien, *Google Hit with Revised Gender Pay Lawsuit*, CNN (Jan. 3, 2018, 7:57 PM), <https://money.cnn.com/2018/01/03/technology/google-gender-pay-lawsuit-revised/index.html> [perma.cc/H6ET-M9QD].

²²¹ *U.S. Customs and Border Protection Agency Selects Salesforce as Digital Modernization Platform*, SALESFORCE (Mar. 6, 2018), <https://investor.salesforce.com/press-releases/press-release-details/2018/US-Customs-and-Border-Protection-Agency-Selects-Salesforce-as-Digital-Modernization-Platform/default.aspx> [<https://perma.cc/J8W7-BPVZ>].

contract.²²² Despite the vocal dissent of some employees, Marc Benioff, Chief Executive Officer of Salesforce, argued that while he was personally opposed to the policy of separating children from their families at the border, Salesforce products were not directly involved in such familial separations.²²³ Protests followed.²²⁴ Possibly in response to the poor reception it received in the wake of its partnership with CBP, Salesforce created the first-ever Office of Ethical and Humane Use of Technology to help address ethical issues that originate from new technological developments.²²⁵ At Microsoft, a similar scenario played out. On June 19, 2018 over 100 employees signed an open letter addressed to CEO Satya Nadella, which was posted on Microsoft's internal message board.²²⁶ The employees were protesting the

²²² Patrick Chu, *Salesforce Ohana Asks Marc Benioff to Cancel Contract with the Border Patrol*, SAN FRAN. BUS. TIMES (June 26, 2018, 10:35 AM), <https://www.bizjournals.com/sanfrancisco/news/2018/06/26/salesforce-ohana-asks-benioff-to-nix-fed-contract.html> [<https://perma.cc/7WPE-NVKT>] (“Given the inhumane separation of children from their parents currently taking place at the border, we believe that our core value of Equality is at stake and that Salesforce should reexamine our contractual relationship with CBP and speak out against its practices[.]”). Some students at Stanford University also signed a petition requesting that Salesforce drop its contract with CBP. If they did not terminate said contract, the students threatened to not interview for jobs at Salesforce. Sean Captain, *Stanford Students Are Vowing Not to Work at Salesforce over Its Border Patrol Deal*, FAST COMPANY (Nov. 14, 2018), <https://www.fastcompany.com/90267905/stanford-students-are-vowing-not-to-work-at-salesforce-over-its-border-patrol-deal> [<https://perma.cc/AGP5-PVDY>]. A Texas nonprofit, Refugee and Immigrant Center for Education and Legal Services, turned down a \$250,000 donation from Salesforce in light of its CBP contract. Laura Sydell, *Immigrant Rights Group Turns Down \$250,000 from Tech Firm over Ties to Border Patrol*, NPR (July 19, 2018, 12:00 PM), <https://www.npr.org/2018/07/19/630358800/immigrant-rights-group-turns-down-250-000-from-tech-firm-over-ties-to-border-pat> [<https://perma.cc/42XZ-7Y4C>].

²²³ Tom McKay, *Salesforce CEO Says It Won't Sever Ties with Custom and Border Protection*, GIZMODO (June 28, 2018, 1:00 AM), <https://gizmodo.com/salesforce-ceo-says-they-wont-sever-ties-with-customs-a-1827195457> [<https://perma.cc/6E58-RFJR>].

²²⁴ Katie Canales, *Activists Marched Outside of the Salesforce Headquarters in San Francisco to Protest the Company's Contract with U.S. Customs and Border Protection*, BUS. INSIDER (July 9, 2018, 6:02 PM), <https://www.businessinsider.com/salesforce-protest-contract-customs-border-protection-san-francisco-2018-7> [<https://perma.cc/PP76-Z8BR>] (reporting that tech workers and community activists protested Salesforce's contract with CBP).

