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The Millennial Corporation

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DRAFT

In a prior paper, *Shareholder Value(s): Index Fund ESG Activism and The New Millennial Corporate Governance*, we argued that the index funds' sudden shift towards socially-responsible investment, after decades of ignoring or opposing it, was driven by the competition to manage growing Millennial wealth. In our view, the main contribution of that paper was identifying sharp differences between Millennials and prior generations over investment, consumption, and employment. It has now become clear that this contribution has implications far beyond index-fund environmental, social and governance ("ESG") activism and is in fact completely transforming the corporate world, marking a fundamental shift in how corporations function and requiring a new framework for analysis. This paper delineates a radical new framework for what we call The Millennial Corporation.

We argue that the Millennial-driven rise of stakeholderism and socially-responsible investing are features of a comprehensive cultural shift in how corporations are expected to behave, rendering earlier accounts of corporate behavior incomplete or obsolete. While there have been moments in the recent past when corporations promoted stakeholderism, these moments were transient and primarily rhetorical, with corporations quickly returning to the business-as-usual of shareholder primacy. This time, Millennials have made it impossible to return to business-as-usual. We show that, unlike Baby Boomers and Generation X, this generation is far more likely to take its politics to work, to the store or website, and to the investment portfolio. This consolidation of economic identity creates feedback effects that collapse the distinction between so-called political considerations, maximizing returns, and stakeholder interests in ways that are eroding traditional corporate law norms.

Far from liberating managers from meaningful constraints--as critics of stakeholder corporate governance often allege--this new dynamic has imposed even further constraints on managers. We show that Millennial stakeholderism is fundamentally different from the stakeholderism of the past. As a result of Millennials' influence, managers have strong incentives to promote stakeholder interests. In fact, they have no choice but to do so. Furthermore, rather than helping managers to insulate themselves, the new stakeholderism exposes managers to higher scrutiny. We present both a theoretical analysis and evidence supporting our account of the rise of the Millennial Corporation.

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"Stories of American industry's competitive woes are starting to give way to stories of corporate revival, at such well-known and diverse companies as Ford, May Department Stores and Xerox. The revival can usually be traced to a new respect for radical change...The new order eschews loyalty to workers, products, corporate structure, businesses, factories, communities, even the nation. All such allegiances are viewed as expendable under the new rules. With survival at stake, only market leadership, strong profits and a high stock price can be allowed to matter."

---Steve Prokesch, "Remaking the American CEO," The New York Times, Jan. 25, 1987.

"Breaking with decades of long-held corporate orthodoxy, the Business Roundtable issued a statement on 'the purpose of a corporation,' arguing that companies should no longer advance only the interests of shareholders. Instead, the group said, they must also invest in their employees, protect the environment and deal fairly and ethically with their suppliers. 'While each of our individual companies serves its own corporate purpose, we share a fundamental commitment to all of our stakeholders,' the group, a lobbying organization that represents many of America's largest companies, said in a statement. 'We commit to deliver value to all of them, for the future success of our companies, our communities and our country.'"

---David Gelles and David Yaffe-Bellany, "Shareholder Value is No Longer Everything, Top CEOs Say," The New York Times, Aug 19, 2019

INTRODUCTION

In this Article, we argue that Millennial and Gen Z investment, consumption, and employment behaviors differ so sharply from those of preceding generations that they are fundamentally altering the corporation. We think that these Millennial behaviors are powering the major developments in corporate law today, including the rise of Employee, Environmental, Social, and Governance ("EESG") investing, the rise of stakeholderism, the 2019 Business

Roundtable break with shareholder primacy, and so-called CEO Activism.[4] Combined, these developments are changing the corporate world in multiple ways, the most prominent of which include: (1) managers have no choice but to engage in EESG because of bottom-up pressure from Millennials; (2) Millennials' consolidated political/economic identity—their tendency to take their politics everywhere they go, to the workplace, the store, the portfolio, as described below—is overriding the usual collective action problem for shareholders; and (3) these developments result in a new kind of short-termism in which CEOs and corporations act defensively to avoid cancel culture and rapid reputational damage from getting on the wrong side of Millennials' politics. As noted, we first identified the transformative power of Millennials on index fund EESG-activism in a prior paper, *Shareholder Value(s): Index Fund ESG Activism and The New Millennial Corporate Governance*.[5] In this article, we reveal how much further Millennial influence has extended beyond index-fund activism to fundamentally reshape the corporate world, requiring a new framework of analysis we call The Millennial Corporation.

Four features of the Millennial generation are driving this fundamental change: (1) its progressive social orientation, which is observably to the left of both the Baby Boomers and Generation X, not just currently, but when they were at the same age; (2) its massive size, standing to inherit $30 trillion in assets, already accounting for over $1 trillion in annual consumption, and projected to constitute 75% of the workforce by 2030, all of which enable it to impose its values;[6]

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[4] We depart from the convention of using the term "ESG" for environmental, social, and governance investing in favor of "EESG," employee, environmental, social, and governance investing, as advocated by Leo Strine. See, Leo E. Strine, Jr., Toward Fair and Sustainable Capitalism 6 (Roosevelt Inst., Working Paper No. 202008, 2020), https://rooseveltinstitute.org/wp-content/uploads//08/RI_Toward FairandSustainableCapitalism_WorkingPaper_202008.pdf [https://perma.cc/69BL-P6MD].
[5] David Webber, Michal Barzuza & Quinn Curtis, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. Calif. L. Rev. 1243 (2020).
[6] Caitlin Mullen, *Gen Buy: Millennials projected to spend $1.4 trillion as influence grows*, BizWomen, Jan. 13, 2020, available at: https://www.bizjournals.com/bizwomen/news/latest-news/2020/01/gen-buymillennials-projected-to-spend-1-4-trillion.html?page=all.

(3) its increasingly consolidated political/economic identity, which ignores traditional distinctions between investing, shopping, and worklife, infusing all three with (mostly) progressive politics; and (4) its sophisticated use of social media to monitor and punish companies that deviate from its wishes. While any one of these features on its own might not have triggered a fundamental shift in how corporations operate, when combined, the net effect is powerful, and is rendering anachronistic the traditional vocabulary of corporate law, requiring new ways of thinking.

In attempting to explain once-marginal and now-ubiquitous EESG and socially responsible investing, scholars have largely tried to fit these developments into existing intellectual frameworks, ones that we believe are inadequate to the task. These accounts can be subdivided into some familiar camps, including the shareholder primacy camp, the reactionary managers camp, the political dysfunction camp, and the concentrated economic power camp. Briefly, the shareholder primacy camp argues that EESG is just the latest hot political topic to come along, that CEOs will adjust rhetorically and perhaps take some concrete steps to deal with it, but that it will all be absorbed into shareholder primacy.[7] An alternative shareholder primacy view, propounded by the EESG investing community itself, insists that socially-responsible investing is simply the most enlightened form of maximizing long-term value, that there is no conflict between caring for the environment, improving worker compensation, promoting diversity, and returns.[8] In contrast, the reactionary managers camp sees EESG as a genuine threat to shareholder primacy,

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[7] Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 122 Colum. L. Rev. (forthcoming 2022).

[8] *See*, *e.g.*, Martin Lipton,Wachtell, Lipton, Rosen & Katz, *Further on the Purpose of the Corporation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 20, 2021) ("The objective and the purpose of a corporation is to conduct a lawful, ethical, profitable and sustainable business in order to ensure its success and grow its value over the long term.") https://corpgov.law.harvard.edu/2021/07/20/further-on-the-purpose-of-the-corporation/; Martin Lipton, Steven A. Rosenblum & Karessa L. Cain, *Thoughts for Boards of Directors in 2020*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 10, 2019), https://corpgov.law.harvard.edu/2019/12/10/thoughts-for-boards-of-directors-in-2020/ [https://perma.cc/Y22J-YN2R].

but views it as an ultimately insincere and exploitative attempt by corporate managers to clawback power lost to shareholders in the shareholder-rights movement and to reduce managerial accountability.[9] Another account stresses that the rise of EESG may be traced to political dysfunction in Washington.[10] And finally, yet another view suggests that EESG is incompatible with competition, describing it as a perk offered up by monopolists who are less accountable to market forces.[11]

On close inspection, each of these accounts can be understood within the long-standing, manager-vs.-shareholder account of corporate structure. Perhaps managers are exploiting concerns about the social impact of corporations to push back against the shareholder rights movement. Perhaps corporate leadership is simply adopting social responsibility as an effective, but ultimately cynical marketing campaign aimed at the concerned public and regulators. Or perhaps we are witnessing the rise of a more sustainable approach to corporate behavior—one sensitive to regulatory, environmental and even social risks, albeit one still ultimately aimed at creating shareholder value perhaps at the expense of increased managerial discretion.

Managers, shareholders, and regulators: the key characters in a story stretching back decades. Trends come and go. Power ebbs and flows among them, but, according to all of the above schools of thought, the fundamental tensions remain the same, and the conventional scholarly framework for understanding the relevant tradeoffs retains its explanatory power. On this view, the rise of EESG and corporate social activism presents one in a long line of interesting

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[9] *See*, *e.g.*, Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 Cornell L. Rev. 91 (2020); Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain*, S. Cal. L. Rev. (forthcoming 2021).
[10] Edward B. Rock, *For Whom is the Corporation Managed in 2020? The Debate over Corporate Purpose*, 76 Bus. Law. 363 (2021).
[11] Mark J. Roe, *Corporate Purpose and Corporate Competition* (2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3817788.

phenomena, which will (and has) sparked no shortage of scholarly commentary, but it is, at the end of the day, fodder for old debates over corporate purpose and the allocation of power within the firm.

In this article, we argue that these accounts, and the shareholder/manager frame that undergirds them, are overlooking a deeply important shift, a widespread and rapid change in stakeholder preferences that is destabilizing the corporate space. That destabilization has rendered inadequate each of the traditional frameworks for assessing the corporate landscape, depriving them of the explanatory power they have wielded for decades. Simply put, EESG and the new stakeholderism are not well explained by existing accounts of corporate law. They are best explained by the increasing economic power of the Millennial generation (and, increasingly, Generation Z) as consumers, investors, and employees, combined with the accelerants of social media and rising political polarization.

Investors, consumers, and employees are, of course, among the key stakeholders of the stakeholder account of corporate purpose. But ours is not a normative account. We argue that millennial stakeholders are *in fact* exerting significant power in ways that shape corporate behavior. To put it provocatively, the Business Roundtable statement embracing stakeholderism is more a hostage statement than a vision statement. Large companies are adopting the rhetoric of social purpose, and in many cases making concrete decisions consistent with that rhetoric, not because CEOs see stakeholderism as a route to increased discretion and managerial slack, but for precisely the opposite reason: hydraulic social and economic forces have constrained their options and left them no choice but to engage with socially-oriented millennial stakeholders.[12]

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[12] *See* Berkeley Lovelace Jr., *CEOs' shift away from shareholder value was aimed at millennials, says former Business Roundtable president*, CNBC Markets (August 19, 2019), https://www.cnbc.com/2019/08/19/ceos-shift-away-from-shareholder-value-aimed-at-Millennials-john-engler.html.

In framing it this way, it should be clear we reject the managerialist account of EESG and corporate social purpose, but we also think it elides critical details to say that managers are maximizing shareholder value even in an enlightened, sustainable way as some EESG advocates argue. For example, it is, at best, unclear whether Delta Airlines created long-term value by denouncing Georgia voting laws,[13] whether Amazon created long-term value by deplatforming Parler, or whether Starbucks created value by allowing employees to wear Black Lives Matter pins to work.[14] We take no position on the long-term share price implications of these decisions.

Our point is that the decisions in each case were made in response to acute, near-term pressures, from stakeholders with real leverage whose primary concern was not the stock price of the company. Our thesis is that such cases reflect a genuinely new phenomenon that is likely to endure, will have a dramatic effect on corporate behavior and financial markets, and requires a richer explanatory framework than the traditional account of managers, stakeholders, and regulators.

But this is not just a governance story. Investors, too, will be affected by this new reality. In our view, the best understanding of EESG investing is as a rational response to a world in which, from moment to moment, companies can be swept into firestorms over, say, a manager's controversial comments, a routine contribution to a suddenly controversial legislator, a chemical leak at a far-flung plant, and so on. Social media picks up on and amplifies these events, significantly eroding what was once the traditional corporate advantage in controlling the flow of

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[13] *See* Thomas Pallini, *Delta spent the pandemic earning goodwill from passengers and workers. It might be about to vanish.*, Bus. Insider (Apr. 3, 2021, 7:38 AM), https://www.businessinsider.com/delta-might-have-lost-pandemic-goodwill-georgia-voting-law-kemp-2021-3 (last visited Aug. 7, 2021) ([T]he public break between Delta and the state government [] yielded repercussions . . . [when] Georgia's House of Representatives on Wednesday night voted to repeal a tax break on jet fuel that greatly benefits Delta.").

[14] *See generally* Haddon, *infra* note __..

information, choosing what image it sought to project. As we will see in several case studies below, Millennial consumers, workers, and investors, armed with social media, closely monitor corporate conduct to ensure actual compliance with expressed values, and sharply call out, divest, boycott, or refuse to work for companies that fall short. That affects all aspects of the corporation, including its share price. It's true that, in the past, securities laws have sometimes been used to effect social change, by "naming and shaming" with disclosures around conflict minerals, political spending, and CEO pay ratio. Some critics have seen the sudden clamor for disclosures around diversity efforts and carbon footprint as an offshoot of this type of approach. But these critiques have it backwards. When a litany of socially sensitive issues can suddenly become very real problems for a consumer brand or for firms recruiting employees, even the most hard-nosed investors must take notice. Information that no investor would have thought material a decade ago, may suddenly become critically important, and disclosure (and our understanding of materiality) need to keep pace.

Indeed, the Millennial generation is historically unique in being substantially to the left of the political median and in seeking to organize their economic lives, including their consumption and employment decisions, around their values in a way that their forebears simply did not. We argue that the dramatic rise in concerns about corporate purpose, ESG, corporate political activism (dubbed "Woke Capital" by its critics), and related phenomena are traceable to this fundamental change.

Foregrounding these social realities is likely to be a more productive framework for understanding the changing landscape of corporate governance and investment risk than the manager/shareholder/stakeholder notions that have guided corporate debates in the past. It's not that these frameworks have been rendered false by these new developments. After all, there will always be shareholders, managers, and agency problems. Instead, these frameworks are losing their explanatory power because stakeholders are interacting in new ways and finding new sources of leverage, with investors worrying about climate change, employees worrying about how labor in the supply chain is treated, and customers demanding that CEOs speak out on pressing social issues, all backed by social media, and in each case, it is the millennial generation (with Gen Z coming up quickly behind) driving these changes.

The key impact of these observations is that, while it is true that we are observing corporations pivot toward stakeholder interests and social purpose, this pivot reflects a relative reduction, rather than an increase in managerial power. The importance of Millennials as consumers, employees, and even as shareholders is a constraint on managerial discretion just as surely as the composition of the board of directors and the market for corporate control. Managers and investors are faced with creating long-term value within the envelope of these constraints, producing a strong incentive for investors to consider EESG risk and sustainability as relevant considerations. This is distinguishable from arguments for EESG investing that draw a straight line between sustainability and firm value. We argue that EESG factors, whether or not they are value increasing in their own right, are relevant investment risks because they largely reflect social concerns that may be salient to key stakeholders.

