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Activism By Any Other Name: Stakeholder Capitalism, ESG, and Political Pushback

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ACTIVISM BY ANY OTHER NAME: STAKEHOLDER CAPITALISM, ESG, AND POLITICAL PUSHBACK

In recent years, Stakeholder Capitalism and ESG have become widely used terms not only in corporate board rooms, but in media commentary more generally. As their use and influence in practice have both grown, so, too, has the pushback from opponents of these values-based norms for the way the world does business. Indeed, in recent months, numerous Republican-led states, like Texas, have taken more substantive actions designed to thwart the actions and aims of ESG- and stakeholder capitalism-oriented corporations and investment funds.[1] But what, exactly, do these terms mean? And where do these terms come from? Moreover, what's all the fuss about? And why are states like Texas taking active steps to discourage or even ban corporate ESG initiatives?

I. INTRODUCTION: STAKEHOLDER CAPITALISM AND ESG

According to the website *Investopedia*, the term ESG, which stands for "environmental, social, and corporate governance" factors "refers to a set of standards for a company's behavior used by socially conscious investors to screen potential investments."[2] Those standards originated from the United Nations "Principles for Responsible Investment" or "UN PRI," which the intergovernmental body first rolled out in 2006.[3] The UN PRI included six different principles:

> Principle 1: "We will incorporate ESG issues into investment analysis and decision-making processes."[4]
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> Principle 2: "We will be active owners and incorporate ESG issues into our ownership policies and practices."[5]
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> Principle 3: "We will seek appropriate disclosure on ESG issues by the entities in which we invest."[6]

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1 Andrew Freedman, *BlackRock, UBS and 348 ESG funds "Banned" in Texas*, AXIOS (Aug. 25, 2022), https://www.axios.com/2022/08/25/texas-bans-blackrock-ubs-esg-backlash.

2 *What Is Environmental, Social, and Governance (ESG) Investing?*, INVESTOPEDIA (Sep. 27, 2022), https://www.investopedia.com/terms/e/environmental-social-and-governance-esg-criteria.asp.

3 *Id*.

4 *Id*.

5 *Id*.

6 *Id*.

> Principle 4: "We will promote acceptance and implementation of the Principles within the investment industry."[7]
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> Principle 5: "We will work together to enhance our effectiveness in implementing the Principles."[8]
>
> And principle 6: "We will each report on our activities and progress towards implementing the Principles."[9]

These principles were a response to what the UN perceived as a failure on the part of corporations and investors to take account of negative externalities when making business decisions based solely on pursuit of profit-related goals, particularly negative externalities related to climate change and other environmental concerns.[10]

The UN's aim in developing these PRI was to establish a set of criteria upon which it would be possible to evaluate the extent to which corporations and ultimately nations were succeeding in their adherence to UN-approved political agendas including efforts to combat climate change and efforts to promote "diversity, equity, and inclusion."[11] By establishing standardized criteria for evaluation, corporations and then, ultimately, nations as whole could be assigned a quantifiable score that would enable them to be more easily compared with one another and thus make easier the work of measuring success and holding one another accountable.[12]

Some also point to the positive benefits of better aligning the broader set of interests that can be factored into business decisions beyond merely those concerned with the bottom line.[13] Speaking to the consulting firm McKinsey & Co., Bruce Simpson puts it like this: "At one level, ESG is simply a checklist conveniently bucketed under environmental, social, and governance benefits. It provides measurement and metrics, however. Purpose-driven ESG links a core benefit the company brings to the world to its ESG priorities."[14] According to

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[7] *Id*.

[8] *Id*.

[9] *Id*.

[10] Investopedia, *supra* note 2; *see also What are the Principles for Responsible Investment?*, PRI ASSOCIATION, https://www.unpri.org/about-us/what-are-the-principles-for-responsible-investment

[11] *Editorial: Understanding ESG And Its Consequences on America*, UPWARD NEWS (Aug. 28, 2022), https://www.upward.news/understanding-esg/.