²²⁵ Minda Zetlin, *Salesforce Employees Objected to Its Immigration Work. CEO Marc Benioff's Response Was Brilliant*, INC. (Nov. 26, 2018), <https://www.inc.com/minda-zetlin/salesforce-ethical-humane-office-marc-benioff-kara-swisher-employee-activism.html> [<https://perma.cc/7G45-JET9>].

²²⁶ Sheera Frenkel, *Microsoft Employees Protest Company's Work with ICE*, SEATTLE TIMES (June 19, 2018, 5:21 PM), <https://www.seattletimes.com/business/microsoft-employees-protest-companys-work-with-ice/> [<https://perma.cc/9KJR-P7JV>]. Eventually, over 300 employees signed the letter. Colin Lecher, *The Employee Letter Denouncing Microsoft's ICE Contract Now Has over 300 Signatures*, VERGE (June 21, 2018, 1:18 PM),

company's \$19.4 million contract with ICE because the agency had been separating migrant parents from their children at the U.S.-Mexico border.²²⁷ The letter stated: "We believe that Microsoft must take an ethical stand, and put children and families above profits."²²⁸ Employees questioned how working with ICE could comport with the company's ethical stances.²²⁹

Microsoft responded, "Microsoft is dismayed by the forcible separation of children from their families at the border . . . We urge the administration to change its policy and Congress to pass legislation ensuring children are no longer separated from their families."²³⁰ In an internal memo to employees, Mr. Nadella stated, "Microsoft is not working with the U.S. government on any projects related to separating children from their families at the border. Our current cloud engagement with U.S. ICE is supporting legacy mail, calendar, messaging and document management workloads."²³¹ Microsoft's relationship with ICE is ongoing.

In the cases of both Salesforce and Microsoft, employee-initiated private ordering in the form of written advocacy did not have the desired effect. In these particular instances, there was an ethical component to employees' concerns. However, the management of each company ultimately decided to keep the contracts.

IV. NORMATIVE CONCERNS AND GUIDING PRINCIPLES

This Part addresses normative concerns related to employee-initiated private ordering. How exactly do private rules established by employees play out, and how should they be addressed? In light of their unique and highly sought-after skill sets, these employees used to believe that their work was innovative with the potential to

<https://www.theverge.com/2018/6/21/17488328/microsoft-ice-employees-signatures-protest> [<https://perma.cc/6QRK-2UBT>].

²²⁷ Frenkel, *supra* note 226.

²²⁸ *Id.*

²²⁹ *See id.* (stating that some employees called for Microsoft to not only cancel its contract with ICE but also refuse to work with those "who violate international human rights law").

²³⁰ Dina Bass & Mark Bergen, *Microsoft Opposes ICE Policy on Migrant Children*, SEATTLE TIMES (June 18, 2018, 3:44 PM), <https://www.seattletimes.com/business/microsoft-opposes-ice-policy-on-migrant-children/> [<https://perma.cc/MK48-NBCN>].

²³¹ *See* Warren, *supra* note 145. Mr. Nadella went on to state

Microsoft has a long history of taking a principled approach to how we live up to our mission of empowering every person and every organization on the planet to achieve more with technology platforms and tools, while also standing up for our enduring values and ethics. . . . Any engagement with any government has been and will be guided by our ethics and principles. We will continue to have this dialogue both within our company and with our stakeholders outside.

Id.

change the world in a positive way. However, some of these employees discovered that their respective companies' decision-making process did not necessarily include their input. If they had, private ordering as currently understood could work as it had always worked: management and investors would make the decisions and employees would help to implement their collective vision of the company. As illustrated in the case studies above, however, once employees realized that their respective companies engaged in behavior that did not align with what they thought were the companies' values (or their own), or made decisions that they deemed unethical, employees upended the private ordering system. In light of the importance of these employees to their companies, and the fact that they were difficult and expensive to replace given their specialized skill set, these employees' concerns could not be easily dismissed. In addition, if the employees decided to disseminate their viewpoints to the public through the use of open letters, walkouts, and the like, company executives would need to take notice and respond.