In Part I we discuss current views of the rise of stakeholderism. We pay special attention to the reactionary managers camp, which asserts that with stakeholderism governance managers (1) do not protect stakeholders; and (2) further insulate themselves.[15] In particular this camp argues

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[15] Bebchuk & Tallarita, *supra* note _ at 158 ("urge institutional investors to avoid cooperating with hedge fund activists and to side with and support corporate leaders."); Bebchuk, Kastiel & Tallarita, *supra* note , at 2 ("stakeholderism would serve the private interests of corporate leaders by increasing their insulation from shareholder oversight")
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that managers will use the rise of EESG to get the support of index funds when activist hedge funds run competing nominees to the board. The truth is likely just the opposite. The most recent example of hedge fund Engine No. 1 using environmental issues to successfully run three dissidents for the Exxon board suggests that managers are not using index fund EESG to thwart hedge funds, rather, hedge funds are using EESG to win index fund support in further exposing managers, combining EESG with traditional activist objectives like reforming executive compensation and increasing payouts.[16] That is increased managerial exposure, not entrenchment. We also part ways with the camp that ascribes EESG to concentrated economic power, that considers EESG a kind of perk that can be offered only by the most powerful companies, which are less accountable to shareholders.[17] In contrast, we argue that the opposite is closer to the truth: EESG is so pervasive and so strongly demanded by Millennials that the only entities capable of even partly resisting it are those with concentrated economic power, like Facebook, Amazon, and Google. We also reject the view that EESG was a progressive alternative to a politically dysfunctional Washington,[18] as it has only continued and even strengthened as the administration, and senate recently changed hands. Finally, though there is some evidence correlating EESG with long-term value, we do not believe that the phenomena we describe, about Millennial activism on the environment and diversity, are truly about returns and returns alone. Indeed, there is some evidence not just that this activism is changing the corporate world, but is also having salutary effects on the environment and diversity themselves.

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[16] See *Infra* Section []

[17] Mark J. Roe, *Corporate Purpose and Corporate Competition* (2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3817788.

[18] Edward B. Rock, *For Whom Is the Corporation Managed in 2020? The Debate over Corporate Purpose*, 76 Bus. Law. 363 (2021)

Part II discusses Millennials' behavior as employees, consumers and investors. It shows that there is plenty of evidence that Millennials are committed to their values, and are willing to pay a premium for them, in all three dimensions. Managers report—and empirical evidence supports—that diversity and environmentalism are necessary for recruiting and retaining talent. Recent studies confirm that firms that support EESG pay lower wages—and nevertheless retain their purpose-driven Millennial employees. Different surveys suggest that Millennials will switch products for EESG reasons. And examples of bans and cancel culture continue to pop. Finally, Millennials, who are willing to forgo returns for values, are driving the rise in EESG investments.

In Part III we analyze the effect of the millennial corporation on management incentives. Far from liberating managers from meaningful constraints—as critics of stakeholder corporate governance often allege—this new dynamic has imposed even further constraints on managers. Millennials discipline managers through several important channels: markets (employment, product, and investment), index funds activism, and recently also hedge funds activism. As a result, managers have strong incentives to promote stakeholderism. The discipline channels that grow out of Millennials' preferences, result in *decreased* management insulation, contrary to the predictions of the reactionary managers school. In support of our thesis, we show how activist hedge fund Engine No. 1 leveraged environmental causes to succeed in its fight against ExxonMobil, and how millennials' preferences contributed to the passage of NASDAQ Board Diversity Rules.

This part also demonstrates the profound net effect of Millennial preferences and their use of social media to monitor and enforce them. We show not just that these preferences are transforming the corporate world via EESG and stakeholderism, they are also having a real world impact on the environment and on diversity, two of Millennials' highest priorities. The evidence suggests that EESG is not just changing the corporate world, it is actually making our institutions more diverse and improving the environment. We also show that these effects do not depend on politics, economic conditions, or market concentration.

Finally, in Part IV, we spell out some of the implications of this profound transformation of the corporate world. First, there is no reason to object to stakeholder governance. We reject the reactionary managers camp which demands a return to shareholder primacy on the grounds that the CEO who has many bosses has no boss. In our view, the CEO who has many bosses has many bosses. EESG is not a top-down managerialist plot to escape shareholder power. It is a bottom-up Millennial preference that exposes managers to shareholder power, worker power, consumer power, and so on. The channels through which Millennial power flows--via shareholders, employees, consumers--are less important than Millennial power and preferences themselves.

Second, Millennial preferences require rethinking our standards of disclosure and the definition of material information. As we show below, Millennial demand for disclosure far exceeds that which is currently required by the securities laws. Those laws require companies to disclose material information, that is, information "that would assume actual significance in the mind of a reasonable investor."[19] Our research strongly suggests that the information that would assume actual significance in the mind of a reasonable investor today differs sharply from what it was twenty or even ten years ago. Information about diversity, sexual harassment settlements, environmental infractions, political contributions, and other potentially socially salient issues that would not have been considered financially material in the past are likely to play a growing role in how investors manage risk. Securities (and corporate) law should keep pace with these developments, adopting a flexible view of materiality, and a general presumption that investors

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[19] *TSC Indus., Inc. v. Northway*, Inc., 426 U.S. 438, 449 (1976).

are entitled to information. From a corporate governance standpoint, managers need space to navigate. Even managers making good faith efforts to put the long-term interests of shareholders first will be forced to make concessions to other stakeholders when those stakeholders have real power within the firm. Attempts to constrain managers' capacity to respond to these forces may do more harm than good. We therefore argue that courts and the SEC should be mindful of this shift in letting notions of materiality change to better fit the needs of the actual marketplace.

We also use this final section to lay out how our thesis has several testable implications. First, as the economic influence of Millennials expands over the coming decades, we think the phenomena of corporate political activism and the weight given to EESG risks will become more important features of the business landscape. Second, we think that these effects will be most evident in industries featuring strong consumer brands or highly educated, well-compensated workforces. These are the companies with the most to lose from mishandling sensitive social issues. Third, we will see the rise of some conservative corporate activism. The general leftward slant of corporate activism and many EESG concerns reflects the political reality of the Millennial generation, which is left of center, at least for the time being. Moreover, the US political system overweights white, rural voices, while economic power tends to concentrate in cities. The marginal consumer or employee and the median voter are systematically different. We may continue to observe progressive attempts to accomplish in the corporate space what they cannot in the more traditionally political one.

I. Traditional Corporate Law Theories Fail to Adequately Explain the Rise of EESG and Stakeholderism

A. The Rise of EESG and Stakeholderism

Both critics and advocates agree that once relatively marginal phenomena like socially responsible investing and stakeholderism have taken center stage in the corporate world.[20] Some recent examples to prove the point: after more than a decade of near total futility in which shareholder proposals demanding that companies do more about global warming earned single-digit percentage support from shareholders, these proposals began winning majority support in 2017 with the backing of the Big Three. Larry Fink recently stated that the environment and global warming were at the center of everything Blackrock does.[21] The 2021 proxy season brought the most recent shock in favor of environmentally friendly investors as dissident shareholders elected three environmentalists to the board of Exxon.[22]

Efforts to increase gender and racial diversity in the corporate boardroom have made significant strides in recent years. From State Street's launch of the SHE fund and its rivalry with Blackrock over who can more aggressively support the election of women as corporate board directors, to this past proxy season's success by the SEIU on racial equity audits, to the adoption of diversity criteria by NASDAQ and Goldman Sachs for companies that list on the former or go public via the latter, the march towards diversity has made significant strides, with the full throated support of some of Wall Street's most traditional players.[23] The flow of money to

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[20] *See e.g.*, Bebchuk & Tallarita, *supra* note , at 103 (2020) ("in the past decade, however, stakeholderism has been on the rise, especially in terms of its acceptance by corporate executives, management advisors, and policy thought leaders."); Bebchuk, Kastiel & Tallarita, *supra* note (forthcoming 2021) (stating that the debate on stakeholderism "seems to have reached a critical juncture").

[21] See e.g., Larry Fink's 2021 Letter to CEO's, BlackRock ("There is no company whose business model won't be profoundly affected by the transition to a net zero economy") https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter ; Andrew Ross Sorkin, *BlackRock C.E.O. Larry Fink: Climate Crisis Will Reshape Finance, NYTimes (Jan 14, 2020)* https://www.nytimes.com/2020/01/14/business/dealbook/larry-fink-blackrock-climate-change.html;

[22] *See infra* Part

[23] *See* discussion *infra* Part .

sustainable funds continues to rapidly increase. In 2020, flows into sustainable funds exceeded $50 billion, nearly tenfold increase over 2018, and almost a fourth of total flows into U.S. stocks and bonds.[24] Total assets in U.S. sustainable funds exceed $200 billion, more than 70 percent increase from their value in 2019.[25] Add to this the Business Roundtable statement referenced earlier and the consensus is clear: ESG/stakeholderism has risen significantly. The question is why? Many scholars have attempted to provide answers within the traditional frameworks of corporate law.

B. Approaches to the Rise of EESG

Corporate law scholars have tried to explain the recent rise of EESG and stakeholderism, and to make predictions on where it will lead us. Will EESG and stakeholderism grow or disappear? Are managers truly committed to following their announcements or is it all just cheap talk? For example, while the Business Roundtable announcement attracted significant attention and publicity, and was described by some as radical,[26] numerous commentators believed that it did not indicate a significant shift in the corporate form and purpose.[27] These different views, as explained above, can be subdivided into some familiar camps, including the shareholder primacy camp, the long-term value camp, the reactionary managers camp, the political dysfunction camp, and the concentrated economic power camp.

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[24] Jon Hale, Ph.D. CFA, *A Broken Record: Flows for U.S. Sustainable Funds Again Reach New Heights*, Sustainability Matters, MorningStar (January 28,2021) https://www.morningstar.com/articles/1019195/a-broken-record-flows-for-us-sustainable-funds-again-reach-new-heights
[25] *Id.*
[26] *See e.g.*, Lipton, *supra* note ; Lipton, Rosenblum & Cain, supra note .
[27] *See e.g.*, Bebchuk & Tallarita, *supra* note ("[W]e show that the BRT statement was mostly for show, largely representing a rhetorical public relations move, rather than the harbinger of meaningful change."); Lucian Bebchuk & Roberto Tallarita, *Stakeholder Capitalism Seems Mostly for Show*, WALL ST. J., August 7, 2020.

The shareholder primacy camp represents general skepticism that anything will change fundamentally in corporate law, and especially not the primacy of shareholders. Stakeholderism is merely rhetorical, and our system will continue to be geared toward shareholders exclusively.[28] Managers' incentives and acts are geared toward maximizing value to shareholders.[29] An alternative shareholder primacy view, supported most prominently by Martin Lipton, equates socially responsible investing with maximizing firms' long-term value.[30]

Other commentators, on the other hand, are both skeptical and concerned. They not only argue that managers will not promote stakeholder welfare, but that armed with discretion and freedom to allegedly protect stakeholders, managers will instead further insulate themselves from shareholders.[31] A prominent pioneer of this reactionary managers view, Lucian Bebchuk, has argued that managers in fact have no incentives to promote stakeholder interests, and can cleverly use stakeholderism to insulate themselves from shareholder pressures. Bebchuk is not alone in this view. For example, Larry Summers, who served as Harvard University president, and as US

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[28] Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine* 122 Colum. L. Rev. (forthcoming 2022)
[29] *Id.*
[30] *See e.g.*, Lipton, *supra* note ("The objective and the purpose of a corporation is to conduct a lawful, ethical, profitable and sustainable business in order to ensure its success and grow its value over the long term") ; Lipton, Rosenblum & Cain, supra note ; *Cf.*, Madison Condon, *Externalities and the Common Owner*, 95 Wash. L. Rev. 1 (2020) (arguing that universal owners have incentives to internalize intra-portfolio externalities, creating an incentive to push for reduced greenhouse gas emissions and therefore explaining at least the environmental activism of institutional investors. Condon also argues that such investors might push companies to deviate from maximizing returns. In our view, even non-universal investors like hedge funds and companies of all scopes and sizes are moving on environmental issues, suggesting that the internalization of externalities is not what's driving even universal investors to move on the same. As stated, we believe the main force operating here is the rise of millennials, though the funds could have multiple motivations, including the one described by Condon); Jeffrey N. Gordon, *Systematic Stewardship*, Columbia Law and Economics Working Paper No. 640 (2021) (explaining index funds ESG activism as an attempt to decrease systemic risks). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782814.
Condon and Gordon theories build on index funds' incentives to increase portfolio value, which are relatively weak. *See e.g.*, Lucian A. Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 Colum. L. Rev. 2029 (2019). The rise of millennials, on the other hand, created competitive pressure among index funds and fear of investors migration, and thus strong incentives for funds' managers to be active. See Barzuza, Curtis & Webber, supra note .
[31] Bebchuk & Tallarita, *supra* note .

Treasury secretary opined that "without enforcement tools the statement lacked teeth," and speculated about the Business Roundtable's alternative motives.[32]

This reactionary management view has several important implications. First, it argues that stakeholders will not benefit at all from the rise of EESG/stakeholderism.[33] In another paper Bebchuk, Kastiel & Tallarita use the example of Other Constituency Statutes, which allowed managers to take into account the interests of other constituencies in change-of-control situations, as support for their argument that stakeholderism is a wolf in sheep's clothing.[34] These statutes, which were adopted in many states in response to the hostile takeover wave of the 80's, arguably, were intended to protect employees and other constituencies that were hurt by hostile takeovers.[35] Yet, in reality, Bebchuk, Kastiel & Tallarita have shown in recent work, employees and other constituencies did not benefit from having them in place.[36] Rather, managers relied on them primarily to benefit themselves.[37] This experience, the authors argue, suggests that stakeholderism is doomed to fail.[38]

Second, the reactionary managers' view asserts that stakeholderism will be harmful as it will lead to further management entrenchment. [39] In particular, in a recent paper, Bebchuk & Tallarita argue that the current motivation of the stakeholderism movement is to empower managers to use stakeholderism as a defense against activist hedge funds.[40] Recently activist

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[32] *See* Richard Henderson and Patrick Temple-West, *Group of US Corporate Leaders Ditches Shareholder-First Mantra*, FT (August 19, 2019), https://www.ft.com/content/e21a9fac-c1f5-11e9-a8e9-296ca66511c9
[33] Bebchuk & Tallarita, supra note at 107 ("we..show that recent commitments to stakeholderism were mostly for show rather than a reflection of plans to improve the treatment of stakeholders.")
[34] Bebchuk, Kastiel & Tallarita, *supra* note .
[35] *Id*.; *See also* Michal Barzuza, *The State of State Antitakeover Law*, 95 Va. Law Rev. 1973 (2009).
[36] Bebchuk, Kastiel & Tallarita, *supra* note .
[37] *Id*.; *see also* Bebchuk & Tallarita, *supra* note .
[38] *Id.*, at 1 ("[T]hese findings also provide important lessons for the ongoing debate on stakeholderism.").
[39] Bebchuck & Tallarita, *supra* note __, at 108 ("[W]e show that acceptance of stakeholderism could well impose major costs.").
[40] *Id.* at 159 ("It might not be a coincidence that support for stakeholderism among some management advisors and corporate leaders has been growing in recent years in which hedge fund activism has intensified.").

hedge funds' common strategy has been to run director nominees to the board.[41] Whether or not they succeed depends, to a large extent, on whether they get the large index funds to vote in support for their candidates.[42] The stakeholderism rhetoric, Bebchuk and Tallarita argue, will be used by managers to "urge institutional investors to avoid cooperating with hedge fund activists and to side with and support corporate leaders."[43]

Furthermore, managers can also use this rhetoric, they argue, to preempt legislative or regulatory reforms that would truly aid stakeholders while constraining managerial power.[44] As a result, not only will stakeholderism not provide meaningful benefits to stakeholders, but accepting it "would be substantially detrimental to shareholders, stakeholders, and society".[45] Bebchuk and Tallarita advocate protecting stakeholders through governmental and not corporate action, that is, with rules and regulations outside the realm of corporate law and governance.[46]

Finally two other accounts attempt to explain the rise of EESG. One account attributes the rise of EESG to public frustration with political dysfunction in Washington.[47] And yet another view relies on the increased concentration in the product markets as the source for this rise.[48] Under this view, EESG is a luxury that monopolists can invest in with their monopolist slack profits.[49] Firms in competitive industries who sell at marginal costs of production have no

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[41] *Id.*
[42] *Id.*
[43] *Id.*, at 158.
[44] *Id.* at 158 ("A second driver is the interest among some corporate leaders and their advisors to use stakeholderism 'strategically' to insulate corporate leaders from shareholder oversight and to impede or delay stakeholder-protecting reforms that would constrain companies' choices.").
[45] *Id.* at 98.
[46] *Id.* at 158 ("In our view, the most effective way to do so [to protect stakeholders] is by adopting laws, regulations and government policies—such as labor-protecting laws, consumer-protecting regulations, and carbon-reducing taxes—aimed at protecting stakeholder groups.")
[47] Edward B. Rock, *For Whom Is the Corporation Managed in 2020? The Debate over Corporate Purpose*, 76 Bus. Law. 363 (2021)
[48] Roe, *supra* note __.
[49] *Id.*

resources for EESG.[50] In contrast, monopolists or quasi-monopolists can abuse their market power to offer the luxury of spending on EESG. [51]

On close inspection, each of these accounts can be understood within the long-standing, manager-vs.-shareholder account of corporate structure. While these commentators might be right if history were repeating itself, we argue that times have changed. As the following parts will show, managers are not driving EESG. They are responding to fierce demand for EESG from Millennials and Gen Z, demand that hits them from all sides: consumption, employment and investment, from both index funds and hedge funds. That demand creates strong incentives to managers to protect stakeholders, and decreases rather than increases their insulation, contrary to the predictions of the above schools of thought. This is the central feature of The Millennial Corporation, in which bottom-up pressures force managers to act in the interests of stakeholders, whether they want to or not.