[12] *Id*.

[13] Dame Vivian Hunt, *Putting Stakeholder Capitalism into Practice*, MCKINSEY & COMPANY: PODCAST (Jan. 7, 2022), https://www.mckinsey.com/capabilities/strategy-and-corporate-finance/our-insights/putting-stakeholder-capitalism-into-practice.

[14] *Id*.

Simpson, "The real issue is the trade-offs between short-termism and long-termism. […] research shows companies that think long-term—meaning five to seven years ahead—substantially outperform, achieving 47 percent higher revenue growth over a 15-year period, for example."[15]

For ESG proponents like Simpson, then, ESG and stakeholder capitalism are about much more than creating a system to ensure that corporations aren't merely paying lip service to the values they espouse when talking about their roles in the world in a broader sense.[16] Rather, ESG and stakeholder capitalism are themselves useful approaches to business that enable corporations better develop strategically advantageous practices that help provide stability and minimize negative externalities.[17] This is because,

> Stakeholder and shareholder interests do align in the long term. If you have happy employees, collaborative suppliers, satisfied regulators, and devoted consumers, then they will help you deliver higher benefits over a longer-term period. It is hard to satisfy everybody in the short term; you may have to make trade-offs, for example, between purpose and profit. But in the long term, we don't believe this trade-off exists.[18]

This confidence in the stakeholder capitalism approach also seems to be reflected by consumer support for the practice as evidenced by their spending.[19] A 2018 *Forbes* survey of 1,000 consumers in the United States and United Kingdom found 85% of consumers were comfortable with higher prices when they resulted from a company engaging in stakeholder capitalist practices.[20] However, it's not immediately obvious what stakeholder capitalism and ESG look like in practice, and not all are as convinced as Simpson or the consumers surveyed.

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[15] *Id*.

[16] *Id*.

[17] *Id*.

[18] Hunt, *supra* note 13. *But see*, Steve Johnson, *ESG Outperformance Narrative 'is Flawed', New Research Shows*, FINANCIAL TIMES (May 3, 2021), https://www.ft.com/content/be140b1b-2249-4dd9-859c-3f8f12ce6036

[19] *Stakeholder Capitalism: Pros, Cons, & Examples*, MANAGEMENT CONSULTED (Oct. 14, 2021), https://managementconsulted.com/stakeholder-capitalism/.

[20] Solitaire Townsend, *88% Of Consumers Want You to Help Them Make a Difference*, FORBES (Nov. 21, 2018, 11:43 AM), https://www.forbes.com/sites/solitairetownsend/2018/11/21/consumers-want-you-to-help-them-make-a-difference/?sh=36bbf96d6954.

II. RISE & RECEPTION: ACTIVIST INVESTING & THE EMERGENCE OF CRITICAL CONCERNS

Stakeholder capitalism can be a simple as a company's internal practices such as in the case of Patagonia's policies geared toward, "protecting migrant workers, choosing suppliers with reduced environmental footprints, and offering recycled and sustainable products."[21] Or it may manifest through diversity initiatives by "[f]ocusing on employing historically underrepresented people and helping them advance," which Simpson claims, "could deliver a major impact."[22] But it can also be more ambitious, as is frequently seen with ESG initiatives.

Take investment giant Blackrock's "2030 net zero statement," which states that "by 2030, at least 75% of BlackRock corporate and sovereign assets managed on behalf of clients will be invested in issuers with science-based targets or equivalent" as part of the fund's support for "an orderly transition to net zero [carbon emissions] by 2050."[23] The firm explains, this is because "[a]t Blackrock, we believe that climate risk is investment risk."[24]

In a 2020 letter to the heads of companies in Blackrock's portfolio, Blackrock CEO Larry Fink wrote, "[c]limate change has become a defining factor in companies' long-term prospects […] I believe we are on the edge of a fundamental reshaping of finance."[25] As part of its efforts to promote and pursue the net-zero climate goal, Blackrock uses its economic weight in the form of proxy votes to pressure the companies in which it has an interest to adopt ESG policies and practices.[26]

There remains, however, significant disagreement over whether ESG initiatives are even effective. Blackrock's former chief investment officer for sustainable investing, Tariq Fancy, wrote that, "[i]n practice, it's not totally clear if [ESG-based green investment initiatives] create much positive environmental

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21 Management Consulted, *supra* note 19.

