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Realizing Diversity, Sustainability, and Stakeholder Capitalism

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REALIZING DIVERSITY, SUSTAINABILITY, AND STAKEHOLDER CAPITALISM

Peter H. Huang[*]

ABSTRACT

Stakeholder capitalism conceives of capitalism with companies maximizing their long-term value, while considering in addition to the interests of their shareholders, also the interests of all their other stakeholders. Examples of such additional stakeholders include customers, employees, communities, creditors, competitors, society at large, and our planet. America today does not have stakeholder capitalism. Instead, America presently has shareholder capitalism, in which publicly held corporations only maximize their stock value to shareholders.

This Essay analyzes proposals for the United States Securities Exchange Commission to require that all reporting companies make periodic mandatory Environmental, Social, and Governance (ESG) disclosures of comparable, standardized, and quantifiable metrics. These required, ongoing ESG report cards would measure the diversity, sustainability, and ethical impacts of companies on other stakeholders besides shareholders. In effect, this one simple regulatory change means that reporting companies effectively will maximize shareholder value subject to ESG constraints regarding other stakeholders' interests, just as corporations now maximize profits subject to economic, legal, market, scientific, and technological constraints.

This Essay analyzes how mandatory periodic ESG disclosures can realize diversity, sustainability, and stakeholder capitalism. This Essay explains why corporate greed as currently practiced under the notion of shareholder capitalism is a championed and cherished part of American popular culture. Finally, this Essay examines possible causes of the belief that corporate greed and individual greed are socially desirable and even somehow virtuous.

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INTRODUCTION

Stakeholder capitalism conceives of capitalism with companies maximizing their long-term value, while considering in addition to the interests of their shareholders, also the interests of all their other stakeholders.[1] Examples of such additional stakeholders include customers, employees, communities, creditors, competitors, society at large, and our planet. America currently does not have stakeholder capitalism, and instead, has shareholder capitalism, in which publicly held corporations only maximize their stock value to shareholders. A valid theoretical foundation for a stakeholder theory of the firm also remains unresolved when there are many firms and heterogeneous agents.[2]

Obligations to all other stakeholders are outside the purview of business law, and instead governed by other areas of law, such as anti-discrimination law, antitrust, civil rights law, consumer protection, employment and labor law, environmental regulations, human rights law, privacy law, products liability, and torts. This legal compartmentalization is what many business law professors

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[1] *See, e.g.*, Klaus Schwab & Peter Vanham, *What Is Stakeholder Capitalism*? The Davos Agenda 2021, Aug. 2021, https://www.weforum.org/agenda/2021/01/klaus-schwab-on-what-is-stakeholder-capitalism-history-relevance/. *See also* KLAUS SCHWAB, WITH PETER VARHAM, STAKEHOLDER CAPITALISM: A GLOBAL ECONOMY THAT WORKS FOR PROGRESS, PEOPLE AND PLANET (2021).

[2] Michael Magill et al., *A Theory of the Stakeholder Corporation*, 83 1685, 1721–22 (2015) (analyzing the case of a single firm and homogeneous agents).

teach law students (in the canonical *Business Associations* course) and believe to be the right division of legal resources and responsibilities.[3]

This Essay analyzes how to realize diversity, sustainability, and stakeholder capitalism through mandatory disclosures, and why stakeholder capitalism is preferable to shareholder capitalism. This Essay explains why corporate greed as currently practiced under the notion of shareholder capitalism is a championed and cherished part of American popular culture. Finally, this Essay examines possible causes of the belief that corporate greed and individual greed are socially desirable and even somehow virtuous.

I. SHAREHOLDER CAPITALISM VERSUS STAKEHOLDER CAPITALISM

Only twenty-one years ago, two prominent corporate law scholars praised "the recent dominance of a shareholder-centered ideology of corporate law among the business, government, and legal elites in key commercial jurisdictions. There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value."[4] They declared that "triumph of the shareholder-oriented model of the corporation over its principal competitors is now assured."[5]

And yet, intense debates are alive and well in today's business, legal, and public discourse on the future and meaning of corporate purpose.[6] For example, Timothy Wu, currently serving in President Biden's National Economic Council as Special Assistant to the President for Technology and Competition Policy,[7] and the Julius Silver Professor of Law, Science, and Technology at Columbia University Law School,[8] pointed out how shareholder capitalism "logically incentivizes corporations to prevent government from acting in ways that might be social welfare-maximizing. In retrospect, what was actually predictable in the

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[3] Jonathan R. Macey, *ESG Investing: Why Here? Why Now?* 19 BERKELEY BUS. L.J. (forthcoming 2022) (analyzing ESG governance as the end of compartmentalization). available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3942903.