II. Millennials Are Driving the Rise of EESG

We argue that Millennials are the main drivers behind the recent rise of EESG and Stakeholderism. In this section, we describe the burgeoning power of the Millennial generation along with its left-leaning politics and its facility with social media. The combination of this generation's size and slant is transforming the corporate world.

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[50] *Id.*
[51] *Id.*

A. Millennial Demographics

First and foremost, the Millennial generation is enormous. It was born between 1981-1996 and has a population of 72 million. Generation Z, born between 1997-2012, has a population of 67 million. The Millennials constitute the largest generation in U.S. history, larger than the Baby Boomers, born 1946-1964, with a population of 69.5 million, and larger also than Generation X, born 1965-1980 with a population of 65 million, the smallest living generation.[52]

Millennials and Generation Z combined already comprise a majority of the U.S. population.[53] In 2020, it is estimated that Millennials spent $1.4 trillion.[54] By 2025 they are expected to comprise half of the U.S. workforce and 75% of the global workforce.[55] And, as described in our prior work, the Millennials stand to inherit roughly $24 trillion in assets, described by BlackRock CEO Larry Fink as, "the largest asset transfer in history."[56] In short, Millennials are rapidly becoming the most dominant generation on the planet, and their priorities matter to corporations.

The Millennials occupy a political space distinctly to the left of the country at large.[57] This is not merely a matter of them being a relatively young cohort. Millennials are different from

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[52] *Resident Population in the United States in 2020, by Generation (in millions)*, Statista (June 2021), https://www.statista.com/statistics/797321/us-population-by-generation/ [https://perma.cc/2XZX-G9F3]. *See also*, "Millennials Coming of Age," Goldman Sachs Global Investment Research, 2021; Available at: https://www.goldmansachs.com/insights/archive/millennials/ ("[T]he Millennial generation is the biggest in U.S. history.").

[53] William H. Frey, *Now, more than half of Americans are millennials or younger*, The Brookings Institute: The Avenue (July 30, 2020), https://www.brookings.edu/blog/the-avenue/2020/07/30/now-more-than-half-of-americans-are-millennials-or-younger/.

[54] Caitlin Mullen, *Gen Buy: Millennials projected to spend $1.4 trillion as influence grows*, BizWomen (Jan. 13, 2020), available at: https://www.bizjournals.com/bizwomen/news/latest-news/2020/01/gen-buymillennials-projected-to-spend-1-4-trillion.html?page=all.

[55] Economy, *supra* note __.

[56] "Profit and Purpose: Larry Fink's 2019 Letter to CEOs," https://www.blackrock.com/americas-offshore/en/2019-larry-fink-ceo-letter.

[57] Johnathan C. Peterson, Kevin B. Smith & John R. Hibbing, *Do People Really Become More Conservative as They Age?*, 82 J. of Pol. 600–611 (2019).

their predecessors in ways that do not have precedent in recent US history. Despite the folk wisdom that younger individuals are always to the left of the median, recent research in political science establishes that Millennials deviate from older cohorts in their leftward political bent.[58] The political preferences of Millennials relative to older cohorts is a novel feature of the political landscape without precedent in recent memory. But it is not just a political fact, it increasingly influences corporate behavior. This is because, as we will show in this section, Millennials are more inclined to bring these values to work, to their consumer behavior than others, and liberals are more inclined to do so than conservatives. This creates a new, persistent set of pressures on firms. As we will argue in the next section, these pressures are pervasive, come from multiple sets of stakeholders, and--as we will ultimately argue--act as an important new constraint on management.

B. Millennials as Consumers, Employees and Investors

An extensive and still-emerging body of social science research demonstrates that Millennial attitudes and behaviors towards consumption, work, and investment differ sharply from the generations that preceded them, the Baby Boomers and Generation X. To generalize, it is extremely important to Millennials that the companies where they work, shop, or invest are both perceived to be forces for good in the world, and actually are. It is tempting to write off this preference as merely rhetorical, but there is emerging evidence that Millennials are willing to accept lower salaries, pay more for products, and obtain lower rates of return if they believe that such sacrifices will actually improve the world, particularly when it comes to issues like the environment and diversity. Raised on social media, Millennials are both able and willing to

[58] *Id.*

publicly attack companies that claim to do social good without backing it up with action. Whereas workers in prior generations might genuinely have feared confronting management on political issues, being labeled a troublemaker, marginalized, even fired and appended with the dreaded label the "disgruntled former employee," today, those same employees can obtain support both inside and outside of the company on social media, and might even enhance their own standing inside the company through such actions. Millennial and GenZ values, combined with social media, have changed the incentive structures for political activism inside corporations, whether it be by shareholders at the annual meeting, workers at the office, or customers at the mall or coffee shop or restaurant or increasingly online. [59]

As we review the research below, and examine actual episodes of cancel culture, it's important to bear one point in mind. CEOs themselves review this research, which is constantly being sent to them by their own marketing, investor relations, and human resources departments. They themselves see this evidence of Millennial and Gen Z interest in ESG, and they are also well aware of many episodes of cancellation and boycott. This, in turn, likely has feedback effects, further driving the move to EESG.[60]

1. Employees – Recruiting and Retaining

As noted above, Millennials already comprise a majority of the workforce, a figure that will rise to 75% by 2030 as the last of the Baby Boomers retire.[61] When it comes to what they say and

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[59] *See also* Sergio Alberto Gramitto Ricci & Christina M. Sautter, *Corporate Governance Gaming: The Power of Retail Investors*, 22 NEV. L.J. (forthcoming 2021) (arguing that millennials' use of "new technologies, social media, online forums, and gaming dynamics" may affect "the way shares are voted").

[60] Management response is further magnified by their personal costs, as their wealth and career are tied to the firm, and their personal risk is non-diversifiable. *See* discussion *infra* Section III.A.

[61] Peter Economy, *The (Millennial) Workplace of the Future Is Almost Here -- These 3 Things Are About to Change Big Time*, Inc. (Jan. 15, 2019), https://www.inc.com/peter-economy/the-millennial-workplace-of-future-is-almost-here-these-3-things-are-about-to-change-big-time.html ("Companies including Ernst & Young and Accenture have already reported that Millennials make up over two thirds of their entire employee base.").

what they do, the evidence strongly suggests that they want to work for companies that have a positive social impact. They are reluctant to work for companies that are not sustainable, eesg-friendly, or diverse, and will even work for less to be employed by companies that share their values. The survey evidence strongly supports this assertion, and early empirical evidence suggests it is more than cheap talk.

Survey after survey shows that Millennials and Gen Z want to work for companies that do social good. [62] A McKinsey study found that two-thirds of Millennials "Take a company's social and environmental commitments into account when deciding where to work.[63] Similar surveys have found that Gen Z prioritizes purpose over salary. For example, on firm wrote of Gen-Z workers:

> They read Mission Statements and Values documents to select where they work and want their employer's values to match their values. They expect consistency and authenticity and will call you out, often publicly, if they don't see it. They will leave companies they believe are hiding or putting too much spin on bad news, ignoring their negative environmental or social impacts, or that have toxic workplace cultures.[64]

Aa recent academic study demonstrates that this is more than just rhetoric. In *The Sustainability Wage Gap*, Philipp Krueger, Daniel Metzger, and Jiaxin Wu used a comprehensive and novel data set to determine that workers, especially Millennials, do in fact accept lower pay to work for sustainable companies:

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[62] For ana overview, *see*, Afdhel Aziz, *The Power Of Purpose: The Business Case For Purpose (All The Data You Were Looking For Pt 2)*, Forbes (Mar. 7, 2020, 12:04 PM), https://www.forbes.com/sites/afdhelaziz/2020/03/07/the-power-of-purpose-the-business-case-for-purpose-all-the-data-you-were-looking-for-pt-2/?sh=48495ce93cf7 [https://perma.cc/6GWT-N2R8 [hereinafter Aziz Part Two] (citing Adele Peters, *Most millennials would take a pay cut to work at a environmentally responsible company*, Fast Company (Feb. 14, 2019), https://www.fastcompany.com/90306556/most-millennials-would-take-a-pay-cut-to-work-at-a-sustainable-company.).

[63]*https://www.mckinsey.com/business-functions/organization/our-insights/purpose-shifting-from-why-to-how#*

[64]Aziz *Part Two*, *supra* note __; *see also 15 Critical Insights into Gen Z, Purpose and the Future of Work*, WeSpire, http://www.wespire.com/wp-content/uploads/2018/07/WeSpire_GenZ-2.pdf (Last accessed Aug. 8, 2021, 11:19 AM).

> [W]e provide evidence that workers earn about 10% lower wages in firms that operate in more sustainable sectors. We hypothesize that this Sustainability Wage Gap arises because workers, especially those with higher skills and from younger cohorts, value environmental sustainability and accept lower wages to work in more environmentally sustainable firms and sectors. Accordingly, we find that the Sustainability Wage Gap is larger for high-skilled workers, especially for those with high non-cognitive skills, and increasing over time. In further analysis, we document that more sustainable firms are also better able to recruit and retain high-skilled workers.[65]

Another report found that "purpose-driven companies had 40% higher levels of workforce retention than their competitors, and … turnover dropped by an average of 57% in the employee group most deeply connected to their companies' giving and volunteering efforts."[66]

These results, from both academic and industry sources provide strong evidence cutting against the view that the rise of socially-responsible investing and stakeholderism is merely rhetorical. Contrary to the dominant corporate law model in which shareholders, employees, and customers each seek to maximize their own utility as shareholders, employees or customers alone, these studies provide clear evidence that Millennial workers are willing to take home less pay for themselves and their families to work at a company that they believe is doing good in the world. The same is true for their willingness to stay in their jobs. Turnover is enormously costly to companies. Building a sustainable company and creating a purpose-driven culture reduces that cost. But it also tells us something about Millennial employees. One could easily imagine a counternarrative, one that comes much closer to the narratives of traditional corporate law, one in

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[65] Philipp Krueger, Daniel Metzger, & Jiaxin Wu, *The Sustainability Wage Gap* (May 07, 2020), Swedish House of Finance Research Paper No. 20-14, European Corporate Governance Institute – Finance Working Paper 718/2020, Swiss Finance Institute Research Paper No. 21-17, Available at SSRN: https://ssrn.com/abstract=3672492 or http://dx.doi.org/10.2139/ssrn.3672492.
[66] Aziz *Part Two*, *supra* note __.

which employees think: forget purpose and sustainability, increase my salary, increase my benefits, or I will leave for another firm. Leaving your job can be a way to increase compensation, benefits, or take time off. The evidence suggests that, for this generation, sustainability and a broader sense of purpose beyond profits reduces such behavior. Attracting talent is the other side of the same coin.

Even former employees have a kind of power today they did not have a few years ago. Social media plays a role, as does the shift in culture described throughout this article. For example, Yael Alflalo was the founder of Reformation, a highly-successful, sustainable fashion brand with hundreds of millions of dollars in annual sales.[67] Reformation was described by New York Magazine's The Cut as "arguably the most successful sustainable fashion brand of all time."[68] But after the company announced on social media that it would be donating to organizations affiliated with Black Lives Matter, the company and its CEO in particular were called out on Instagram by a former manager of Reformation's flagship store for racial discrimination.[69] Elle Santiago described being repeatedly passed over for promotion in favor of white women, and called out the CEO for repeat instances of demeaning behavior.[70] In addition to pointing out racism, Santiago also lamented the fact that the company, despite positioning itself as feminist and pro-woman, offered "a lack of options when it comes to sizing and fit (many of Reformation's It-dresses stop at a size 12, when the average US woman is now between a size 16-

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[67] Sally Ho, *Sustainable Fashion: Reformation Founder Resigns After Brand's Racist Culture Exposed*, Green Queen (June 16, 2020), https://www.greenqueen.com.hk/sustainable-fashion-reformation-founder-resigns-after-brand-racist-culture-exposed/ [https://perma.cc/75UR-ASZN].

[68] *Id.* (citing Kristen Bateman, "*How I Get It Done: Reformation Founder Yael Aflalo*," The Cut (April 24, 2019), https://www.thecut.com/2019/04/yael-aflalo-reformation-interview.html).

[69] *Id. See also* Elle Santiago (@energyelle), Instagram (June 4, 2020), https://www.instagram.com/p/CBBw_ABjUCi/?hl=en.

[70] Ho, *supra* note __.

18).”[71] Alfalo-- the CEO--was fired.[72] Similar stories led to the swift departure of women’s co-working space The Wing’s Audrey Gelman, founder and editor-in-chief of Refinery29’s Christene Barberich, and CrossFit founder and CEO Greg Glassman.[73]

Yet another example was what occurred at Starbucks in the Summer of 2020. The company faced sharp backlash from both customers and employees after banning baristas from wearing Black Lives Matter pins at work.[74] The backlash was so intense that Starbucks not only reversed its position but printed and distributed to its workers 250,000 Black Lives Matter and other social justice t-shirts.[75] Internal corporate memos revealed that, in instituting the ban, Starbucks deployed the standard, pre-Millennial corporate playbook by attempting to stay above the political fray for fear of alienating customers with disparate political views.[76] Political neutrality—on the surface, not behind the scenes—has long been the standard corporate response. As Starbucks quickly learned, that doesn’t work anymore. Employees were so upset by the ban, particularly after the killing of George Floyd, that the company was forced to hold a worker “listening session” that prompted it to change course.[77] Starbucks has long recruited younger workers, notably by providing benefits like college tuition assistance.[78] No company as dependent on younger employees as Starbucks could afford to ignore Millennial voices. In the end, they did not.

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[71] *Id.* (citing Mary Nunes, *It's True: The Average Size of the American Woman Is No Longer 14*, Byrdie (Dec. 22, 2020), https://www.byrdie.com/average-body-weight).
[72] *Id.*
[73] *Id.*
[74] Heather Haddon, *Starbucks, in Reversal, to Distribute ‘Black Lives Matter’ Shirts to Baristas*, Wall St. J. (June 12, 2020, 5:25 PM), https://www.wsj.com/articles/starbucks-in-reversal-to-distribute-black-lives-matter-shirts-to-baristas-11591974649.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*

2. Millennials as Consumers—They Shop Sustainably, They Boycott, They Cancel

As with employment, Millennial consumption patterns differ markedly from those of prior generations. Here, the research also shows the extent to which this generation prizes social ends, though we have more soft survey evidence than hard empirical evidence, in contrast to the employment context. That said, CEOs receive and review this survey research, strongly suggesting it affects their thinking. That survey research shows that Millennials consume differently than previous generations. They are willing to pay more for sustainable goods.[79] Immersed in cancel culture, they also boycott and call out hypocrisy when they see it.