22 Hunt, *supra* note 13.

23 Press Release, Blackrock, 2030 Net Zero Statement (2021), https://www.blackrock.com/corporate/about-us/our-2021-sustainability-update/2030-net-zero-statement.

24 *Id*.

25 Dan Mangan, *'That is Not Capitalism, that is Abusing the Market:' Sen. Ted Cruz Blasts Blackrock's Larry Fink's 'Woke' ESG Policies*, CNBC (May 24, 2022, 12:23 PM), https://www.cnbc.com/2022/05/24/sen-ted-cruz-blasts-larry-fink-over-woke-shareholder-votes-on-climate.html.

26 BlackRock, *supra* note 23.

impact that would not have occurred otherwise."[27] Fancy concluding that the push for ESG by funds like BlackRock is a "dangerous placebo that harms the public interest."[28]

Some like green activist and founder of Environmental Progress[29], Michael Shellenberger, argues that ESG leads to greater reliance on coal, which is costlier and worse for carbon emissions than other fossil fuels.[30] Shellenberger writes that, "climate activists have successfully pressured governments, banks, and corporations to divest from oil and natural gas companies[… and have] succeeded in driving public and private investment away from oil and gas exploration and toward renewables."[31] As Shellenberger puts it, "[t]he result of successful climate activism is, paradoxically, rising coal use and carbon emissions. That's because electricity produced from natural gas produces about half of the emissions of coal."[32] Moreover, is it argued that "ESG guidelines have discouraged the use of fossil fuels and diverted countries from investing in them, making them scarcer and more expensive [sic] and impacting economies at large in the process."[33]

Beyond the effectiveness of ESG relative to its goal of combating climate change, it's unclear that whether such stakeholder capitalist initiatives are good for investors and society more broadly. Writing in *The Financial Times*, Steve Johnson casts doubt on claims that stakeholder capitalism initiatives like ESG in fact align with long-term profitability, reporting that, "[t]he widely held belief that 'sustainable' investing delivers outperformance is a mirage and the above-market returns are actually achieved by exposure to so-called style factors long known to boost investment returns."[34] According to Johnson, the research indicates that ESG-related returns seen so far "have been artificially inflated by momentum pushing up the value of ESG-friendly stocks."[35] Meanwhile, the

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[27] Silvia Amaro, *Blackrock's Former Sustainable Investing Chief Now Thinks ESG Is A 'Dangerous Placebo'*, CNBC (Aug. 24, 2021, 6:50 AM), https://www.cnbc.com/2021/08/24/blackrocks-former-sustainable-investing-chief-says-esg-is-a-dangerous-placebo.html.

[28] *Id*.

[29] Michael Shellenberger, *About*, MICHAEL SHELLENBERGER, https://michaelshellenberger.substack.com/about.

[30] Upward News, *supra* note 11.

[31] Michael Shellenberger, *How Climate Activists Caused the Global Energy Crisis*, MICHAEL SHELLENBERGER (Oct. 27, 2021), https://michaelshellenberger.substack.com/p/how-climate-activists-caused-the?s=w.

[32] *Id*.

[33] Upward News, *supra* note 11.

[34] Steve Johnson, *ESG Outperformance Narrative 'is Flawed', New Research Shows*, FINANCIAL TIMES (May 3, 2021), https://www.ft.com/content/be140b1b-2249-4dd9-859c-3f8f12ce6036.

[35] *Id*.

Nordic Institute for Finance, Technology and Sustainability's Sony Kapoor has been more pointed in his criticism of ESG, arguing that, "most ESG investing is a ruse to launder reputations, maximize [sic] fees and assuage guilt."[36] It comes as no surprise, then, that it is these critiques which form the foundation for the emergent anti-ESG movement.