Typically, the success of private ordering is viewed through the lens of economic efficiency.²³² In the case of employee-initiated private ordering, however, as employee norms rooted in equity, ethics, and other values have emerged, the focus is less on purely financial optimality and more on the integration of employees' norms within the profit-maximization calculus. Employees may want to know that they are not contributing to an unethical outcome; companies may find that town halls are cheaper than walkouts. In response to employee-initiated private ordering, companies have responded in different ways. In order to allay employee concerns, some companies have developed a set of principles to guide their decision-making process.²³³ Other companies have acknowledged their employees' concerns and have withdrawn from controversial projects. Still, others have noted their employees' concerns, but have not acted upon them. In short, the norms and values of highly skilled and difficult-to-replace employees may be forcing companies to consider social externalities resulting from their business models, products, and customers.

But all of this information also begs the question: is it appropriate for these employees to be a force in the corporate governance context? Should there be limits to what employees can weigh in on? For example, should employees only be able to advocate for issues that impact them personally, such as their salaries? Or is it okay for employees to speak out on social issues generally, such as climate change or immigration policy?

In the sections that follow, this Part suggests a few ways that companies can put their investors on notice of these employee-initiated private ordering endeavors and incorporate the values of equity and ethics. This Part also discusses how employees can work with their respective companies to change existing practices and implement new legal norms where it is prudent to do so. Lastly, this Part

²³² Avery Katz, *Taking Private Ordering Seriously*, 144 U. PA. L. REV. 1745, 1745 (1996).

²³³ *Artificial Intelligence at Google*, *supra* note 136.

discusses some of the questions which will inevitably arise if employee-initiated private ordering is here to stay.

A. The Role of Public Company Reporting Obligations

Some companies already acknowledge the impact of social dynamics in their “Risk Factors” or “Our Business” sections. For example, Alphabet disclosed the following in its Form 10-K for the year ended December 31, 2018:

We are subject to increasing regulatory scrutiny as well as changes in public policies governing a wide range of topics that may negatively affect our business.

Changes in social, political, and regulatory conditions or in laws and policies governing a wide range of topics may cause us to change our business practices. Further, our expansion into a variety of new fields also raises a number of new regulatory issues. These factors could negatively affect our business and results of operations in material ways.²³⁴

The “Risk Factors” sections in quarterly (Form 10-Q)²³⁵ and annual (Form 10-K)²³⁶ reports may provide one avenue to more specifically address the potential impact of employee-initiated private ordering. Under Item 105 of Regulation S-K,²³⁷ high technology public companies could describe the impact employee-initiated private ordering has on their respective companies. One way to convey this type of information as a risk factor is as follows:

We are subject to increasing employee actions on a wide range of topics that may negatively affect our business.

Changes in social, political, and regulatory conditions, business practices, or in laws and policies governing a wide range of topics may

²³⁴ Alphabet Form 10-K, *supra* note 53, at 7–8.

²³⁵ See U.S. SEC. & EXCH. COMM’N, FORM 10-Q: GENERAL INSTRUCTIONS (2018), <https://www.sec.gov/about/forms/form10-q.pdf> [<https://perma.cc/D6T2-LZCB>].

²³⁶ See U.S. SEC. & EXCH. COMM’N, FORM 10-K: GENERAL INSTRUCTIONS (2018), <https://www.sec.gov/about/forms/form10-k.pdf> [<https://perma.cc/J6UK-LMFV>].

²³⁷ Item 503(c) of Regulation S-K reads in part:

(c) Risk factors. Where appropriate, provide under the caption “Risk Factors” a discussion of the most significant factors that make the offering speculative or risky. This discussion must be concise and organized logically. Do not present risks that could apply to any issuer or any offering. Explain how the risk affects the issuer or the securities being offered. Set forth each risk factor under a subcaption that adequately describes the risk.

cause our employees to take action to bring these issues to our attention ranging from letter writing advocacy to shareholder proposals to walkouts. Depending on the action, these employee-initiated actions may negatively affect our business and results of operations in material ways.