"Belief-driven buyers" comprise 69 percent and 67 percent of age groups 18-34 and 35-54, respectively, compared to only 56 percent of those over age fifty-five.[80] These buyers "choose, switch, avoid or boycott a brand based on where it stands on the political or social issues they care about."[81] A similar, more recent study by PWC showed that consumers are very responsive to ESG: "Sixty-six percent of Americans believe it's good for business when companies address social justice issues [and] [s]ix-in-10 (61%) said they will reward companies that actively address social justice issues."[82] While this data referred to consumers overall, the evidence also shows that Millennials are significantly more sensitive to EESG in their consumption choices.[83]

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[79] *66% of Consumers Willing to Pay More for Sustainable Goods, Nielsen Report Reveals*, Ashton, https://ashtonmanufacturing.com.au/66-of-consumers-willing-to-pay-more-for-sustainable-goods-nielsen-report-reveals/ ("According to a 2015 global report that polled 30,000 consumers almost three out of four millennials are willing to pay a premium for sustainable goods.").
[80] *Two-Thirds of Consumers Worldwide Now Buy on Beliefs*, Edelman (Oct. 2, 2018), https://www.edelman.com/news-awards/two-thirds-consumers-worldwide-now-buy-beliefs [https://perma.cc/3K6J-8HSE].
[81] Earned Brand 2018, Edelman (Oct. 2, 2018), https://www.edelman.com/earned-brand.
[82] *How Can Consumer-Facing Companies Weave Social Justice into their DNA?*, *supra* note __.
[83] *Id.* ("Younger consumers (17-38 years) are almost twice as likely to consider EESG issues when making purchasing decisions than consumers over 38 years old.").

Substantial survey research suggests that Millennials will act on their politics as shoppers. For example, a 2018 survey showed that 91% of Millennials reported that they would switch products to a purpose-driven firm, compared to 66% of consumers overall.[84] More than a third (36 percent) of Americans claim that they have cancelled a brand in the past year, though 30 percent have cancelled one-to-two brands, 5 percent three-to-five, and 1 percent over five brands.[85] Such surveys are always subject to the concern they are cheap talk, reflecting respondent claims of what they would do, not evidence of what they actually do. While it is difficult to track actual brand switching at a macro level, several recent examples suggest that the surveys reflect more than cheap talk.

For example, some sustainable companies have been called out for versions of greenwashing—sometimes even falsely called out. For example, customers of Oatly, a Swedish vegan milk brand, organized a boycott of the company.[86] Having built the company on the principle that oatmilk was better for the environment and a more sustainable product than milk, Oatly was excoriated on Twitter after selling a $200 million stake to a consortium including private equity firm Blackstone, which had been purportedly making investments resulting in deforestation of the Amazon.[87] In fact, Blackstone had made no such investments.[88] The company's response further illustrates the new realities of the Millennial Corporation. Blackstone

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[84] Afdhel Aziz, The Power Of Purpose: The Business Case For Purpose (All The Data You Were Looking For Pt 1), Forbes (Mar. 7, 2020, 12:06 PM), https://www.forbes.com/sites/afdhelaziz/2020/03/07/the-power-of-purpose-the-business-case-for-purpose-all-the-data-you-were-looking-for-pt-1/?sh=c7928f930baf (citing 2018 Purpose Study, Cone Porter Novelli, https://www.conecomm.com/research-blog/2018-purpose-study (last accessed Aug. 11, 2021).).
[85] *2021 Business of Cancel Culture Study*, Porter Novelli at 8–9 (Jan. 25, 2021), https://www.porternovelli.com/findings/the-2021-porter-novelli-the-business-of-cancel-culture-study/.
[86] Kian Bakhtiari, *Why Brands Need to Pay Attention to Cancel Culture*, Forbes (Sep. 29, 2020, 6:32 PM), https://www.forbes.com/sites/kianbakhtiari/2020/09/29/why-brands-need-to-pay-attention-to-cancel-culture/?sh=4c754a1d645e.
[87] *Id.*
[88] Izzy Schifano, *Explained: People are suddenly saying they're boycotting Oatly, but why?*, The Tab (Sept. 1, 2020), https://thetab.com/uk/2020/09/01/explained-oatly-blackstone-boycott-173205.

immediately issued a press release, "Setting the record straight on Blackstone's investment in the Brazilian company Hidrovias," describing the Twitter campaign as "blatantly wrong and irresponsible," pointing out that Hidrovias had no connection to deforestation and that it abided by the Amazon Soy Moratorium, and further touting both Hidrovias' and Blackstone's commitments to EESG.[89] Interestingly, Blackstone updated the press release in May 2021 to indicate that it had liquidated its position in Hidrovias.[90] Oatly was not public at the time so we cannot check for stock price or sales effects from this episode, but the company did recover to have a successful IPO in May 2021.

The resurgence of the Black Lives Matter movement in response to the killing of George Floyd swept through the corporate world as it did through the rest of society. IBM, Microsoft and Amazon quickly announced bans or moratoriums on selling facial recognition technology to police departments.[91] Google, Estee Lauder, and PepsiCo announced programs to increase minority hiring.[92] Apple, Target and Comcast announced significant donations to advance social justice initiatives.[93] While many of these initiatives were welcomed, they were not accepted at face value or uncritically. Millennial consumers fact-check claims and use social media to call out virtue signaling. For example, Sharon Cuter, the 33-year old founder of Uoma Beauty, a cosmetics

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[89] *Setting the record straight on Blackstone's investment in the Brazilian company Hidrovias*, The Blackstone Group Inc. (Sept. 10, 2019), https://www.blackstone.com/blackstone-hidrovias-brazil/.
[90] *Id.*
[91] Larry Magid, *IBM, Microsoft And Amazon Not Letting Police Use Their Facial Recognition Technology*, Forbes (June 12, 2020, 9:26 PM), https://www.forbes.com/sites/larrymagid/2020/06/12/ibm-microsoft-and-amazon-not-letting-police-use-their-facial-recognition-technology/#5e75fa451887.
[92] Rob Copeland, *Google Sets Hiring Goal to Advance Black Executives*, Wall St. J. (June 17, 2020, 7:11 PM), https://www.wsj.com/articles/google-adds-new-hiring-goal-to-boost-black-executives-11592421504; Bowdeya Tweh, Patrick Thomas & Sebastian Herrera, *Apple, Google Join Roster of Companies Pledging to Donate, Change Practices on Race*, Wall St. J. (June 12, 2020, 9:25 AM), https://www.wsj.com/articles/in-corporate-reckoning-executives-pressed-to-improve-racial-equity-in-workplaces-11591917711?mod=business_lead_pos1.
[93] Jean E. Palmieiri, *Target Chief Promises to Improve Diversity, Reopen Damaged Stores*, WWD (June 10, 2020), https://wwd.com/business-news/retail/target-chief-promises-to-improve-diversity-reopen-damaged-stores-1203650300; Tweh, Thomas & Herrera, *supra* note __.

company targeting Black women consumers, created the #pulluporshutup hashtag which quickly went viral on Instagram.[94] Cuter accused companies of cheap talk in support of Black lives, demanding that they disclose the racial makeup of their executives and workforce.[95] Cuter's targets weren't alone. Despite its history of working with high-profile Black designers and athletes, and its social media posts on racism, Adidas's workforce was revealed to be fewer than 4.5 percent Black.[96] When employees raised issues of racism at a company meeting, Karen Parkin, the company's global head of human resources, characterized such talk as "noise" only raised in the United States.[97] She rapidly resigned as employees successfully demanded that the company increase hiring of Blacks and Latinos.[98] Adidas competitor Reebok quickly dropped its sponsorship of the CrossFit Games after the CrossFit CEO tweeted inflammatory comments about George Floyd's killing.[99]

These examples of callout culture and cancel culture pose a challenge to those who believe that EESG is primarily rhetorical, that corporate managers can continue managing the company as usual while paying lip service to important causes. Again, from the Porter Novelli Business & Social Justice Study:

> 63 percent of individuals now say companies can no longer make a statement of support without also showing their actions to address social justice issues . . . [and] [m]ore than half (54%) of individuals say they are watching to see how

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[94] Gabby Shacknai, *UOMA Beauty's Sharon Chuter is Holding Brands Accountable with 'Pull Up or Shut Up,'* Forbes (June 8, 2020, 2:10 PM), https://www.forbes.com/sites/gabbyshacknai/2020/06/08/uoma-beautys-sharon-chuter-is-holding-brands-accountable-with-pull-up-or-shut-up/?sh=51581b1d70de.

[95] *Id.*

[96] Kevin Draper & Julie Creswell, *Black Superstars Pitch Adidas Shoes. Its Black Workers say They're Sidelined.*, N.Y. Times (June 19, 2019), https://www.nytimes.com/2019/06/19/business/adidas-diversity-employees.html.

[97] Kevin Draper & Julie Creswell, *Adidas Executive Resigns as Turmoil at Company Continues*, N.Y. Times (June 30, 2020), https://www.nytimes.com/2020/06/30/business/adidas-karen-parkin-resigns.html.

[98] *Id.*

[99] Phil Helsel, *CrossFit CEO Steps Down After Inflammatory George Floyd Comments*, NBC NEWS (June 9, 2020, 11:51 P.M.), https://www.nbcnews.com/news/us-news/crossfit-ceo-steps-down-after-inflammatory-george-floyd-comments-n1228941.

> brands have made progress in addressing social justice issues, and 45 percent have gone so far as to do research to see what companies have done to make headway against the commitments they made over the past year.[100]

Millennial employees, consumers, and investors will fact check claims and callout companies that fail to live up to their own rhetoric, often with significant economic consequences. In response, there is some evidence of companies competing over how transparent they can be. Many companies tout—and market researchers recommend—approaches like "radical transparency" in which they go far beyond the demands of the securities laws to disclose, for example, what factories they use, where they source their materials, how much their products actually cost, and the demographics of their workforce. These approaches are aimed at building Millennial loyalty.[101] Perhaps predictably, some companies like Everlane that promised such transparency and then failed to live up to it experienced a harsh backlash when, for example, accusations of racism and union busting emerged.[102] Further, we have seen the emergence of apps like Good On You that cater to Millennials and Gen Z. Good On You offers ethical ratings for fashion brands "to empower people's shopping choices," taking the position that, "Brands should publish information about their supply chain and direct operations to increase accountability and drive improved outcomes for people, the planet and animals. Consumers have a right to know how

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[100] *2021 Porter Novelli Business and Social Justice Study*, https://www.porternovelli.com/findings/2021-porter-novelli-business-social-justice-study/ (July 20, 2021, 10:47 AM).

[101] Jane Boutelle, *Six Essential Brand Qualities for Building Millennial Loyalty*, Digsite, https://www.digsite.com/blog/Millennials/six-essential-brand-qualities-building-millennial-loyalty (last visited Aug. 8, 2021).

[102] Jessica Testa, Vanessa Friedman, & Elizabeth Paton, *Everlane's Promise of 'Radical Transparency Unravels*, N.Y. Times (July 26, 2020), https://www.nytimes.com/2020/07/26/fashion/everlane-employees-ethical-clothing.html.

a brand impacts on the issues they care about."[103] As of July 2020, the app had over 600,000 users.[104]

3. Investors - Millennials Drive Investment in EESG

In previous work we argued that index fund EESG activism is driven by Millennial preferences.[105] In a sentence, we argued that the reason why the index funds, and the big three in particular, abruptly changed course around 2017 and began embracing EESG generally, and environmental and diversity issues in particular, was to attract Millennial wealth.[106] Index funds all own the same investments, so they cannot compete on performance.[107] They have all whittled fees down to zero or close to it.[108] All they have left to compete over is assets under management.[109] Millennials care about ESG, stand to inherit $24 trillion in wealth, and will soon become the most dominant investors, consumers, and employees.[110] The race to manage their retirement assets is what prompted the indexes to adopt EESG.[111] Rather than replicate those arguments here, we refer the reader to our prior work, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*.[112]

Since we published our paper, substantial additional evidence has emerged showing that Millennials drive EESG investments.[113] Recent work shows that Millennials contributed over $51

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[103] Good On You, https://goodonyou.eco/about/ and https://goodonyou.eco/faqs/ (last visited Aug. 4, 2021).
[104] *Good On You, the Application that Empowers your Wardrobe*, Galerie Joseph Paris (July 16, 2020), https://galeriejoseph.com/en/2020/07/16/good-on-you-the-application-that-empowers-your-wardrobe/.
[105] David Webber, Michal Barzuza & Quinn Curtis, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. Calif. L. Rev. 1243 (2020).
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Millennials are a Driving Factor in the Growth behind EESG Investments*, Nasdaq (May 25, 2021, 11:39 AM), https://www.nasdaq.com/articles/Millennials-are-a-driving-factor-in-the-growth-behind-esg-investments-2021-05-25.

billion to sustainable investment funds in 2020, ten times what they had contributed just five years earlier.[114] Concerns over climate change appear to be the largest driver of this growth.[115] Millennials are also making and investing more than ever as they advance in their careers. They are more than twice as likely as Generation Xers to say that they often or always use investment vehicles that take EESG into account (33% of Millennials versus 16% of Generation X and just 2% of Baby Boomers).[116] That research has also confirmed our view that the battle to manage the massive transfer of wealth to Millennials was driving that sudden interest in EESG by the Big Three and index funds more generally.[117] As etf.com CEO Dave Nadig stated, "The No. 1 question I get from advisors is how to handle the coming generational wealth transfer… EESG has emerged as one of the dominant answers to that question."[118]

4. Millennials Drove the Business Roundtable's Rejection of Shareholder Primacy in Favor of Stakeholderism

The evidence described above shows that Millennials really are different, and this difference is what is driving change in corporate law. We are not the only ones who recognize this. Though it has not been widely acknowledged within academia, Millennials were the reason why the Business Roundtable made its blockbuster announcement on August 19, 2019 adopting stakeholderism and abandoning shareholder primacy. By coincidence, another far less momentous event took place that same day: we posted our paper, "Shareholder Value(s)..." to SSRN, arguing

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[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Swipe to Invest: The Story Behind Millennials and Investing*, MSCI (Mar. 2020), https://www.msci.com/documents/10199/07e7a7d3-59c3-4d0b-b0b5-029e8fd3974b [https://perma.cc/6QMA-3HXH].

that Millennials were driving the pivot to EESG. It turned out that the Business Roundtable announcement was driven by a recognition of the new reality we described in our paper. Former BRT President John Engler could not have made it clearer: "The Business Roundtable's statement pledging to revise a longstanding principle of corporate governance was aimed at Millennials who are growing skeptical of capitalism."[119]

Pfizer's Sally Susman offered a more thorough explanation for the Roundtable's motives:

> The Business Roundtable announcement meant something very personal to me as well. Now I have a better way to advocate for young people to consider a career in business. Sure, I know many millennials who frown at the thought of joining a corporation. But I also know others who are finding truly meaningful work. . . . For any young person or individual re-thinking their career, please take a moment to read the Business Roundtable announcement. Then, give business a second look.[120]

Susman's focus was on employment, on recruiting Millennials for careers in business. But it could just as easily be applied to nearly every interface between Millennials and the corporate world, as employees, as consumers, as investors. The BRT announcement was about reframing capitalism away from the "greed is good" image of the 1980s, captured by the New York Times quote that introduced this article, and towards the more purpose-driven orientation Millennials demand of it today. As Engler noted, "We better let the American public, especially this massive new [Millennial] generation that's coming up, understand what's brought them unprecedented wealth and success and opportunity."[121]

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[119] Berkeley Lovelace Jr., *CEOs' shift away from shareholder value was aimed at Millennials, says former Business Roundtable president*, CNBC (Aug. 19, 2019, 6:20 PM), https://www.cnbc.com/2019/08/19/ceos-shift-away-from-shareholder-value-aimed-at-Millennials-john-engler.html.