III. AN EQUAL AND OPPOSITE REACTION: CONSERVATIVES PUSH BACK

It is worth recognizing that ESG is itself a political issue. The goal of ESG, first and foremost combating climate change, remain a hot button political issue and one "viewed by critics as alarmism."[37] Yet, the Biden administration has "been eager to expand corporate activism in the U.S." and has "show[n] more enthusiasm for ESG than any prior administration in its fight against climate change."[38]

In its first 50 days, the Biden administration worked to roll back Trump-era Department of Labor rules reforming the use of proxy voting by activist investors representing employee retirement investments.[39] And the Biden Department of Labor has even gone further with proposed rules that it says may actually require the evaluation of ESG factors.[40]

ESG, so say its critics, hurts Americans in terms of jobs and ultimately serves to strengthen America's adversaries while weakening America.[41] Senator Ted Cruz (R-TX) has lambasted BlackRock and others advocating for ESG, saying of their efforts, "that is not capitalism, that is abusing the market" and accusing them of working "to advance their own political interests."[42] Republican

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36 *Id*.

37 Upward News, *supra* note 11.

38 Upward News, *supra* note 11; *see also*, Bhakti Mirchandani, *Five Ways the Biden Administration Advanced Sustainable Investing in Its First 50 Days, Including Two Last Week*, FORBES (Mar. 15, 2021, 2:00 AM), https://www.forbes.com/sites/bhaktimirchandani/2021/03/15/five-ways-the-biden-administration-advanced-sustainable-investing-in-its-first-50-days-including-two-last-week/?sh=26e7d7a93f0a.

39 Bhakti Mirchandani, *Five Ways The Biden Administration Advanced Sustainable Investing In Its First 50 Days, Including Two Last Week*, FORBES (Mar. 15, 2021, 2:00 AM), https://www.forbes.com/sites/bhaktimirchandani/2021/03/15/five-ways-the-biden-administration-advanced-sustainable-investing-in-its-first-50-days-including-two-last-week/?sh=26e7d7a93f0a; *see also*, Brian Croce, *DOL Proposal Supports ESG Considerations For Fiduciaries*, PENSIONS & INVESTMENTS (Oct. 13, 2021, 12:05 PM), https://www.pionline.com/regulation/dol-proposal-supports-esg-considerations-fiduciaries.

40 Lawrence A. Cunningham, *Opinion: Biden Administration Wants ESG To Factor in Employee Retirement Funds. That Mandate Would Hurt Workers*, MARKETWATCH (Oct. 28, 2021, 7:20 AM), https://www.marketwatch.com/story/biden-administration-wants-esg-to-factor-in-employee-retirement-funds-that-mandate-would-hurt-workers-11635406359.

41 Mangan, *supra* note 25.

42 Mangan, *supra* note 25.

senators recently even sent a letter to 51 major law firms warning the firms of their concerns about the "institutionalized antitrust violations being committed in the name of ESG."[43] Citing what they described as a "collusive effort to restrict the supply of coal, oil, and gas, which is driving up energy costs across the globe and empowering America's adversaries abroad," the Senators used the letter to remind the 51 firms of their duty to inform corporate clients of potential legal risks associated with antitrust violations, writing, "[t]o the extent that your firm continues to advise clients regarding participation in ESG initiatives, both you and those clients should take care to preserve relevant documents in anticipation of those investigations."[44]

This political divide further evidenced by the conservative group, Consumers' Research, and its campaign against so-called "woke capitalism."[45] Criticizing corporate CEOs across a variety of issues "from childhood obesity to allegations of forced labor in China."[46] The ad campaign "is designed to change the thinking in corporate boards around the economic and political costs of getting involved in flashpoint issues such as voting rights" and is intended to serve as a counter-incentive for corporations.[47] Of course, with targets so far including (1) American Airlines for excessive executive compensation after receiving taxpayer bailout funds, (2) Coca-Cola for its role in the obesity epidemic sweeping the nation, and (3) Nike for the alleged use of Chinese slave labor in manufacturing, the campaign doesn't limit itself to ESG-related criticisms with regard to climate change.[48] Instead, this broader approach seems geared to put companies on notice that if they want to become responsive to stakeholder concerns, they need to expect those concerns from both sides of the aisle.[49]