The Human Capital Management Coalition, which is comprised of 25 institutional investors with more than \$2.8 trillion in assets under management, requested the U.S. Securities and Exchange Commission (“SEC”) adopt rules requiring “issuers to disclose information about their human capital management policies, practices and performance”²³⁸ in a petition for rulemaking in July 2017. This then led to recommendations from the SEC’s Investor Advisory Committee in March 2019, stating:

As the U[.]S[.] transitions from being an economy based almost entirely on industrial production to one that is becoming increasingly based on technology and services, it becomes more and more relevant for our corporate disclosure system to evolve to include disclosure regarding intangible assets, such as intellectual property and human capital. Human capital is increasingly conceptualized as an investable asset. Modernizing the [SEC’s] framework for corporate reporting generally should reflect these facts, subject to the standard of materiality.²³⁹

The Investor Advisory Committee contrasts the financial market’s view of human capital to the SEC’s: the former sees it as a source of value and the latter, as a cost.²⁴⁰ Furthermore, the “available information [about human capital] is not consistent, verified, or comparable across companies. Differences in [human capital management] make existing disclosure requirements, such as the 10-K requirement to disclose the number of employees, difficult for investors to interpret or use.”²⁴¹

SEC Chairman Jay Clayton outlined a set of principles to guide disclosure requirements and disclosure guidance: “(1) materiality; (2) comparability; (3) flexibility; (4) efficiency; and (5) responsibility.”²⁴² Clayton stated his “belie[f] that

²³⁸ MEREDITH MILLER, HUMAN CAPITAL MANAGEMENT COALITION, RULEMAKING PETITION TO REQUIRE ISSUERS TO DISCLOSE INFORMATION ABOUT THEIR HUMAN CAPITAL MANAGEMENT POLICIES, PRACTICES AND PERFORMANCE 1 (July 6, 2017), <https://www.sec.gov/rules/petitions/2017/petn4-711.pdf> [<https://perma.cc/5Y9R-YR28>].

²³⁹ See HUMAN CAPITAL MANAGEMENT DISCLOSURE, RECOMMENDATION OF THE INVESTOR ADVISORY COMMITTEE 1 (Mar. 28, 2019), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/human-capital-disclosure-recommendation.pdf> [<https://perma.cc/7456-FSV5>].

²⁴⁰ *Id.* at 2.

²⁴¹ *Id.*

²⁴² Jay Clayton, *Remarks to the SEC Investor Advisory Committee*, U.S. SEC. & EXCH. COMM’N (Mar. 28, 2019), <https://www.sec.gov/news/public-statement/clayton-remarks-investor-advisory-committee-032819> [<https://perma.cc/WM6G-YJ9N>].

our disclosure requirements and guidance must evolve over time to reflect changes in markets and industry while being true to these principles, which in well-designed rules can be mutually reinforcing.”²⁴³ In particular, Clayton pointed to current human capital disclosure requirements under Items 101 and 102 of Regulation S-K: they “date back to a time when companies relied significantly on plant, property and equipment to drive value. Today, human capital and intellectual property often represent an essential resource and driver of performance for many companies.”²⁴⁴ In addition, Clayton stated, “[t]he strength of our economy and many of our public companies is due, in significant and increasing part, to human capital, and for some of those companies human capital is a mission-critical asset.”²⁴⁵ One way to address such disclosure, as Clayton suggested, is to require a breakdown of a company’s workforce, including how this breakdown implicates the company’s cost and value.²⁴⁶ Information related to key performance indicators, such as turnover, internal hire and promotion rates, diversity data, and the like could be added to the disclosures in the business section of SEC filings.²⁴⁷ This section could also include a summary of material elements of important company policies and a more robust statement on the competitive conditions in a company’s area of business.²⁴⁸ Intel Corporation (“Intel”), a semiconductor company, provides good examples of what types of disclosures to make and how to organize such information.²⁴⁹ When discussing human capital, this Article would also suggest disclosing the potential impact of employee-initiated private ordering on company policies and business and legal practices. This type of disclosure may prove important for future studies, as it may illustrate the breadth and depth of employee-initiated private ordering.