[120] Sally Susman, *'You're going to need a cleanse': How Pfizer's Sally Susman was criticized for choosing a corporate career*, NBC News (Aug. 25, 2019, 8:59 PM), https://www.nbcnews.com/know-your-value/feature/you-re-going-need-cleanse-how-pfizer-s-sally-susman-ncna1045551 [https://perma.cc/SF3S-Y32L].

[121] Berkeley Lovelace Jr., *CEOs' shift away from shareholder value was aimed at Millennials, says former Business Roundtable president*, CNBC (Aug. 19, 2019, 6:20 PM), https://www.cnbc.com/2019/08/19/ceos-shift-away-from-shareholder-value-aimed-at-Millennials-john-engler.html.

As it turns out, the Business Roundtable announcement was just one of many transformations wrought by the rise of the Millennials.

C. Summary

In sum, the evidence shows that Millennials prioritize EESG as employees, consumers, and investors. Survey research, empirical research, experimental research, and numerous case studies demonstrate that this preference is not just rhetorical. Millennials will change jobs or stay in jobs depending on whether they view their employer as a purpose-driven, sustainable company. They will boycott brands, callout brands, actively seek out new brands, and use apps and other forms of ethical assessment to shape their consumption habits. They will seek out investment funds that will use their shareholder power to promote environmental and diversity issues.

Companies that use these values as a marketing ploy without backing it up with concrete action—or worse, by acting in ways that directly contradict the rhetoric—face harsh backlash from Millennial employees, consumers, and investors. Social media offers unprecedented ability for users to monitor corporate behavior and expose corporate misbehavior.[122] There are many examples in which that backlash becomes particularly harsh when motivated by a sense of betrayal, in which supposedly sustainable and purpose-driven companies violate the implicit or explicit promises they make to their Millennial stakeholders. Millennials are serious about their commitments and if they sense that companies are not, they act on it. Transparency in itself is

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[122] 2021 Business of Cancel Culture Study supra note __ at 4 (stating that 64 percent of Americans “think social media has given them a voice to influence companies,” that 72 percent “feel more empowered than ever before to share their thoughts or opinions about companies,” and that 69 percent see “cancelling a brand as a way not only to get attention [] for an issue or act, but also change a company’s ways (68 [percent])”).

becoming more valuable, in part because social media and cancel culture provide unprecedented opportunities not just to access but to act on information.

Moreover, corporate managers constantly receive evidence of these Millennial, and increasingly Gen Z, preferences.[123] They see the data, and they are well aware of companies, products, employers, even CEOs who have been cancelled or otherwise penalized. They are therefore competing to satisfy this demand and to avoid being branded in the wrong way. They are looking to get ahead of competitors, to be more socially responsible, more forward-thinking and -acting about EESG. Contrary to the hypothesis that EESG is a product of market power, massive, near monopolistic market power is just about the only company feature that can thwart EESG. Only the Amazons, the Googles and Facebooks of the world can afford not to promptly bend to these forces. That's not to suggest that they are actively interested in opposing these forces, it's just that they, unlike most companies, cannot be immediately harmed by them. Contrast that with, for example, Everlane, which went from $50 million in revenue to a $15 million drop in profits after accusations of ethical violations emerged.[124]

The bottom line is that, contrary to some predictions, the demand for EESG and stakeholderism is not coming from managers seeking to weaken shareholder power and assert their own interests and prerogatives. It is coming from the ground up, from Millennial employees, consumers, and investors. Far from empowering managers, it is making them weaker, more vulnerable, more beholden to more stakeholders than before, an argument we develop in the next section.

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[124] Testa, Friedman & Patton, *supra* note __.

III. The Millennial Corporation - Managers' New Boss

As the previous parts have shown, Millennials' commitment to values translates to the bottom line of firms' performance. These effects, we argue, have fundamentally changed the balance of power within firms. Part A argues that the collective action problem is rooted in shareholder preferences to maximize returns. Part B shows that millennials exert pressure and discipline on management through four different channels. Part C demonstrates that millennial preferences have effects on board diversity and the climate. To summarize, this part will show how the millennials operate to promote ESG and to discipline managers.

A. The Classic Corporation & Stakeholderism

Under the classical analysis of the corporation, managers were subject primarily to the power of the owners of the firms, the individual shareholders. These shareholders maximized returns exclusively. And since ownership is dispersed, shareholders suffered a severe collective action problem.[125] Shareholders had no incentive to be active as they could rarely influence firms and had little to gain from such influence.[126] Consequently, there was little that shareholders could do to discipline managers, who had some incentives to increase firm value, but stronger incentives to maximize their personal gains instead.[127]

Similarly, even large and powerful index funds like the Big Three, who manage shareholder money, had weak incentives to exercise that power to check and discipline managers.[128] While the

[125] See generally Adolf A. Berle & Gardiner C. Means, THE MODERN CORPORATION AND PRIVATE PROPERTY (rev. ed. 1991).
[126]
[127] Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 . J. Fin. Econ. 305, *PINCITE* (1976).
[128] *See, e.g.*, Lucian A. Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 Colum. L. Rev. 2029, *PINCITE* (2019).

big three index funds - BlackRock, StateStreet and Vanguard - had plenty of voting power to influence firms, their managers reaped no rewards from being active. Fund managers' compensation was historically designed to reward assets under management not changes to the portfolio's value.[129] Furthermore, if the value of the firms in BlackRock's portfolio increased, so did that of rivals State Street and Vanguard, as they all owned the same assets.[130] Thus, they gained nothing from being active, in fact, activism would confer identical benefits on their competitors, creating a classic free-rider problem.[131]

Under this classic account of the corporation, in which managers had only weak incentives to improve shareholder value, they had no incentives to improve stakeholder value. In fact, as current critics of stakeholderism point out, stakeholderism was invoked primarily as a tool to further insulate managers from shareholder pressure. This was the case for the "other constituency statutes" that Bebchuk, Kastiel & Tallarita deploy as evidence that stakeholderism won't work.[132] These statutes, which allowed managers to consider the interests of other constituencies (like employees and suppliers), were used primarily to fight hostile bidders who offered shareholders a premium for selling their stock.[133]

B. Millennial - Incentives to protect stakeholders & Decreased Insulation

The Millennial Corporation, this Part will argue, stands in sharp contrast to the classical corporation just described. In the Millennial Corporation, managers face discipline from several

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[129] *Id. cf.* Marcel Kahan & Edward Rock, *Index Funds and Corporate Governance: Let Shareholders Be Shareholders*, 100 B.U. L. Rev. 1771 (2020) (*parenthetical explanation strongly recommended with use of "cf.").
[130] Bebchuck & Hirst, *supra* note __.
[131] Bebchuk & Hirst, *supra* note _; *cf.* Jill Fisch, Asaf Hamdani & Steven Davidoff Solomon, *The New Titans of Wall Street: A Theoretical Framework for Passive Investors*, 168 U. PA. L. REV. 17 (2019) (arguing that index funds face competition from other funds).
[132] Bebchuk, Kastiel & Tallarita, *supra* note __.
[133]

important and significant channels. Section 1 will discuss how the different markets in which Millennials operate - products, employment and investment - create incentives for managers to promote stakeholderism. Section 2 will discuss how index funds discipline managers with respect to stakeholderism, and Section 3 will show how even hedge funds have started running EESG-focused campaigns against management, using EESG as a leverage to nominate directors to the board.

1. Channel I: Market Discipline

The collective action problem is rooted in shareholders' preferences to maximize returns exclusively. When the goal is to maximize returns, it is not rational for an individual shareholder to invest in activism. Since that shareholder owns only a fraction of each firm, the costs of activism outweigh any potential benefits (and the likelihood of successful activism is close to zero). Millennials, on the other hand, are committed to their values, which they might prioritize over returns.[134] Furthermore, consuming and working in firms they value is important for their identity. As a result, millennials' preference for value consumption and employment is not conditioned on having influence on firms. Put differently, each millennial will do so even if others do not. Paradoxically, this very feature of Millennial behavior is what gives it such influence. It further reduces the collective action problem.[135]

Managers receive materials from marketing firms and other industry players regarding this millennial demand for EESG. Even if it is not clear how millennials might act, or whether they will act, managers may rationally choose, in the absence of contrary evidence, to take that risk seriously.

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[134] *See infra* Part II.
[135] Cf. Eleonora Broccardo, Oliver Hart & Luigi Zingales, *Exit vs. Voice* (2020) (when individuals benefit from consequential positive effects on others the free riding problem is mitigated), available at https://ssrn.com/abstract=3671918.

Especially as they observe repeat examples of firms that were criticized, penalized or even boycotted. Thus managers face a new power, a groundswell of bottom-up demand from their consumers, employees and investors. Failure to respond to that demand could have negative consequences. Furthermore, millennials know how to monitor.[136] They demand transparency and they want to analyze the hard data. They are not easily fooled by claims, or virtue- signaling declarations. Part of their culture is to follow up and verify commitment and compliance, and publicly calling out someone not living up to their own rhetoric can earn Millennials credit and prestige in ways that were not true for prior generations.[137]

Finally, managers' careers and personal wealth are tied to the success of their company. If their firm is targeted by cancel culture for example, the CEO's personal wealth and career trajectory are at risk. More important, this risk is non-diversifiable. This risk aversion costs further motivate managers to invest (even excessively) in EESG. [138]

2. Channel II : Index Fund ESG Activism

As we described in our prior paper, Millennials' pressure on managers is also felt indirectly through a separate channel, the activism of the big three index funds - Blackrock, State Street and Vanguard. These funds engage in vigorous competition to be branded as EESG promoters in order to attract and retain millennials as investors.[139] In particular, we show that while these funds haven't used their power and stewardship to protect shareholder value and maximize their portfolios,[140] they

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[136] *See* discussion *infra* notes __–__ and accompanying text.
[137] I*d.*; *cf.* Ricci & Sautter, *supra* note __ (arguing that millennials' use of technology reduces costs of engagement).
[138] *Cf.* Yakov Amihud & Baruch Lev, *Risk Reduction as a Managerial Motive for Conglomerate Mergers*, 12 Bell J. Econ. 605 (1981) (finding evidence that managers engage in conglomerate mergers to diversify employment risk); Jensen & Meckling, *supra* note __, at *PINCITE* (excessive diversification as one manifestation of the agency problem).
[139] *See* Barzuza, Curtis & Webber, *supra* note _.
[140] *See e.g.*, Bebchuk & Hirst, supra note _ .

became highly active with respect to EESG causes.[141] As we found, the big three have also voted systematically against board members for lack of diversity on their boards.[142] State Street started the Fearless Girl campaign that pressured firms to add female board members and simultaneously voted against nomination committees of all-male boards.[143] BlackRock then raised the stakes, adopting a policy demanding at least two female board members and voting against non-compliance.[144]

Since we published our paper, the big three have continued and intensified their EESG activism. For example, the big three recently turned their efforts to pressure firms to improve board racial and ethnic diversity.[145] In the early part of 2021, Blackrock voted against 130 boards based on lack of diversity. During 2020-21 it voted globally against 1,862 board members based on lack of diversity,[146] and, overall it voted against reelection of 10% of the 64,000 directors it voted on, voting against at least one director in more than 3,000 firms, due to corporate governance concerns.[147]

Similarly, State Street recently announced it will vote against chairs of nomination committees in boards that do not have at least one member from underrepresented communities by the end of the year.[148] And it has already voted against nomination committees chairs based on lack of disclosure of the ethnic and racial composition of their boards.[149]

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[141] *See* Barzuza, Curtis & Webber, *supra* note _. *See also*, Condon.
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] BlackRock, Pursuing Long-Term Value for Our Clients, A look into the 2020-21 Proxy Voting Year, p. 9 (2021), https://www.blackrock.com/corporate/literature/publication/2021-voting-spotlight-full-report.pdf
[146] *Id.*
[147]*Id.* ("Corporate governance concerns — including lack of board independence, insufficient diversity, and executive compensation — prompted most of the votes against directors' elections.").
[148] *Racial diversity stagnated on corporate boards, study finds*, CNBC (June 10, 2021, 1:52 PM), https://www.cnbc.com/2021/06/10/racial-diversity-stagnated-on-corporate-boards-study-finds.html.
[149] *Id.*

Most firms now have majority voting rules which require that board members running unopposed who receive more votes against than in favor submit their resignation to the board.[150] While the board may choose to renominate the director who did not receive support from a majority of the votes,[151] the board is also required to address the source of shareholder dissatisfaction, or else may face a negative ISS recommendation in the next annual election.[152]

The big three also exert significant pressure on managers to achieve environmental goals, and accordingly voted against directors for environmental reasons. As Andy Behar, CEO of As You Sow, a shareholder advocacy non-profit, reflects on the big three activism: "This idea that boards of directors are these sacred institutions that can't be touched is done." [153] Furthermore, index funds' activism is not limited to annual elections. Recently they increased their support for shareholder proposals, breaking from their decades-long practice of supporting management. During the recent proxy season, BlackRock supported more than half of the environmental shareholder proposals it voted on.[154] These proposals request firms to reduce greenhouse gas (GHG) emissions,[155] report

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[150] Marc S. Gerber, *US Corporate Governance: Boards of Directors Face Increased Scrutiny*, 2014 Insights 157, 157 (Skadden, Arps, Slate, Meagher & Flom LLP), https://perma.cc/SKC3-HXCE ("Approximately 90 percent of S&P 500 companies (and approximately 46 percent of Russell 3000 companies) have a majority voting standard in director elections and/or a policy requiring resignation if a director fails to get majority support . . .").

[151] Stephen J. Choi et al., *Does Majority Voting Improve Board Accountability?*, 83 U. Chi. L. Rev. 1119, 1126 (2016) ("As a legal matter, nothing prevents the board from appointing the very person who failed to receive a majority of 'for' votes to fill the vacancy.").

[152] ISS Proxy Voting Guidelines Benchmark Policy Recommendations, Voting for Director Nominees in Uncontested Elections, Responsiveness p.12 (2021) (stating that ISS may recommend voting against directors if "At the previous board election, any director received more than 50 percent withhold/against votes of the shares cast and the company has failed to address the issue(s) that caused the high withhold/against vote"). https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf.

[153] Lindsay Frost, EESG *'Excuses Wear Away' as BlackRock Zeroes In*, Agenda (June 23, 2021), https://www.agendaweek.com/c/3259304/412564?referrer_module=searchSubFromAG&highlight=exxon.

[154] *Id.* ("BlackRock backed 64% of the 72 environment-related shareholder proposals it voted on globally,")

[155] BlackRock Investment Stewardship, Vote Bulletin, Chevron Corporation, Item 4: Reduce Scope 3 Emissions (FOR).
https://www.blackrock.com/corporate/literature/publication/2021-voting-spotlight-full-report.pdf

progress in achieving environmental targets,[156] and report lobbying payments.[157] Thus, managers also face pressure to implement the request in these shareholder proposals. While these proposals are precatory, not implementing a proposal that received support from a majority of the shareholders leads to a negative ISS voting recommendation in annual elections.[158] That's what gives them teeth.

Finally as shown in the next section, the big three also gave their support to Engine 1 , a small hedge fund that targeted Exxon Mobile with an EESG focused proxy fight, and won.

3. Channel III: Hedge Fund ESG Activism

Millennials' pressure on management is felt through another major channel - hedge fund activism. For well over a decade, activist hedge funds have become the main threat to managers. Recently, their main strategy has been to run director nominees to the board.[159] Whether they succeed depends, to a large extent, on the support of the large index funds.[160] Opponents of stakeholderism have argued that management will use the stakeholderism rhetoric to get the support of institutions in their fight against activist hedge funds,[161] to " urge institutional investors to avoid cooperating with hedge fund activists and to side with and support corporate leaders."[162]

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[156] BlackRock Investment Stewardship, Vote Bulletin, General Electric Corporation, Item 7: Report on Meeting the Criteria of the Net Zero Indicator (FOR) https://www.blackrock.com/corporate/literature/publication/2021-voting-spotlight-full-report.pdf

[157] BlackRock Investment Stewardship, Vote Bulletin Exxon Mobile, Item 9: Report on Lobbying Payments and Policy (FOR) https://www.blackrock.com/corporate/literature/publication/2021-voting-spotlight-full-report.pdf

[158] ISS Proxy Voting Guidelines Benchmark Policy Recommendations, Voting for Director Nominees in Uncontested Elections, Responsiveness, p.12 (2021) (ISS may recommend voting against directors if "The board failed to act on a shareholder proposal that received the support of a majority of the shares cast in the previous year…"). https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf

[159] Bebchuk & Tallarita

[160] *Id.*

[161] *Id.* ("Stakeholderism has been used to urge institutional investors to be more deferential to corporate leaders and more willing to side with them in any engagement with hedge fund activists")

[162] *Id.* at 158.