But while the ad campaign may be meant as a shot across the bow more broadly, Consumers' Research is also engaged in a more specific campaign against BlackRock, specifically the fund's ESG agenda. The organization published a "Consumer Warning" white paper targeting BlackRock directly,

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[43] David Thomas, *Senate Republicans Warn U.S. Law firms Over ESG Advice*, REUTERS (Nov. 4, 2022, 5:23 PM), https://www.reuters.com/legal/government/senate-republicans-warn-us-law-firms-over-esg-advice-2022-11-04/.

[44] *Id*.

[45] Eamon Javers, *Conservative group launches ad campaign against 'woke capitalism,' targeting CEOs by name*, CNBC (May 18, 2021, 9:44 AM), https://www.cnbc.com/2021/05/18/conservative-group-launches-ad-campaign-targeting-nike-coca-cola-american-airlines-ceos.html.

[46] *Id*.

[47] *Id*.

[48] *Id*.

[49] *See* Javers, *supra* note 45.

writing that, "BlackRock has used its position as a major shareholder of U.S. oil companies to push a left-wing agenda meant to hobble domestic oil production."[50] And argued that the fund's ESG advocacy is resulting in "higher energy costs, inflation, weakened energy infrastructure, the dismantling of fossil fuel companies, loss of (primarily blue-collar) jobs, and weaker national security."[51] According to the report, although these negative effects are being experienced by consumers across the board, "those hardest hit are the poor, who are most vulnerable to the loss of livelihood, higher cost of living, community disruption, and energy poverty."[52]

And in August, Consumers' Research even sent a letter to the governors of Alaska, Arizona, Colorado, Idaho, Louisiana, Montana, Nevada, Oklahoma, South Carolina, Texas, Utah, and Wyoming urging them to divest their state employee retirement funds from pro-ESG firms.[53] The letter argued that, "BlackRock, along with other large firms like Vanguard and State Street, are weaponizing passive investing funds, abrogating their fiduciary duty, and betraying the pensioners they are supposed to be serving."[54]

As Alayna Treene, a reporter for Axios, has observed, "[t]he crusade against ESG investments is something many conservatives feel deeply about — they view these companies as cultural enemies who are misusing investment funds to promote pro-climate policies."[55] In an interview with Axios, Consumers' Research executive director, Will Hild, accused Black Rock directly, saying that BlackRock "is using money that doesn't belong to them to push an extreme agenda with no regard for American families who are paying the price."[56] Hild also cast doubt on the sincerity of BlackRock's ESG efforts, telling Axios that while BlackRock claims to be, "pushing companies to prepare for climate change […] what they're actually preparing them for is policy that BlackRock wants enacted and is pushing to enact."[57]

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50 *Consumer Warning: BlackRock Crushing America*, CONSUMERS' RESEARCH, https://consumersresearch.org/ConsumerWarning_BlackRock_Crushing_America/; see also, *About BlackRock*, CONSUMERS' RESEARCH, https://aboutblackrock.com/.

51 *Consumer Warning: BlackRock Crushing America*, CONSUMERS' RESEARCH.

52 *Id*.

53 Will Hild, *Letter: BlackRock ESG*, CONSUMERS' RESEARCH (Aug. 17, 2022), https://consumersresearch.org/Letter_BlackRock_ESG/.

54 *Id*.

55 Alayna Treene, *Conservatives' War on BlackRock*, AXIOS (Aug. 17, 2022), https://www.axios.com/2022/08/18/blackrock-esg-conservatives.

56 *Id*.

57 *Id*.