[4] Henry Hansmann & Reiner Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001).

[5] *Id*. at 468.

[6] *See, e.g*., RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 186 (Elizabeth Pollman, Robert B. Thompson, & Peter P. Weidenbruch Jr. eds., 2021). *See also* Yong-Shik Lee, *Reconciling Corporate Interests with Broader Social Interests—Pursuit of Corporate Interests Beyond Shareholder Primacy*, Feb. 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4024349.

[7] THE WHITE HOUSE, *White House Announces Additional Policy Staff*, Mar. 5, 2021, https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/05/white-house-announces-additional-policy-staff/.

[8] Timothy Wu, Faculty Profile, Columbia Law School, https://www.law.columbia.edu/faculty/timothy-wu.

year 2000 was that urging corporations to focus only on shareholder value would yield the backlash we see today."[9] Wu noted that a fatal flaw of shareholder capitalism is that it overvalues "the ability and likelihood of government doing that which the corporation is being asked to ignore."[10]

Wu split his normative critique of shareholder capitalism into two parts. First, shareholder capitalism "ignores public choice theory and the obvious incentives of corporations who are told to maximize shareholder welfare to prevent the legal system from actually providing protections that might decrease corporate profit. . . . And the shareholder value model is not independent of governmental failure but one of its causes."[11] Wu cited this very timely example related to global climate change:

> Take environmental protection. Say we recognize absolutely no duty in corporations to take into account harms caused to the environment and ask them only to maximize profit. If new environmental laws will reduce long-term shareholder value by some billions of dollars, it is in the interest of the corporation to spend millions, if not billions, of dollars to prevent the passage of such laws and try to weaken those already in existence. That's elementary public choice theory.[12]

Second, shareholder capitalism "grandly overestimates the legal system and what it can realistically do for people. Yes, the government is powerful, and laws are commands backed by a threat of force. But to expect the law to fill in all the gaps is to expect far too much."[13] As another timely example, Wu considers employment conditions:

> The law, of course, can curb abuses and outliers by barring sexual harassment or policing misconduct, like failures to pay overtime. But to say the corporation has no ethical duties, and we'll leave it to the law to create the working conditions we'd like to see, is a recipe for terrible work conditions once you accept the limits of the law.[14]

The #MeToo viral social movement demonstrates how mere laws against sexual harassment are not enough to prevent sexual harassment, partly because

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[9] Tim Wu, *The Goals of the Corporation and the Limits of the Law*, THE CLS BLUE SKY BLOG, Sept. 3, 2019, https://clsbluesky.law.columbia.edu/2019/09/03/the-goals-of-the-corporation-and-the-limits-of-the-law/#comments.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

government enforcement of laws is contingent on adequate funding and motivation of government agencies.

Trees, oceans, and our precious environment do not, in general, have standing to sue to legally protect themselves.[15] An additional reason that laws are not always enforced is they are often very personally and professionally costly for individuals to enforce. All legal rights that people have are real options, in the sense that to exercise those legal rights, people may have to pursue costly litigation.[16] As former Harvard law school dean and university president Derek Bok said, "There is far too much law for those who can afford it, and far too little for those who cannot."[17]

Partnoy has also cleverly demonstrated that shareholder primacy is illogical by constructing "counterexamples that show how the notions that shareholders should be assigned first priority, and that managers should maximize shareholder wealth, are illogical."[18] Specifically, Partnoy shows "that economically equivalent firms, which should by definition choose the same projects, will instead be led to engage in different behavior if they seek to maximize shareholder value."[19] Partnoy presents three "counterexamples related to counterexamples related to capital structure, residual claimants, and temporal challenges."[20] Partnoy had raised some of his arguments in his earlier work about financial derivatives.[21]

II. CORPORATE SOCIAL RESPONSIBILITY

Do corporations have social responsibilities? In an often-cited essay, 1976 economics Nobel Laureate Milton Freidman[22] controversially argued that corporations only have the social responsibility of maximizing profits for their

[15] *See, e.g.*, CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING? LAW, MORALITY, AND THE ENVIRONMENT (3rd ed., 2010).

[16] Peter H. Huang, *A New Options Theory for Risk Multipliers of Attorneys' Fees in Federal Civil Rights Litigation*, 73 N.Y.U. L. REV. 1943 (1998); Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 Stan. L. REV. 1267 (2006).