B. Corporate Social Responsibility Reports

Although not required by law, some companies publish yearly corporate social responsibility reports. For example, Intel releases such reports annually.²⁵⁰ Its most recent report covers the period from 2018 to 2019 and includes information on

²⁴³ *Id.*

²⁴⁴ Jay Clayton, *Remarks for Telephone Call with SEC Investor Advisory Committee Members*, U.S. SEC. & EXCH. COMM’N (Feb. 6, 2019), <https://www.sec.gov/news/public-statement/clayton-remarks-investor-advisory-committee-call-020619> [<https://perma.cc/HR2T-9BXK>].

²⁴⁵ Clayton, *supra* note 242.

²⁴⁶ *See id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ Intel Corp., *Annual Report (Form 10-K)* 8–18 (Feb. 1, 2019), <https://www.sec.gov/Archives/edgar/data/50863/000005086319000007/a12292018q4-10k-document.htm#s243ba567089a4889a02993ecdceef5c8> [<https://perma.cc/UP9H-W233>].

²⁵⁰ *See, e.g.*, INTEL, *CORPORATE RESPONSIBILITY AT INTEL: 2018–2019 REPORT* (2019), <http://csrreportbuilder.intel.com/pdfbuilder/pdfs/CSR-2018-Full-Report.pdf> [perma.cc/3WHC-J8CM].

environmental sustainability, supply chain responsibility (to ensure responsible labor systems are in place), diversity and inclusion, and social impact (volunteer work of its employees).²⁵¹ Microsoft does something similar. Microsoft's corporate social responsibility report covers the amount of money and time spent on educating people on coding and other skills, the amount of money donated and the number of nonprofits served, and the company's environmental impact.²⁵² Both Intel and Microsoft also provide information based on Global Reporting Initiative ("GRI") Sustainability Reporting Standards.²⁵³ GRI is an independent international organization that has pioneered sustainability reporting.²⁵⁴ According to GRI, "[r]eporting with the GRI Standards supports companies, public and private, large and small, [to] protect the environment and improve society, while at the same time thriving economically by improving governance and stakeholder relations, enhancing reputations and building trust."²⁵⁵

Because human capital is typically included in corporate social responsibility reports, it may be prudent for GRI to have a section in its reporting standards that includes employee-initiated actions within companies. The information could be presented as a specific metric under a particular issue (e.g., number of employee-initiated shareholder proposals related to environmental issues) or a more qualitative disclosure regarding employee relations with management. The latter may be more appealing in light of remarks that SEC Chairman Clayton made to the SEC Investor Advisory Committee: instead of imposing strict standards or metrics, "investors would be better served by understanding the lens through which each company looks at its human capital."²⁵⁶

Employees are on the front lines of what is occurring in companies and they can be helpful in identifying potential areas of improvement in companies. This is particularly true in areas of corporate governance and equity-related issues such as gender disparity in pay. Another way to ensure that this information is transparent and in the public domain is to require companies to not only house this information

²⁵¹ *Id.*

²⁵² See MICROSOFT, CORPORATE SOCIAL RESPONSIBILITY REPORT (2019), <https://www.microsoft.com/en-us/corporate-responsibility/reports-hub> [<https://perma.cc/345C-T8GZ>].

²⁵³ INTEL, INTEL 2017–18 CORPORATE RESPONSIBILITY REPORT: GRI CONTENT INDEX (2018), <http://csrreportbuilder.intel.com/pdfbuilder/pdfs/Intel-2017-18-GRI-Content-Index.pdf> [<https://perma.cc/UNX5-M4TS>] (Intel GRI Index); *Global Reporting Initiative Index*, MICROSOFT, <https://www.microsoft.com/en-us/corporate-responsibility/gri-index> [<https://perma.cc/XB83-VGUJ>] (last visited Feb. 24, 2019) (Microsoft GRI Index).