In reality, however, the evidence points in the exact opposite direction. Not only does EESG fail to help managers fend off activists, rather, activist hedge funds use EESG to win index-fund support against managers. That was clearly the case in the most high profile fight of the 2021 proxy season, when a small startup fund, Engine No. 1, gained three board seats on ExxonMobil board after a proxy campaign focused on climate change.[163]

To be sure, Exxon was a candidate for a traditional activist attack after losing _ of its market value following the pandemic and the fall of oil and gas prices globally. Yet, Engine's success shocked markets.[164] It won because of its focus on EESG.[165] A small, relatively new fund, Engine held only a tiny fraction of Exxon - a $40M stake,[166] hardly a fifth of one percent of Exxon's outstanding stock.[167] Furthermore, the campaign that placed three out of the fund's four nominees on Exxon's board cost $12.5M - a strikingly low number for a proxy fight of this magnitude,[168] especially compared to Exxon's expenditures.[169] Accordingly, the victory was

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[163] *The Little Engine that Could, ExxonMobil Loses a Proxy Fight with Green Investors*, The Economist (May 29, 2021) ("An activist hedge fund succeeds in nominating at least two climate-friendly directors to the energy giant's board").
[164] ("The high-profile ExxonMobil shareholder vote in May sent shock waves through many of corporate America's boardrooms")
[165] David A. Katz and Laura A. McIntosh, Wachtell, Lipton, Rosen & Katz, *EESG Activism After ExxonMobil*, Harv. L. Sch. F. on Corp. Gov. (July 23, 2021).
https://corpgov.law.harvard.edu/2021/07/23/eesg-activism-after-exxonmobil/
[166] Robert G. Eccles & Colin Mayer, Can a Tiny Hedge Fund Push ExxonMobil Towards Sustainability?, Har. Bus. Rev. (Jan. 20, 2021).
https://hbr.org/2021/01/can-a-tiny-hedge-fund-push-exxonmobile-towards-sustainability
For comparison, other activist hedge funds that placed a slate in high visibility proxy fights - _____
[167] Thomas Ball, James Miller, and Shirley Westcott, Alliance Advisors, *Was the Exxon Fight a Bellwether?*, Harv. L. Sch. F. on Corp. Gov. (July 24, 2021) ("Engine No. 1 launched in December with approximately $250 million in assets, and owned 0.02% of Exxon's outstanding shares").
https://corpgov.law.harvard.edu/2021/07/24/was-the-exxon-fight-a-bellwether/#4
[168] Svea Herbst-bayliss, *Little Engine No. 1 Beat Exxon with Just $12.5 Mln*, Reuters (June 30, 2021) ("Investors said the fund's small budget could become a template for low-cost proxy contests")
https://www.reuters.com/business/little-engine-no-1-beat-exxon-with-just-125-mln-sources-2021-06-29/
[169] *Id.* ("Industry experts speculated that Exxon's costs could have topped $100 million")

described as not less than "shocking",[170] "David against Goliath",[171] "the Little Engine that Could",[172] and "The most groundbreaking development this proxy season"[173]

Industry players explained Engine 1's win as a result of its unique strategy to use EESG as a leverage.[174] A Wachtell Lipton memo explains:[175]

> While there were various factors at play in the ExxonMobil scenario, the bottom line is this: A newly launched and virtually unknown hedge fund with a tiny stake in a massive global enterprise managed to leverage environmental and governance issues into winning three board seats at the annual meeting, displacing three incumbent directors, and is now in a position to influence the strategic direction of the company.[176]

The NYTimes echoes this view in a column titled "*Exxon's Board Defeat Signals the Rise of Social-Good Activists":*

> Indeed, Engine reminded BlackRock, Vanguard and State Street that its campaign was in line with their own publicly stated goals to see the carbon emissions of the companies in their portfolios fall sharply over the next 30 years.[177]

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[170] Svea Herbst-bayliss, *Little Engine No. 1 Beat Exxon with Just $12.5 Mln*, Reuters (June 30, 2021) ("Engine No. 1 in May shocked the oil-and-gas industry") https://www.reuters.com/business/little-engine-no-1-beat-exxon-with-just-125-mln-sources-2021-06-29/

[171] *See e.g.* Peter Georgescu, *EN1 Versus Exxon: This David Wants To Strengthen His Goliath*, Just Capital, Forbes (April 30 2021) https://www.forbes.com/sites/justcapital/2021/04/30/en1-versus-exxon-this-david-wants-to-strengthen-his-goliath/?sh=407d9c47e396

[172] *The Little Engine that Could, ExxonMobil Loses a Proxy Fight with Green Investors*, The Economist (May 29, 2021)

[173] Thomas Ball, James Miller, and Shirley Westcott, Alliance Advisors, *Was the Exxon Fight a Bellwether?*, Harv. L. Sch. F. on Corp. Gov. (July 24, 2021) https://corpgov.law.harvard.edu/2021/07/24/was-the-exxon-fight-a-bellwether/#4.

[174] *See e.g.*, Lindsay Frost, *Activist Hedge Funds Increasingly EESG Converts*, Agenda (July 26, 2021) ("Whereas before an activist investor had to reflect more ownership, Engine No. 1 has shown that a smaller position, coupled with a compelling EESG issue, could be sufficient to win a campaign for a board seat (or four). Boards cannot afford to ignore the issues raised by activists, even little-known funds.") https://www.agendaweek.com/c/3253704/411854?referrer_module=searchSubFromAG&highlight=exxon

[175] David A. Katz and Laura A. McIntosh, *Wachtell, Lipton, Rosen & Katz, EESG Activism After ExxonMobil*, Harv. L. Sch. F. on Corp. Gov. (July 23, 2021), https://corpgov.law.harvard.edu/2021/07/23/eesg-activism-after-exxonmobil/.

[176] *Id.*

[177] Matt Phillips, *Exxon's Board Defeat Signals the Rise of Social-Good Activists*, N.Y. Times (June 9, 2021), https://www.nytimes.com/2021/06/09/business/exxon-mobil-engine-no1-activist.html [https://perma.cc/6U7J-FP5J].

BlackRock voted for three out of Engine's four candidates, explaining that "...we believe more needs to be done in Exxon's long-term strategy and short-term actions in relation to the energy transition in order to mitigate the impact of climate risk on long-term shareholder value."[178]

As this activist hedge fund campaign demonstrates, in contrast to the predictions of the reactionary managers camp, managers did not use stakeholderism to fight off hedge fund activism. Quite the contrary, activist hedge funds used EESG as leverage to get support from index funds for their board candidates. And as analysts opined, "it's hard to overstate the impact that Exxon's defeat will have on corporations across the country."[179] There is no doubt that other hedge funds will go this route, [180] and receive enthusiastic support from the institutions. [181]

As the Engine campaign shows, since hedge funds now can use EESG as leverage in their fights with management, and might get the institutions to support their candidates, managers are less insulated and more exposed to hedge fund attacks. As an immediate result, managers have to take EESG seriously and constantly invest in it and improve it.

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[178] Press Release, BlackRock, Vote Bulletin: ExxonMobil Corporation (May 26, 2021), ("Exxon and its Board need to further assess the company's strategy and board expertise against the possibility that demand for fossil fuels may decline rapidly in the coming decades, as was recently discussed in the International Energy Agency's (IEA) Net Zero 2050 scenario. The company's current reluctance to do so presents a corporate governance issue that has the potential to undermine the company's long-term financial sustainability.") https://www.blackrock.com/corporate/literature/press-release/blk-vote-bulletin-exxon-may-2021.pdf [https://perma.cc/4L38-NLE9].

[179] Matt Phillips, *Exxon's Board Defeat Signals the Rise of Social-Good Activists*, N.Y. Times (June 9, 2021), https://www.nytimes.com/2021/06/09/business/exxon-mobil-engine-no1-activist.html [https://perma.cc/6U7J-FP5J].

[180] Thomas Ball, James Miller, and Shirley Westcott, Alliance Advisors, *Was the Exxon Fight a Bellwether?*, Harv. L. Sch. F. on Corp. Gov. (July 24, 2021) ("There is little doubt that Engine No. 1's victory in the Exxon proxy fight will embolden other investors to launch board contests in the future that focus on E&S issues."). https://corpgov.law.harvard.edu/2021/07/24/was-the-exxon-fight-a-bellwether/#4

[181] Thomas Ball, James Miller, and Shirley Westcott, Alliance Advisors, *Was the Exxon Fight a Bellwether?*, Harv. L. Sch. F. on Corp. Gov. (July 24, 2021) ("Engine No. 1 launched in December with approximately $250 million in assets, and owned 0.02% of Exxon's outstanding shares"). https://corpgov.law.harvard.edu/2021/07/24/was-the-exxon-fight-a-bellwether/#4

But it is critically important to emphasize that the Engine No. 1 campaign did not stop at EESG. Rather, the campaign included other, non-EESG demands of the type that are common to activists' campaigns.[182] Activist hedge funds typically target firms which they believe invest excessively and pressure management to cut investments and instead distribute some money to shareholders. Accordingly, in its letter to management, Engine No. 1 argued that management should cut some non-profitable investments.[183] Furthermore, in its letter to management, Engine promoted a classic hedge fund intervention in CEO pay, tying it to shareholder value and cutting it based on Exxon's recent performance. [184]

Thus, Engine's activism showed that activists can actually use EESG as leverage to *reduce* management insulation, even for issues beyond the realm of stakeholderism, such as firms' capital investment, and even beyond that, to intervene in executive compensation, the heart of managerial incentives. This defied the predictions of the reactionary managers camp.

4. Channel IV: Regulation - Nasdaq Diversity Listing Rules

Millennial preferences are also reshaping regulation. On August 6, 2021 the SEC approved Nasdaq's board diversity listing standards. These standards require boards to publicly disclose board-level diversity statistics and to have at least two diverse members or explain why they do

[182] *See, e.g.*, Peter Georgescu, *EN1 Versus Exxon: This David Wants To Strengthen His Goliath*, Just Capital, Forbes (April 30, 2021), https://www.forbes.com/sites/justcapital/2021/04/30/en1-versus-exxon-this-david-wants-to-strengthen-his-goliath/?sh=407d9c47e396 ("But James is suggesting immediate changes in the way Exxon handles money and his ideas will bring smiles to those who care about little more than dividends and earnings per share.").

[183] *Id.* ("He has a specific request to fund only projects that can break even on the assumption of conservative oil and gas prices.").

[184] *Id.* ("EN1 would like to change executive compensation to align it more closely with shareholder value. That's a nice way of saying the CEO has been grossly overpaid.").

not.[185] During the comment period, the SEC received 200 submissions, out of which 85 percent supported the rules (Comments submitted to the SEC become public immediately.).[186] Not surprisingly, firms that cater to millennials publicized their support. For example, Robin Hood CEO Wes Moore wrote in his comment, in support of the Nasdaq Rule,[187] "Corporations that lead on equity and inclusion become more durable, have greater resonance with America's diverse consumer markets, and are more creative and competitive in the global marketplace."[188]

As noted, the rule requires firms to disclose information on their board diversity. As stated by SEC chair Gary Gensler :[189]

> These rules reflect calls from investors for greater transparency about the people who lead public companies, and a broad cross-section of commenters supported the proposed board diversity disclosure rule. Investors are looking for consistent and comparable data when making decisions about their investments. I believe that our markets work best when investors have access to such information.[190]

In opposing the rule, Republicans from the Senate Banking committee argued that mandatory disclosure of diversity could be used by activist groups to pressure firms to make changes:

> NASDAQ's alternative to satisfying the quota requirement—disclosure explaining non- compliance—could still hurt companies even if they do not change their

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[185]Nasdaq's Board Diversity Rule What Nasdaq-Listed Companies Should Know, https://listingcenter.nasdaq.com/assets/Board%20Diversity%20Disclosure%20Five%20Things.pdf (last updated Aug. 6, 2021).

[186] Comments on NASDAQ Rulemaking, US Securities and Exchange Commission, https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081.htm ().

[187] Katherine Doherty and Jeff Green,Nasdaq Wins SEC Support for Plan to Diversify Company Boards Bloomberg News (August 6, 2021) https://www.bnnbloomberg.ca/nasdaq-wins-sec-support-for-plan-to-diversify-company-boards-1.1637637

[188] Wes Moore, Robin Hood CEO, Support for File No. SR-NASDAQ-2020-081, Related to Board Diversity (January 8, 2021), https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8222707-227724.pdf

[189] Chair Gary Gensler, Statement on the Commission's Approval of Nasdaq's Proposal for Disclosure about Board Diversity and Proposal for Board Recruiting Service, US Securities and Exchange Commission (August 6, 2021) https://www.sec.gov/news/public-statement/gensler-statement-nasdaq-proposal-disclosure-board-diversity-080621

[190] *Id.*

> behavior. Activist groups could use the information to start costly pressure campaigns against corporations with allegedly non-diverse boards. NASDAQ appears to acknowledge this by quoting your earlier remarks that transparency 'creates external pressure from investors *and others* who can draw comparisons company to company.'[191]

This development contradicts a second prediction of the reactionary managers camp. Far from preempting new regulation, the new drive for EESG prompted it.[192] Millennial pressure is affecting more than just corporate managers and investment managers. It is affecting regulators too.[193]

C. Millennial EESG Activism Has Effects Both Inside the Corporate World and Beyond

1. Effects on Diversity

The rise of the Millennials hasn't just led to much more talk about boardroom diversity. It has led to much more boardroom diversity. In 2017, the Big Three index funds began actively pushing for more women to be hired on corporate boards. The results have been immediate and dramatic, which is hardly surprising, given that the Big Three hold XX% of the market. According to one recent study, the Big Three's campaign in favor of board gender diversity lead firms to add more female directors, [194] and to promote female directors to key positions on the board.[195]

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[191] https://www.banking.senate.gov/imo/media/doc/NASDAQ_LETTER.pdf
[192] *See* Bebchuk & Tallarita, *supra* note __.
[193] Alexandra Olson, SEC approves Nasdaq's plan to require board diversity, AP News (August 7, 2021) https://apnews.com/article/business-race-and-ethnicity-ef14c40ab196e29b3a9f3022ee70d0f7 ("Lorraine Hariton, CEO of the women's workplace advocacy group Catalyst, said Nasdaq's plan was a reasonable response to a desire from the consumers, investors and many company leaders for greater transparency on corporate diversity.")
[194] *See* Todd A. Gormley, Visha K. Gupta, David A. Matsa, Sandra Mortal & Lukai Yang, *The Big Three and Board Gender Diversity: The Effectiveness of Shareholder Voice*, European Corporate Governance Institute – Finance Working Paper 714/2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3724653 ("We estimate that their campaigns led firms to add at least 2.5 times as many female directors in 2019 as they had in 2016, accounting for most of the increase in board gender diversity over that period.").
[195] *Id.*

Millennials' fight for racial diversity has also started showing results.[196] The share of new directors in S&P 500 firms who are Black has tripled from 11% in 2020 to 33% in 2021,[197] an unprecedented jump in the data, according to Julie Daum, the North American board practice leader for Spencer Stuart.[198] Daum, ISS and other commentators, all attribute this jump in the data to the murder of George Floyd and the Black Lives Matter protests in the summer of 2020.[199]

That's not to say that diversity on U.S. corporate boards has been achieved. Far from it.[200] But these changes are significant. Overall 456 directors were nominated this year, the largest number of new nominations since 2004.[201] Almost three quarters (72%) of the new directors that were nominated in 2021 are women or belong to a racial or ethnic minority; the share of new

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[196] Catherine Thorbecke, *Boardroom diversity is on the rise after racial reckoning hits private sector, study finds*, ABC News (June 16, 2021, 2:04 PM), https://abcnews.go.com/Business/boardroom-diversity-rise-racial-reckoning-hits-private-sector/story?id=78312353.