[17] Derek Bok, *A Flawed System*, HARV. MAG., May–June 1983, at 38.

[18] Frank Partnoy, *Shareholder Primacy is Illogical*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 186, 186 (Elizabeth (Pollman, Robert B. Thompson, & Peter P. Weidenbruch Jr. eds., 2021).

[19] *Id*. at 186.

[20] *Id*. at 200.

[21] Frank Partnoy, *Financial Innovation and Corporate Law*, 36 J. CORP. L. 799 (2006), and Frank Partnoy, *Adding Derivatives to the Corporate Law Mix*, 34 GA. L. REV. 599 (2000).

[22] The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1976, Facts, Milton Friedman, https://www.nobelprize.org/prizes/economic-sciences/1976/friedman/facts/.

shareholders.[23] Corporations engage in often contested political speech and social activism. Corporations have great power. "Corporations kill people"[24] as the corporate law scholar, University of California, Berkeley, School of Law, Adrian A. Kragen Professor of Law, Frank Partnoy,[25] observed in exploring "the role corporate law and governance might play in … two aspects of corporate behavior—decision-making and oversight—on human life."[26] Partnoy's thoughtful analysis considers "how should corporate law and governance address tradeoffs between corporate profits and human life?"[27]

III. MANDATORY ESG DISCLOSURES

This Essay analyzes proposals for the United States Securities Exchange Commission (SEC) to require that all reporting companies make periodic mandatory Environmental, Social, and Governance (ESG) disclosures of comparable, standardized, and quantifiable metrics.[28] ESG is the successor to Corporate Social Responsibility (CSR), in the sense that while CSR considered social accountability, ESG makes those considerations measurable and quantifiable.[29]

These required, ongoing ESG report cards would measure the ESG impacts of companies on other stakeholders besides shareholders. In effect, this one simple regulatory change means that reporting companies will effectively maximize shareholder value subject to ESG constraints regarding other stakeholders' interests, just as corporations now maximize profits subject to economic, market, scientific, and technological constraints. The SEC should require that ESG disclosures are user-friendly by following the principles and examples that Chip Heath, the Stanford University Graduate School of Business Thrive Foundation for Youth Professor of Organizational Behavior, Emeritus,[30]

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[23] Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG. Sept. 13, 1970, http://umich.edu/~thecore/doc/Friedman.pdf.

[24] Frank Partnoy, *Corporations and Human Life*, 40 SEATTLE UNIV L. REV. 399, 399 (2017).

[25] Frank Partnoy, Faculty Profile, https://www.law.berkeley.edu/our-faculty/faculty-profiles/frank-partnoy/#tab_profile.

[26] Partnoy, *supra* note 24, at 400.

[27] *Id*. at 400.

[28] *See, e.g.*, Commissioner Allison Herren Lee, *Shelter from the Storm: Helping Investors Navigate Climate Change Risk*, Mar. 21, 2022, https://www.sec.gov/news/statement/lee-climate-disclosure-20220321; SEC, *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, Release Nos. 33-11042, 34-94478; File No. S7-10-22, Mar. 21, 2022.

[29] *See, e.g.*, Arend Kooij, *ESG vs. CSR: How Should Your Brand Approach Showcasing Accountable Values*, Investisdigital, July 22, 2021, https://www.investisdigital.com/blog/esg-and-sustainability/how-are-esg-and-csr-different.

[30] Chip Heath, Faculty Profile, Organizational Behavior, https://www.gsb.stanford.edu/faculty-research/

and Karla Starr, an award-winning business and science journalist with a background in psychology, neuroscience, sociology, and system dynamics,[31] offer about how to make communication of numbers meaningful.[32]

IV. MANDATORY DIVERSITY DISCLOSURES

Then Acting SEC Chair and Commissioner Allison Herren Lee gave a speech titled *Diversity Matters, Disclosure Works, and the SEC Can Do More* at the Council of Institutional Investors Fall 2020 Conference.[33] Current SEC Chairman Gary Gensler stated in a House Appropriations subcommittee hearing on May 26, 2021 that the SEC is considering requiring ESG disclosures, with top priorities being reports about climate and human capital.[34] The SEC is considering mandating "disclosures about the diversity of a company's senior management" among "diversity reporting requirements as part of a corporate workforce disclosure proposal."[35] The number of large, publicly-traded companies in the S&P 500 stock index voluntarily making DEI (Diversity, Equity, and Inclusion) disclosures in their required annual 10-K filings with the SEC jumped from 2020 to 2021.[36] It was a low of 72, or about 14% of the S&P index, in 2020 and was at least 402, or about 80% of the S&P 500, in 2021.[37]