²⁵⁴ *About GRI*, GLOBAL REPORTING INITIATIVE (2017), <https://www.globalreporting.org/information/about-gri/Pages/default.aspx> [<https://perma.cc/86EB-CGZG>] ("GRI helps businesses and governments worldwide understand and communicate their impact on critical sustainability issues such as climate change, human rights, governance and social well-being.").

²⁵⁵ *Id.*

²⁵⁶ Clayton, *supra* note 242.

on their company websites, but also to mandate that they disclose it in Form 10-Ks or proxy statements. The placement of the information depends on the goals of the company. If companies want their customers or the public to be aware of this information, a sustainability report is most likely the right repository of that information. If, on the other hand, companies deem the information material to an investor's decision to buy or sell company stock, it would be appropriate to place it in their SEC filings.

C. Industry-Specific Standards

Employee-initiated private ordering efforts can also have a bigger impact if standards are tailored for high technology companies based on their industry and are specifically drafted in response to diversity, equity, and ethical concerns.²⁵⁷ This would serve two purposes. First, employees would get the transparency needed to communicate with their employers about their desires. And second, companies would be able to address employee concerns about the actions the company takes or intends to take. In this case, the first set of industry-specific sustainability accounting standards covering financially material issues, released by the Sustainability Accounting Standards Board Foundation (“SASB”) on November 7, 2018,²⁵⁸ may be instructive. According to SASB, “[p]ublishing the standards ushers in a new era for global capital markets in which businesses can better identify and communicate significant opportunities for sustaining long-term value creation.”²⁵⁹ These standards, which cover 77 industries, were the product of six years of research and market consultation, including the input of many of the world's most well-known investors and businesses from all sectors.²⁶⁰ Under SASB, the “Technology and Communications” sector is most relevant to high technology companies with a focus on the “Software and IT Services” industry.²⁶¹ There are six different subcategories

²⁵⁷ “In the United States, the delegation of standards-development activity to the private sector represents a conscious national policy.” Contreras, *supra* note 29, at 215.

²⁵⁸ Sustainability Accounting Standards Board, *SASB Codifies First-Ever Industry - Specific Sustainability Accounting Standards*, GLOBALNEWSWIRE (Nov. 7, 2018, 05:40 PM), <https://globenewswire.com/news-release/2018/11/07/1646736/0/en/SASB-Codifies-First-Ever-Industry-Specific-Sustainability-Accounting-Standards.html> [<https://perma.cc/ZUG9-E22U>] (“[SASB] is an independent, nonprofit standard-setting organization that develops and maintains robust reporting standards that enable businesses around the world to identify, manage and communicate financially-material sustainability information to their investors.”).

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ SUSTAINABILITY ACCOUNTING STANDARDS BD., SOFTWARE & IT SERVICES: SUSTAINABILITY ACCOUNTING STANDARD (Oct. 2018), https://www.sasb.org/wp-content/uploads/2018/11/Software_IT_Services_Standard_2018.pdf [<https://perma.cc/9TST-BUM8>] (“SASB standards are intended for use in communications to investors regarding sustainability issues that are likely to impact corporate ability to create value over the long term. Use of SASB standards is voluntary. A company determines which standard(s) is

under the standards, including “Recruiting and Managing a Global, Diverse & Skilled Workplace.”²⁶² Based on the topic summary of this particular subcategory, it is clear that employees of high technology companies are “key contributors” to such companies.²⁶³ In these instances, the analysis that accompanies the development of industry standards for decision-making processes could be expanded to include ways in which to give employees a voice within companies that help with their retention. Additionally, the standards should provide more clarity regarding disclosures of what a company’s employee engagement entails and whether the company provides a mechanism by which management and boards of directors will address employees concerns.