[197] *See* SpencerStuart, 2021 S&P 500 Board Diversity Snapshot https://www.spencerstuart.com/-/media/2021/july/boarddiversity2021/2021_sp500_board_diversity.pdf; ISS Corporate Solutions, Number of Black Director Appointments Grows Exponentially at Large U.S. Companies, ISS Press Release (May 25, 2021), https://insights.issgovernance.com/posts/number-of-black-director-appointments-grows-exponentially-at-large-u-s-companies/.

[198] *See* Catherine Thorbecke, Boardroom Diversity is on the Rise After Racial Reckoning Hits Private Sector, Study Finds, ABC News (June 16, 2021) (citing Daum telling ot ABC News: "We've been collecting this data for a long time and we've never seen a jump like that.") https://abcnews.go.com/Business/boardroom-diversity-rise-racial-reckoning-hits-private-sector/story?id=78312353.

[199] See Catherine Thorbecke, Boardroom Diversity is on the Rise After Racial Reckoning Hits Private Sector, Study Finds, ABC News (June 16, 2021) ("Daum said most companies tend to start looking for new directors in September, noting that Floyd's murder and last summer's Black Lives Matter protests likely loomed large over that decision-making process."); ISS Corporate Solutions, Number of Black Director Appointments Grows Exponentially at Large U.S. Companies, ISS Press Release (May 25, 2021) ("The spike follows widespread racial justice protests last summer that, in turn, prompted many U.S. corporate leaders to pledge to increase the number of Black directors and executives within corporate ranks.)

[200] SpencerStuart, 2021 S&P 500 Board Diversity Snapshot (Just 21% of all S&P 500 directors in 2021 are Black/African American, Hispanic/Latino/a, Asian, American Indian/Native Alaskan or multiracial ... And women now represent 30% of all S&P 500 directors). Furthermore, there are less achievements in small firms. See generally Kobi Kastiel & Yaron Nilli, *The Corporate Governance Gap*, 131 Yale L. J. (Forthcoming 2022) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3824857

[201] SpencerStuart, 2021 S&P 500 Board Diversity Snapshot. As low turnover continued to be an impediment to changes to US boards, some of these nominations led to increase in board size. Theo Francis & Jennifer Maloney, *Big Companies Boost Share of Black and Latino Directors*, WSJ (June 16, 2021) ("A number of boards—including Square and Ralph Lauren—added seats, in many cases increasing diversity without waiting for openings from retirement.") https://www.wsj.com/articles/this-years-influx-of-directors-starts-shift-in-boardroom-diversity-11623835801?mod=pls_whats_news_us_business_f

directors who are Latino or Hispanic has more than doubled, rising from 3% in 2020 to 7% in 2021; and the total share of new directors from racial or ethnic minorities has almost doubled from 21% in 2020 to 47% in 2021.[202]Overall 2021 saw the most diverse incoming class of directors in history.[203]

2. Effects on Climate

The evidence shows that Millennials are reshaping the corporation and the investment space. Even more remarkably, a recent study found that the climate campaigns by the big three achieved meaningful environmental results.[204] The study used novel data on engagements of the big three with individual firms in their portfolio and found that the funds targeted large firms with high CO2 emission in which they held large stakes.[205] The study also found evidence consistent with the hypothesis that the funds' efforts were effective. In particular, the study found a strong and statistically significant negative association between ownership by the big three and carbon emissions.[206] Importantly, consistent with causal connection, this effect became stronger in recent years, after the funds launched their public climate campaigns.[207]

There is also apparent progress on other dimensions such as disclosure. BlackRock reported that 65% of the 224 firms it targeted for climate change issues have "made progress on integrating climate risk into business strategy and disclosures."[208]

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[202] SpencerStuart, 2021 S&P 500 Board Diversity Snapshot https://www.spencerstuart.com/-/media/2021/july/boarddiversity2021/2021_sp500_board_diversity.pdf
[203] SpencerStuart, 2021 S&P 500 Board Diversity Snapshot ("Driven by the increase in Black/African American directors, the incoming class of directors is the most diverse we have seen"). https://www.spencerstuart.com/-/media/2021/july/boarddiversity2021/2021_sp500_board_diversity.pdf
[204] José Azar, Miguel Duro, Igor Kadach & Gaizka Ormazabal, *The Big Three and Corporate Carbon Emissions around the World*, J. Fin. Econ. (forthcoming 2021). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3553258
[205]*Id.*
[206] *Id.*
[207] *Id.*
[208]*Need Author name(s)*, *ESG 'Excuses Wear Away' as BlackRock Zeroes In*, AGENDA (*Need Date*), https://www.agendaweek.com/c/3259304/412564?referrer_module=searchSubFromAG&highlight=exxon.

IV. Implications

Our account of the Millennial corporation has important implications for corporate law and finance. In this section we characterize these implications. Section A discusses implications for securities law, and in particular to disclosure and materiality doctrine. Section B discusses implications for corporate law, with a focus on managers' fiduciary duties. Section C discusses the relationship between EESG and firm performance. Section D discusses implications for firms. We end this Part with a discussion, in Section E, of how the rise of Millennial stakeholders affects our understanding of the firm.

For decades, corporate governance scholarship has been dominated by a debate which pits shareholder primacy versus stakeholderism. Shareholder primacy holds that the purpose of the firm is to maximize returns to shareholders, while stakeholderism asserts that firms should have commitments to non-shareholder stakeholders as well. Neither doctrine is particularly helpful in explaining the Millennial corporation, because it is characterized by preferences that overlap across traditional stakeholder categories like consumer, employee, and shareholder.

A. Can Securities Law Keep Pace?

Companies' disclosures to investors have become one of the key fronts in the debate over EESG. Investors have demanded more details about firms' performance with respect to environmental and social metrics and argued that these disclosures are essential to their asset allocation decisions. With new appointments to the Securities and Exchange Commission early in the Biden administration, the SEC has made developing new disclosure guidelines related to climate change a priority. These new requirements are now the subject of a vigorous debate. The disclosure debate mirrors the larger one: Are these new disclosures an essential ingredient in accurately pricing firms, or is this an attempt to turn America's securities regulator into a tool of social change?[209]

In this part we argue that financial disclosures need to keep pace with the changing nature of corporate governance. The idea that financially material disclosures can be clearly distinguished from politically motivated disclosure requirements is less tenable when firms find themselves financially affected by perceptions of their social and environmental responsibility. Stakeholder power is leading to a convergence of the political and the financial, and one of the main consequences is that social issues can become financial problems in short order. Drawing distinctions between financial and social motivations is becoming increasingly pointless and untenable. Instead, regulators should be asking whether the demanded disclosures are actually something most investors want.

Even before the SEC engaged with the issue, many of the largest firms had already begun to make voluntary EESG disclosures. Frameworks like SASB and GRI provide guidelines for firms to voluntarily make structure disclosures on EESG issues in standardized ways, akin to what investors might receive in a 10-K. Many companies go beyond even these voluntary disclosure frameworks to produce lengthy reports that outline their EESG goals and metrics. And as noted above, some have adopted the concept of "radical transparency" to cater to Millennials and Gen Z and to win points on websites like Good On You that have become a quasi-ISS for consumers who value EESG.

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[209] Paul G. Mahoney & Julia D. Mahoney, *The New Separation of Ownership and Control: Institutional Investors and ESG*, forthcoming Columbia Business Law Review (2021), https://papers.ssrn.com/abstract=3809914 (last visited Aug. 11, 2021).

i. Stakeholder Interest Convergence at the SEC: Human Capital Management

To illustrate how pressure from Millennial stakeholders is changing disclosure obligations, consider the new Human Capital Management disclosure obligations. This new disclosure rule is typical of the debate over the role of the SEC in EESG issues. Effective November 9, 2020, the SEC expanded the obligations of registrants to make disclosures regarding their "human capital" under Item 101(c)(1)(xiii) of Regulation S-K.[210] Prior to the adoption of this new rule, the SEC had only required registrants to disclose the number of employees. The revision to the disclosure requirement now calls on companies to include in their filings:

> "A description of the registrant's human capital resources, including the number of persons employed by the registrant, and any human capital measures or objectives that the registrant focuses on in managing the business (such as, depending on the nature of the registrant's business and workforce, measures or objectives that address the *development, attraction and retention of personnel*)."[211]

The emphasis on, not just the numerical size of the workforce, but on firms' relationship to their employees—including attraction and retention—is a result of investors' growing awareness that a firm's relationship to its employees is an essential ingredient to both returns-oriented and socially-oriented EESG investors.

The expansion of disclosure related to human capital was in part a response to a rulemaking petition from the Human Capital Management Coalition, an organization of investors including mostly union pension funds as well as some private asset managers.[212] The petition

[210] 17 C.F.R. 229, 239, and 240 (2020), https://www.sec.gov/rules/final/2020/33-10825.pdf.
[211] *Id.* Emphasis added.
[212] Human Capital Management Coalition, Members, https://www.hcmcoalition.org/members (accessed Aug. 1, 2021).

made the case for the increasing importance of employee talent to investors, noting that SASB had highlighted human capital issues as material to a number of industries.

Larry Fink of Blackrock explicitly addressed human capital in his 2020 letter:

> "Companies ignore stakeholders at their peril – companies that do not earn this trust will find it harder and harder to attract customers and talent, especially as young people increasingly expect companies to reflect their values. The more your company can show its purpose in delivering value to its customers, its employees, and its communities, the better able you will be to compete and deliver long-term, durable profits for shareholders….
>
> A company that does not seek to benefit from the full spectrum of human talent is weaker for it – less likely to hire the best talent, less likely to reflect the needs of its customers and the communities where it operates, and less likely to outperform….
>
> [W]e ask that your disclosures on talent strategy fully reflect your long-term plans to improve diversity, equity, and inclusion, as appropriate by region."[213]

Several features of Fink's letter are notable. First is the explicit connection between the need to attract and retain talent and the expectation of "young people" that companies will reflect their values. Second is the emphasis on delivering value to "employees and customers." In framing the issue this way, Fink implicitly recognizes the convergence in interests in stakeholders as customers, stakeholders as employees. The entire statement, of course, is coming from a firm whose stakeholder role is as an investor, and we have argued elsewhere that firms like Blackrock are internalizing the interests of their younger investors.[214]

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[213] Larry Fink, *Larry Fink CEO Letter*, BlackRock, Inc., (Jan. 26, 2021), https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter.
[214] BCW

The response of firms to the new disclosure requirements is telling. While some firms have given fairly bare-bones disclosures,[215] others have taken the opportunity to outline their approach to managing human capital risks in detail. Starbucks, for example, wrote in it's 10-K:

> "We recognize the diversity of customers, partners and communities, and believe in creating an inclusive and equitable environment that represents a broad spectrum of backgrounds and cultures. Working under these principles, our Partner Resources Organization is tasked with managing employment-related matters, including recruiting and hiring, onboarding and training, compensation planning, performance management and professional development. Our Board of Directors and Board committees provide oversight on certain human capital matters, including our Inclusion and Diversity programs and initiatives." [216]

Starbucks goes on to outline several board committees and their specific roles in addressing human capital issues, their approach to salaries and benefits, including specifically outlining initiatives related to employee mental health.[217]

SEC-mandated disclosures are not the only area of significant changes in how firms speak to investors about their employees. A significant number of large public companies have agreed to begin disclosing detailed EE0-1 data, in part reflecting pressure from the New York City Comptroller's office.[218] Companies are required to submit these reports to the U.S. Equal Opportunity Employment Commission. While firms have long been required to assemble these detailed reports, which include breakdowns of rank-and-file employees by race and gender across

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[215] Margaret Engel, *New Human Capital Disclosure Requirements: An Early Read on Developing Best Practices*, Compensation Advisory Partners (Jan. 12, 2021), https://s3.us-east-2.amazonaws.com/capartners.production/wp-content/uploads/2019/07/15125840/CAPintel-21-01-07-New-Human-Capital-Disclosure-Requirements-An-Early-Read-on-Developing-Best-Practices-v5.pdf p 4 (Tyson Foods says simply "We believe our overall relations with our workforce are good.")
[216] *Id.* at 5.
[217] *Id.* at 8.
[218] Jena McGregor, *Urged to Back Up Pledges for Racial Justice, 34 Major Firms Commit to Disclose Government Workforce Data*, Wash. Post (Sept. 29, 2020, 11:09 AM), https://www.washingtonpost.com/business/2020/09/29/corporate-diversity-data-pledge/ [https://perma.cc/L6X7-4VW8].

different job types, these companies are not agreeing to disclose this information to investors. These reports therefore provide a concrete numerical backdrop to Larry Fink's request, noted above, for companies to discuss long term plans to increase diversity, and the SEC's principles-based disclosure on human capital. Since companies already have this data, and investors are increasingly treating diversity as a material issue, it is hard for companies to resist investor requests to make it public.

It is important to recognize the convergence in interests across stakeholder groups. Diversity also matters because prospective employees increasingly value diversity in the workforce and want to work for diverse companies. Those employees, of course, are themselves the retirement savers whose money BlackRock seeks. Moreover, a lack of workforce diversity has the potential to become an issue for *consumers*, as the Adidas case vividly illustrates.[219] The point is that these investors, consumers, and employees are not distinct groups of individuals, they are the same individuals interacting with companies in various ways, but with a willingness to foreground their values in these various roles.

Despite the fact that investors are seeking increased disclosures and many firms are sharing more with investors than the SEC requires, some have objected to the SEC's human capital disclosures as outside the purview of the SEC. A comment letter from the Heritage Foundation argued that "[R]hetorical obfuscation notwithstanding, the goal of proponents of ESG, CSR, SRI, sustainability requirements, diversity requirements or stakeholder theory is not to increase corporate profits but to instead alter corporate behavior by legislative, regulatory or

[219] Supra https://www.forbes.com/sites/shelleykohan/2020/06/12/adidas-lags-behind-nike-and-puma-in-terms-of-diversity-and-inclusion/?sh=21bf55d679f6. https://www.complianceweek.com/ethics-and-culture/adidas-vows-more-diverse-and-inclusive-workplace-after-key-exec-departs/29157.article.

other means in furtherance of some (or many) social or political objectives … [N]owhere in the mission of the Commission is found a reference to furthering any social, environmental or other factor."[220]

Our main objection to the Heritage critique is not that it is inaccurate. Rather, it fails to acknowledge that we now live in a world where at least some investors prioritize goals other than maximizing returns. While it is true that some EESG investors argue that EESG maximizes returns, we believe a significant cohort of investors care about their social goals at least as much, if not more than, returns, just as there are employees who opt to earn less to work in a sustainable business, and consumers who will pay more for a sustainable product. When the investor utility function includes returns but also maximizing social goals, materiality starts to look a little different. Deciding whether something is a social issue or a business issue matters less if your investors care about that issue, and we think the SEC should (and already is) abandoning the effort to try. In this instance, employee relationships are critical to the success of most modern companies for both traditional business and for social reasons.. We advance an understanding of the human capital disclosure requirement that foregrounds the increasing importance of employee-relations of a successful firm. It recognizes the expanding phenomenon of employee and customer stakeholders eager to integrate social values into their economic life. Investors with multiple preferences are merely responding to stakeholders' ability to exercise power within the firm by seeking disclosure that helps manage those risks, and the SEC is merely responding to

[220] https://www.sec.gov/comments/s7-11-19/s71119-6324042-194712.pdf

investors' changing understanding of what types of risks matter, and what types of preferences investors have.[221]

iii. Materiality

There is a temptation to interpret the rise of EESG investing through the shareholder-stakeholder frame that has long-dominated discussion of corporations' social role. As we have argued, we think that this is not the right approach, not because that distinction has been rendered meaningless, but because its explanatory power breaks down when stakeholders have other-regarding preferences.[222] Similarly, drawing on notions of "corporate purpose" seems to miss the thrust of these changes. In our view, corporations are simply trying to navigate the world as they find it rather than fundamentally rethink the nature of the firm.