A drawback of the current increased DEI disclosures is the lack of standardization in terms of location, quality, and quantity.[38] For example, Facebook, now Meta Platforms Inc., disclosed employee diversity data for the first time in its 2021 10-K.[39] That disclosure revealed that a mere 3.9% of its workforce is African-American.[40] Nike, Inc. and Walgreens Boots Alliance Inc. included three paragraph discussions of DEI efforts in their 2021 10-Ks.[41]

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faculty/chip-heath.

[31] Karla Starr, https://kstarr.com/.

[32] CHIP HEATH & KARLA STARR, MAKING NUMBERS COUNT: THE ART AND SCIENCE OF COMMUNICATING NUMBERS (2022).

[33] SEC Commissioner Allison Herren Lee, *Diversity Matters, Disclosure Works, and the SEC Can Do More:* Remarks at the Council of Institutional Investors Fall 2020 Conference, Sept. 22, 2020, Wash. D.C., https://www.sec.gov/news/speech/lee-cii-2020-conference-20200922.

[34] Andrew Romonas, *SEC Considering Corporate Disclosures on Diversity, Gensler Says*, BLOOMBERG L., May 26, 2021.

[35] *Id.*

[36] Andrew Romonas, *S&P 500 Opens Up on Diversity After Floyd as Investors Seek More*, BLOOMBERG L., Feb. 11, 2022.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

Nike's 10-K did not reference diversity metrics it publishes elsewhere.[42] Walgreens' 10-K filing to the SEC[43] referenced workforce diversity statistics on its website,[44] based on EEO-1 filings that Walgreens submitted to the Equal Employment Opportunity Commission about ethnicity, binary gender, and race distributions of their employees.[45] The present hodgepodge of qualitative and quantitative disclosures lacks comparability. A similar problem of incomparability applies to ESG Exchange-Traded Funds (ETFs).[46] Additionally, disclosures that are not in or referenced by annual reports and 10-Ks filed with the SEC lack the disciplining effect of potential shareholder lawsuits for materially misleading disclosures.

A recent study[47] found that most job applicants care so much about potential employers' diversity and demographics to be willing to forgo more than $1,000 in salary to work at a more inclusive company.[48] Having a more diverse workforce and board of directors may actually increase corporate profits because people with diverse cultural identities, demographic attributes, ethnicities, geographic origins, race, religion, sexual orientation, physical abilities, and socioeconomic statuses provide diverse backgrounds, expertise, perspectives, and viewpoints. More identity diversity is correlated with greater cognitive diversity,[49] entailing "these five components: information (e.g., data, facts), knowledge (e.g., understanding, structure), heuristics or algorithms (e.g., differential diagnosis, recipes), representations, which consist of perspectives (e.g., alphabetical order or chronological order) and categorizations (e.g., west coast, east coast, midwestern, and southern), and mental models (e.g., econometric models, weather forecasting).[50] A large body of empirical and experimental research[51] finds that cognitive diversity "creates bonuses for

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42 Nike, *2020 Representation & Pay*, https://purpose.nike.com/2020-representation-pay.

43 Walgreens Boots Alliance, Inc., Form 10-K, https://www.bloomberglaw.com/product/blaw/document/XRKSDKO1?ets=5.

44 https://www.walgreensbootsalliance.com/about-us/diversity-equity-and-inclusion.

45 https://www.walgreensbootsalliance.com/corporate-responsibility/report-resources.

46 Ryan Clement, *Why Comparability is a Greater Problem Than Greenwashing in ESG ETFs,* 13 WM. & MARY BUS. L. REV. (forthcoming 2022).

47 Jung Ho Choi et al., *Do Jobseekers Value Diversity Information? Evidence from a Field Experiment*, Stanford Graduate School of Business Accounting Working Paper No. 4010, Feb. 2022, https://www.gsb.stanford.edu/faculty-research/working-papers/do-jobseekers-value-diversity-information-evidence-field-experiment.

48 Maggie Overfelt, *Hey, Employers: Job Hunters Really Want to See Your Diversity Data*, INSIGHTS BY STAN. BUS., Mar. 21, 2022, https://stanford.io/3N4VZH8 (reporting on the study).