More crucially, however, some of these efforts are already bearing fruit. In November, Disney ousted CEO Bob Chapek, under whose tenure the entertainment giant has been seen supporting more left-leaning political interests.[58] After recently losing a high-profile fight against Florida's Republican Governor Ron DeSantis, the Disney board has asked former Disney chief Bob Iger to return to lead the company instead of Chapek.[59] In his first townhall meeting with Disney employees, Iger signaled his intention to lead Disney in a more politically neutral direction.[60] According to independent journalist and conservative activist, Christopher F. Rufo, "[t]his is an important shift. Iger is signaling that Disney is moderating its position in the culture war."[61]

Responding to claims that Disney employees want to see the company stay out of politics, Iger said, "Do I like the company being embroiled in controversy? Of course not. It can be distracting, and it can have a negative impact on the company. And to the extent that I can work to kind of quiet things down, I'm going to do that."[62] Such a response vindicates the approach of certain activists on the right.[63] Indeed, Disney's willingness to change course in response to activist-induced market and reputational pressures tells activists on the right that their tactics are effective.[64] As Rufo puts it, "the conservative strategy was to damage Disney's brand, make the company pay a political price, and force the company to declare neutrality. So far, it appears that the strategy is working."[65]

IV. A GAME TWO CAN PLAY: STATE-LEVEL DEVELOPMENTS AND COMPARISON OF TACTICS

Political ad campaigns notwithstanding, this anti-ESG sentiment is being felt most acutely at the state level, where Republicans electoral success for state-wide office has far outpaced that of Democratic success in stark contrast to the

58 Christopher F. Rufo, *Returning CEO Bob Iger Moves Toward Neutrality In The Culture War*, CRISTOPHER_RUFO (Nov. 29, 2022), https://christopherrufo.com/disney-retreats/.

59 *Id*.

60 *Id*.

61 *Id*.

62 *Id*.

63 *Id*.

64 Christopher F. Rufo, *Returning CEO Bob Iger Moves Toward Neutrality In The Culture War*, CRISTOPHER_RUFO (Nov. 29, 2022), https://christopherrufo.com/disney-retreats/; *see also Editorial: Apple Faces Public Scrutiny for Threatening To Remove Twitter*, UPWARD NEWS (Dec. 1, 2022), https://www.upward.news/apple-faces-public-scrutiny-twitter/ (detailing a recent successful Republican response to Apple's threats to remove Twitter from the App Store).

65 Rufo, *supra* note 58.

federal government where Democrats control the levers of power. For instance, in August, Arizona's Mark Brnovich led a coalition of 19 state attorneys general in requesting that the Securities and Exchange Commission "look into BlackRock's ties to China and whether it is prioritizing its fiduciary responsibility to investors."[66] Importantly, some states appear to be listening.[67]

In August, just one month after a similar move by West Virginia[68], Texas Comptroller Glenn Hegar published a list of companies and investment funds that boycott energy companies through ESG that are now subject to divestment under Texas law.[69] According to Hegar's announcement, ESG climate initiatives have resulted in "an opaque and perverse system in which some financial companies no longer make decisions in the best interest of their shareholders or their clients, but instead use their financial clout to push a social and political agenda shrouded in secrecy."[70] Going further, the report accuses companies on the divestment list of exhibiting "a systemic lack of transparency that should concern every American regardless of political persuasion, especially the use of doublespeak by some financial institutions as they engage in anti-oil and gas rhetoric publicly yet present a much different story behind closed doors."[71]

As a result of Hegar's determination, the Employees Retirement System of Texas, Teacher Retirement System of Texas, Texas Municipal Retirement System, Texas County and District Retirement System, Texas Emergency Services Retirement System and the Permanent School Fund are now "subject to the investment prohibitions and divestment requirements in the statute include."[72] Among the reasons for the creation of the divestment list targeting funds said to be acting in opposition to energy companies, Hegar cites the rising price of energy, geopolitical instability, the supply chain crisis, and "an increasingly hostile federal regulatory environment hampering new domestic energy exploration and production."[73] Importantly, the statute under which Hegar has the authority to create such a divestment list was only enacted last

66 *Id*.