Alternatively, employers can publish their own standards or principles (such as the artificial intelligence principles that Google put forth)²⁶⁴ and make them widely available to employees and other stakeholders. Employees could then hold their respective companies accountable to these standards. At the same time, employees could get transparency on the factors that contributed to the decision. If the employees find that their respective companies did not abide by the enumerated principles or standards, the employees would then have the extralegal means, via standards or principles, to hold their company accountable.

relevant to the company, which disclosure topics are financially material to its business, and which associated metrics to report, taking relevant legal requirements into account.”). Google falls under the Software & IT Services industry under the Technology and Communications sector. *See Download Current Standards*, SASB, <https://www.sasb.org/standards-overview/download-current-standards/> [<https://perma.cc/YC8T-AWQ2>] (last visited Sept. 7, 2019) (navigate to “Find your Sector and Industry” search box and enter “GOOG”).

²⁶² *See* SUSTAINABILITY ACCOUNTING STANDARDS BD., *supra* note 261, at 23–27. The other five categories are environmental footprint, data privacy and freedom of expression, data security, intellectual property protection and competitive behavior, managing systemic risks from technology disruptions. *Id.*

²⁶³ *See id.* at 23. Each subcategory has a topic summary. The topic summary for Recruiting and Managing a Global, Diverse & Skilled Workforce reads:

Employees are key contributors to value creation in the Software & IT Services industry. While the number of job openings in the industry continues to grow, companies commonly find it difficult to recruit qualified employees to fill these positions. The shortage in technically skilled domestic employees has created intense competition to acquire highly skilled employees, contributing to high employee turnover rates.

Id.

²⁶⁴ *See Artificial Intelligence at Google*, *supra* note 136.

D. Partnering with Other Groups

Employee-initiated private ordering at only one company, however big, may not be enough to implement permanent societal change and will likely not be able to address systemic issues. For example, employees can work towards changing legal norms if a large number of them take collective action, such as the Google Walkout. These protests played a part in the demise of mandatory arbitration provisions for sexual misconduct, which were standard in the high technology industry as well as other industries.²⁶⁵ It is also important for employees to form coalitions with other groups, such as nonprofit organizations, academics, and the like, who can bring additional pressure to bear on companies to take action. It may even be the case that joining a labor union could provide another avenue for employee-initiated private ordering.²⁶⁶

E. The Limits of Employee-Initiated Private Ordering

The white-collar employees discussed in this Article do not necessarily represent all employees and, for that reason, it would not be prudent for one employee's viewpoint to represent all employees. Some may even say that these employees constitute an elite group, given their positions in their companies. Furthermore, depending on a company's culture, some companies may be more receptive to their employees' demands than others. Related to a company's receptivity is the issue of whether employee-initiated private ordering is unique to high technology companies because of how uniquely situated their employees are. There is also the question of what issues should be the subject of employee-initiated private ordering. As we begin to delve further into this phenomenon of employee-initiated private ordering, we must consider where the limits lie. As the beginning of this Article mentions, there are both benefits and potential limits to employee-initiated private ordering.

Currently, the spectrum of employee-initiated private ordering is broad and ranges from policies that may affect employees directly to practices that impact stakeholders, many of which are global in nature given high technology companies' place on the world stage. It remains to be seen whether employee-initiated private ordering will become a permanent fixture in the private ordering landscape.

V. CONCLUSION

Employee-initiated private ordering is a new phenomenon within high technology companies. As these innovative companies continue to make their marks

²⁶⁵ See *supra* notes 2–6 and accompanying text.

²⁶⁶ In the future, I plan to explore the question of whether high technology employee can work within the existing labor union framework to effect legal changes or, given the cultural and business environment, whether the ad hoc organizing which currently exists continues to be the norm.

on the world in positive and negative ways, their employees are attempting to impose order. Employees make these attempts as companies wade into gray areas of ethical conduct and engage in behavior that some employees may deem unacceptable. No longer content to sit on the sidelines, employees are taking a stand. In the process, they have inserted themselves into the decision-making process and, at times, have changed or upended long-standing legal norms. The continued impact of employee-initiated private ordering remains to be seen, but as long as there is a demand for this group of highly skilled employees, they will continue to have a voice. Only time will tell whether their viewpoints will be amplified or muted as new issues arise in high technology companies that have broader societal or ethical implications.