The notion that a corporation must consider the interests of all of its stakeholders to create value for shareholders is not new. Indeed, Bebchuck and Tallaitta dub it "enlightened shareholder value" and take a largely nothing-new-here approach to it.[223] Maximizing profit by responding to the social preferences of employees and consumers is still maximizing profit, after all, and that is what corporations have always done.

In our view, though, something fundamental has changed, and that change has important implications. Many investors prioritize social objectives for the purpose of attaining those social objectives, while others prioritize the same because they believe it maximizes returns. It is

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[221] See, e.g., David H. Webber, *Rethinking 'Political' Considerations in Investment*, transcript of remarks delivered to Delaware Bar and Judiciary on Sep. 12, 2016, fifth anniversary publication forthcoming Del. J. Corp. L. (2021).

[222] See, e.g., David H. Webber, *Rethinking 'Political' Considerations in Investment*, transcript of remarks delivered to Delaware Bar and Judiciary on Sep. 12, 2016, fifth anniversary publication forthcoming Del. J. Corp. L. (2021).

[223] Bebchuk & Tallarita, *supra* note

exceedingly difficult to regulate information disclosure by trying to discern when the information is wanted for profit maximization versus some overlapping or alternative purpose. Regardless, in a world in which consumers and employees are sensitive to the social implications of corporate behavior, and that sensitivity can result in dramatic effects on brand value, employee retention, and ultimately profit, investors must worry about a dramatically expanded universe of risks, and the information firms provide investors should change accordingly. In short, we need an expanded concept of materiality.

Materiality is a core concept in securities regulation. In the presence of a duty to disclose, companies must share material information with the market that would assume actual significance in the mind of a reasonable investor.[224] Millennial preferences should force a re-reckoning with traditional notions of materiality, as these preferences are altering what kind of information so-called reasonable investors would deem to be important. Courts should not be too quick to dismiss disclosures about social or environmental issues merely because such disclosures would not have ordinarily been understood to relate to a company's financials. If courts lag investors in understanding the connection between stakeholder preferences and firm performance, or--worse--if such disclosures are dismissed as puffery, then investors risk being left in the dark. Instead, courts should follow investors' lead, and adopt a flexible notion of materiality that is responsive to investors changing needs for information.

B. Can Corporate Law Keep Pace?

[224] TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)

In the prior section, we examined the securities law implications of Millennial preferences. Here we describe their implications in the corporate space, particularly with regard to fiduciary duties. In many ways, the analysis remains largely the same as it is for securities law, applied in the corporate law context. Just as the kinds of information that investors consider material has changed, so the kinds of information we should expect boards to receive, review, and analyze should alter our notions of fiduciary duty.

The ideology of shareholder primacy long associated with Milton Friedman has also held sway in corporate law for decades, as nicely captured in the opening quotation of this article. Many have argued over the years that Delaware law requires companies to maximize shareholder value (at least without breaking the law). More recently, as shareholder primacy has come under increasing attack, so has the view that the law requires it. Former Chief Justice of the Delaware Supreme Court Leo E. Strine, Jr. has recently argued in two articles that EESG is consistent with Delaware fiduciary duties along several dimensions. One article conceptualizes EESG as "an extension of the board's duty to implement and monitor a compliance program under Caremark."[225] That is, EESG should be situated within the compliance function of corporations as part of a larger effort by which companies seek to abide by legal and ethical requirements in the conduct of their businesses. "[A]s a matter of practical business strategy, if a company strives to be an above-average corporate citizen, then it will also be much more likely to simultaneously meet its minimum legal and regulatory duties." A second piece, co-authored by Strine and Chris Brummer, argues that corporate fiduciary duties are consistent with efforts aimed at diversity,

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[225] Leo E. Strine, Jr., Kirby M. Smith and Reilly Steel, 106 Iowa L. Rev. 1885 (2020) https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3198&context=faculty_scholarship

equity, and inclusion as a means to comply with civil rights and anti-discrimination laws and norms.[226]

We don't object to these accounts and in large part agree with them. But in our view, the Millennial and Gen Z demand for EESG and DEI are already driving corporate efforts past what is strictly required by corporate, environmental, civil rights, or antidiscrimination law. Many corporate actions that would be in perfect compliance with the law would be so repugnant to Millennials and Gen Z that they could be devastating to the company. If you consider the many examples cited above, all caused corporate harm. None were illegal. To some extent, we are more concerned with courts or regulators inefficiently obstructing the rise of EESG than we are with using it to help companies meet their legal obligations.

Nor are concerns about harm to firm value merely anecdotal. One recent study analyzes the effect of ESG incidents on firms, over the last ten years.[227] Negative ESG incidents have an immediate negative effect on firms' market value and the study found that, following negative ESG incidents, firms earnings and operational profits declined for years.[228] These results suggest that at the time of public revelation of the problem, capital markets underestimated the negative future effects they would have on firms' performance.[229]

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[226] Brummer, Christopher J. and Strine, Leo, Duty and Diversity (February 18, 2021). U of Penn, Inst for Law & Econ Research Paper No. 21-08, Columbia Law and Economics Working Paper No. 642, Vanderbilt Law Review, Forthcoming, Available at SSRN: https://ssrn.com/abstract=3788159 or http://dx.doi.org/10.2139/ssrn.3788159

[227] Simon Glossner, *ESG Incidents and Shareholder Value* (2021) (finding that "firms' past ESG incident rates predict more incidents, weaker profits, and lower risk-adjusted stock returns.") https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3004689

[228] *Id.* at 3 ("A value-weighted US portfolio with high ESG incident rates is associated with a significant negative alpha of about −3.5% per year")

[229] *Id.* ("past ESG incident rates predict negative sell-side earnings surprises, suggesting that analysts overestimate the earnings of firms with high incident rates.")

As is well understood, corporate fiduciary duties are largely vindicated through process. Bad business outcomes alone cannot be a basis for fiduciary breaches. Business bears well-known risks, and bad outcomes are part of the game. Still, common sense dictates that bad business outcomes are more likely to be the ones that wind up in court. When such outcomes arise, courts often look for what procedures companies had in place to avoid those bad outcomes. Good procedures often insulate corporate fiduciaries from liability.

Procedures inside the Millennial Corporation necessarily will look somewhat different from prior corporate iterations. The point being made here is close to our argument for an expanded concept of materiality. For example, the information one would expect boards and managers to examine before making significant business decisions should look considerably different today than it did a decade ago. Not long ago, one might expect companies to be acting primarily on financial information. But as we have by now made clear, what once would have counted as hard-nosed business and financial information appropriate for board consideration has changed. For example, consider revelations about sexual harassment inside the corporation. Such questions might once have largely have been treated in a narrow "dollars and cents" sense, about the risks of a lawsuit, the strengths or weaknesses of the case, the costs of settlement and confidentiality, and so forth. Today, if the extent of a corporate board's analysis of one sexual harassment claim were to determine the cost of settlement and confidentiality, it would likely be a breach of fiduciary duty. Boards should have systems in place for investigating such claims, discerning their veracity, determining if there are other such claims, making some assessment about whether the organization fosters a culture of sexual harassment, hiring outside counsel to investigate, and so forth. All of our evidence strongly suggests that Millennial and Gen Z investors, consumers, and employees would react with swift outrage against a company whose culture tolerated and failed to root out such harassment or worse. This necessarily translates into judges and courts, for example, seeing an increase in cases in which boards are reviewing and discussing a far broader range of materials than they might previously have assessed to do their jobs. Presentations about employee and customer satisfaction, retention and recruitment rates, sourcing of materials, supply chain issues, social media monitoring and reporting, and so forth. In short, what once looked like care or prudence has changed.

A second implication for corporate law is the convergence point. While it is not our argument that distinctions between shareholders, employees, and customers no longer matter, we make the case that these distinctions are breaking down under the weight of strong Millennial and Gen Z preferences that transcend them. In a world where shareholder primacy reigned, board deliberations that focused exclusively on the interests of shareholders would have been appropriate. Consider a corporate decision to outsource jobs to a factory overseas, one over which the company has little oversight or control. That decision might once have focused on the ability of the overseas factory to make the same quality product for less, net of increased shipping costs, increasing profits by reducing the cost of production. Today, the same decision that would exclude any assessment of the impact on employees or customers might look like a failure of care, if, for example, customers revolted either against the harm to employees or perhaps human rights or child labor abuses at the overseas factory. Convergence requires an expansion of the field of decisionmaking.

In some respects, changes in the corporate space might be analogized to the transition on the investor side from the "prudent man" to the "prudent investor" standard. Under the prudent man standard, a fiduciary would examine each investment on its own merits and avoid speculative or risky investments.[230] Interpretations of that standard began to clash with the rise of modern portfolio theory and diversified investing. Under the prudent man standard, investment in stock was once viewed as per se risky and a breach of fiduciary duty, but after the inflation of the 1970s, which punished bonds and rewarded stock, failure to invest in the stock market began to look like such a breach. In addition, investing in a diversified basket of stocks, in which the fiduciary would conduct no firm-specific analysis before investing, similarly looked like a breach of the prudent man rule. A switch to the prudent investor rule accommodated investing in stock and diversified investment. A transformation of our understanding in what actually served the interests of beneficiaries in turn transformed the law. [231]

Similarly, corporate law precedents that presuppose a world of shareholder primacy may need to be recast or overruled to accommodate the realities of both stakeholderism and stakeholder convergence. Precedents that might once have made it difficult for boards to consider the environment, diversity, or workers rapidly look like they inhibit managers from doing what is demanded from them by their own stakeholders, including shareholders.

C. A New Framework for Corporate Governance Scholarship

The evidence supports the conclusion that Millennials and GenZ take their mostly left-of-center politics with them when they shop, work, and invest. While much of this evidence is self-reported survey evidence, some of it is already showing up in hard data demonstrating that this is more than just rhetoric. To an extent that was not true for Baby Boomers and GenX, Millennials are willing to take a paycut, pay more for a product, and accept lower rates of return to promote

[230] Harvard College v Amory, 26 Mass 446 (1830).
[231] Robert Sitkoff, *Trust Law, Corporate Law, and Capital Market Efficiency*, 28 J. Corp. L (2003)

values beyond their own narrow economic advancement. If this is true, it follows that corporations and their managers often confront stakeholders, primarily employees, customers, and shareholders, who all want the same thing, say, a company that opts for sustainable business practices. In our view, one of the most important features of the Millennial Corporation is this convergence of interests between stakeholders who are often depicted as being adversarial, or at least mutually exclusive. From a more traditional perspective, shareholders want to pay labor less and charge customers more to increase profits, labor wants to maximize compensation, customers want the highest quality product for the lowest price. Under shareholder primacy, managers should ultimately serve shareholder interests, and under a stakeholder view, managers should be empowered to mediate between these often competing interests. But in our view, when stakeholder interests converge, as they often do in the Millennial Corporation, the shareholder primacy versus stakeholders debate is sapped of explanatory power. Neither adequately explains socially responsible investing. Both are downstream from a more important phenomenon.

When Amazon dropped Parler, was the company acting in the interests of shareholders? Or stakeholders more broadly? If the latter, which stakeholders? Was it the high-skilled Amazon employees who demanded Parler's removal from the platform because of its tolerance of white supremacists? Was it Amazon customers who might have taken their business elsewhere for the same reason? If Amazon would lose skilled employees or customers to competitors by continuing to host Parler, was it not also in the interest of shareholders to drop it? Would a shareholder primacy versus stakeholderist framework provide more or less insight into the company's actions? If we're right about Millennials, then neither the shareholder primacy nor stakeholderist perspectives offer much insight. Who managers prioritize is a purely semantic exercise when your stakeholders want the same things.

This position might seem to strengthen the managerialist explanation for the rise of ESG, as articulated by Bebchuk and others, namely, that socially responsible investing and the departure from shareholder primacy are means for managers to reassert control over the corporation, clawing back power from shareholders. According to the managerialists, stakeholderism empowers managers under the theory that the CEO who has many bosses has no bosses. At the purely theoretical level, this sounds plausible and attractive. It is true that managers in the past have sometimes used stakeholderism not to empower employees or customers but to insulate themselves from accountability to shareholders. But our view of the facts suggests that the rise of EESG is far from a managerialist plot, or even one that managers are capable of exploiting to their advantage. If Bebchuk et al were correct, CEO behavior today would be reminiscent of the pre-shareholder rights revolution days of Jack Welch and Al "Chainsaw" Dunlap. Do today's CEOs dealing with Millennials and socially responsible investors remind anyone of the superstar CEO era when corporate leaders ruled with an iron fist, firing workers by the tens of thousands, hiring their friends and business school classmates to serve on boards of directors, massively increasing their own compensation? Far from it. Today's CEOs are hardly the Pharaohs of yesteryear. They are, first and foremost, afraid of getting fired.

The reality on the ground suggests that the CEO who has many bosses has many bosses. In the era of the Millennial Corporation, CEOs have even less power than they did at the peak of shareholder primacy. CEOs have gone from a constituency of none in the days of the Imperial CEO, to a constituency of one--shareholders--under shareholder primacy, to a noisy constituency of shareholders, employees, and customers in the Millennial Corporation. They are worried about reputational damage and about getting fired and they are worried that it can come from almost anywhere at any time. And it's not just CEOs who are worried. It's all senior managers, it's almost everyone in a position of authority inside the corporation.

Millennial prioritization of socially responsible investing, their willingness to boycott products, work for less, and accept lower rates of return to promote their politics not just rhetorically but in the real world, is the engine of change in corporate law today. We cannot understand corporate behavior today without paying close attention to these generational dynamics.

What does all this mean for the corporate law scholar? We think it means a doubling down on legal realism. Corporate law has long turned to fields like economics to help understand and shape itself. In particular, the past two decades have seen a sharp increase in corporate law empiricism. But that empiricism has been almost exclusively devoted to how various corporate governance arrangements and practices affect share price. Corporate legal scholarship has always had a strong consequentialist bent, and we believe that this should continue. But we need to broaden the scope of what we examine. In particular, we think that broader engagement with political scientists and the political science literature, and broader engagement with other aspects of business academia beyond finance and into departments like marketing and management, are fruitful paths for further scholarship in this space. If we are correct that a major cultural shift is taking place, in which new generations have preferences that differ sharply from those of their forebears, then it will not be possible to understand ongoing developments in corporate law without understanding that larger trend. Corporate law scholars should aim to study it directly, working with scholars in other fields, furthering the trend towards interdisciplinarity.

Finally, while these recommendations may sound somewhat sweeping, the developments we describe in the paper have consequences for corporate law scholars that are closer to home. If we are correct that stakeholder interests are converging, that because of Millennials and Gen Z the interests of shareholders, employees, and consumers increasingly overlap, it follows that the bodies of law governing shareholders, employees, and consumers will increasingly overlap too. Inside legal academia itself, we anticipate future collaboration between corporate law, investment law, labor and employment law, and antitrust scholars.

Conclusion

At bottom, our view of the rise of EESG is that it's about values, Millennial values, and increasingly Gen Z values. We do not think it's business as usual, we do not think it's a managerialist plot, we do not think it's about political gridlock or the perks of concentrated economic power. It's no exaggeration to say that EESG and stakeholderism are about the younger generations' desire to envision a habitable future for themselves. Yes, EESG might well improve long term shareholder value, but at bottom that's not the movement's motivating principle. The reality of EESG is simple: EESG is important because corporate America is facing pressure from young people seeking to live their economic lives consistent with a set of social values. Firms and investors are responding to the changing reality of the marketplace.