67 Pete Schroeder, *How Republicans-Led States Are Targeting Wall Street With 'Anti-Woke' Laws*, REUTERS (Jul. 6, 2022, 10:16 AM), https://www.reuters.com/world/us/how-republican-led-states-are-targeting-wall-street-with-anti-woke-laws-2022-07-06/.

68 Freedman, *supra* note 1.

69 Press Release, Glenn Hegar, Comptroller, State of Texas, *Texas Comptroller Glenn Hegar Announces List of Financial Companies that Boycott Energy Companies (*Aug. 24, 2022), https://comptroller.texas.gov/about/media-center/news/20220824-texas-comptroller-glenn-hegar-announces-list-of-financial-companies-that-boycott-energy-companies-1661267815099.

70 *Id*.

71 *Id*.

72 *Id*.

73 *Id*.

year, suggesting that the purpose of the law was to discourage ESG initiatives such as those advanced by BlackRock and other activist investment funds.[74]

In a vein similar to Tariq Fancy's criticism of BlackRock's ESG push as ineffective, the efforts of states like Texas to force divestment have likewise been criticized as being unlikely to bear fruit. Speaking to Axios, Daniel Firger, managing director of the climate finance consultancy Great Circle Capital Advisors, counsels that the Texas divestment list is not expected to make waves on Wall Street because "[t]he holdings of Texas' funds covered under the ban are far lower than those from states like California and New York, which have moved aggressively to limit their fossil fuel exposure."[75]

Still, it is hard to ignore the parallels between the tactics employed by investment giants like BlackRock to encourage the adoption of ESG and the tactics of state governments to discourage the adoption of ESG. To be sure, state actors have one tool hedge funds cannot deploy: the legislation of new laws. However, so far that state power has been deployed so as simply to give state officers the legal authority to play the activist investment game by the same rules as actors like BlackRock.

Understood this way, actions by states like Texas and West Virginia are less a rejection of activist investing as such, and more an embrace of it, albeit with the aim of achieving very different goals. It is worth noting, for instance, Texas Senator Ted Cruz's criticism of BlackRock discussed earlier.[76] Cruz's complaint was not merely that BlackRock was exercising its power to engage in proxy votes such that Cruz can be understood as standing in opposition to the existence or exercise of said shareholder power as such, rather Cruz's complaint was contingent on the way that shareholder power is exercised by BlackRock.[77] According to Cruz, the problem is that BlackRock is advancing policies and practices that fail to maximize shareholder value thus constituting a breach of the fund's fiduciary duty to investors.[78]

While many have sought to understand the conservative pushback to ESG and stakeholder capitalism as a rejection of activist investing as a practice[79],

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[74] Freedman, *supra* note 1; *see also*, S.B. 13, 2021 Leg. 87th Reg. Sess. (Tx. 2021), https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB00013I.pdf.
[75] Freedman, *supra* note 1.
[76] Mangan, *supra* note 25.
[77] Mangan, *supra* note 25.
[78] Mangan, *supra* note 25.
[79] Upward News, *supra* note 11.

even including those opposing ESG-based investing[80], such a characterization fails to take full account of what is taking place. But by acknowledging the sense in which opposition to activist investing itself becomes a form of activist investing when the rhetoric is put into action, we can reframe this struggle so as to better account for the actions of both sides.

Conservative opponents of ESG and stakeholder capitalism do not need to see themselves as engaging in activist investing for us to conclude that this is what they are doing. Moreover, recognizing their actions for what they are need not constitute a fatal blow to the anti-ESG cause as hypocritical or incompatible with itself. This is because, as we have seen above, the pushback against ESG is not pushback against the use of shareholder power, but against the way that power is being used.

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80 Javers, *supra* note 45; *see also*, Treene, *supra* note 55; *see, e.g.*, Consumers' Research, *supra* note 50.