49 Peter H. Huang, *Boost: Improving Mindfulness, Thinking, and Diversity*, 10 WM. & MARY BUS. L. REV. 139, 139. 190 (2018).

50 *Id*. at 190–91 (citations omitted).

51 *Id*. at 190–94.

organizations by improving decision-making, creativity, innovation, prediction, problem-solving, and productivity."[52]

Does greater diversity of board members make a difference? A recent empirical study finds that "the increased presence of minority directors on the twelve regional Federal Reserve Banks—the quasi-governmental entities responsible for evaluating many commercial banks' lending to underserved communities—is associated with greater lending to these communities."[53] This research involves a comparison group of twelve regional Federal Reserve Banks with precisely identical "regulatory and supervisory functions in different statutorily defined regions."[54] This and other unique features of the design and setting of this research provide consistent evidence of how more racially diverse Federal Reserve Bank boards are "associated with Fed-regulated banks' increased lending to underserved groups. That diversity can be consequential even where, as with the Fed, the connection between the organization's leadership and policy outcomes is attenuated encourages greater scholarly attention to the influence of diversity on outcomes in other public- and private-sector contexts."[55] Mandatory corporate diversity disclosures are just one part of realizing diversity. Other complementary non-corporate diversity efforts must also happen.[56]

V. MANDATORY CARBON FOOTPRINT REPORT CARDS

Global climate catastrophe is an existential threat for humanity and this planet. The transformative power of capitalism can be harnessed to improve environmental decision-making through carbon pricing to reflect negative externalities, repealing energy subsidies, improving and strengthening the National Environmental Policy Act, and refocusing government-funded

[52] *Id.* at 139.

[53] Brian D. Feinstein et al., *Board Diversity Matters: An Empirical Assessment of Community Lending at Federal Reserve-Regulated Banks*, Jan. 5, 2022, https://ssrn.com/abstract=4000110.

[54] *Id.* at 3.

[55] *Id.* at 1.

[56] *See, e.g.* Peter H. Huang, *Put More Women in Charge and Other Leadership Lessons from COVID-19*, 15 F.I.U. L. REV. 353 (2021); Peter H. Huang, *Pandemic Emotions: The Good, the Bad, and the Unconscious—Implications for Public Health, Financial Economics, Law, and Leadership*, 16 NW. J.L. & SOC. POL'Y 80 (2021); 'Peter H. Huang, *Resistance is Not Futile: Challenging AAPI Hate*, 28 WM. & MARY J. RACE, GENDER, & SOC. JUST. 261 (2022); Peter H. Huang, *Anti-Asian American Racism, COVID-19, Racism Contested, Humor, and Empathy,* 16 F.I.U. L. REV. 669 (2022).; Peter H. Huang, *Put Even More Women and Minorities in Charge*, Symposium, 17 S. C. J. INT' L. & BUS. (forthcoming).

research towards environmental and Earth sciences, economics of our environment, biological diversity, and climate engineering.[57]

The Financial Stability Oversight Council (FSOC),[58] was established by the Dodd-Frank Wall Street Reform and Consumer Protection Act,[59] in part to respond to emerging threats to the stability of the United States financial system.[60] In response to President Biden's Executive Order 14030, *Climate-Related Financial Risk*,[61] the FSOC released a report in October 2021 identifying "climate change as an emerging and increasing threat to U.S. financial stability.[62] That report included a recommendation for the SEC to develop "climate-related disclosures to give investors and market participants the information they need to make informed decisions, which will also help regulators and financial institutions assess and manage climate-related risks."[63]

Already more than 2,000 corporations today voluntarily include carbon emissions data in their published annual reports.[64] As is to be expected, for such voluntary disclosures, there is a lack of comparability, standardization, uniformity, and verifiability by third-party auditors.[65] For example, most companies also in their self-interest omit what is known as Scope 3 data,[66] which are "emissions are the result of activities from assets not owned or controlled by the reporting organization, but that the organization indirectly impacts in its value chain. . . . Scope 3 emissions, also referred to as value chain emissions,

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57 SHI-LING HSU, CAPITALISM AND THE ENVIRONMENT: A PROPOSAL TO SAVE THE PLANET (2021).

58 The FSOC consists of 10 voting members who head the U.S. Department of the Treasury, the Board of Governors of the Federal Reserve System, the SEC, the Consumer Financial Protection Bureau, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Commodity Futures Trading Commission, the Federal Housing Finance Agency, and the National Credit Union Administration, in addition to the independent member with insurance expertise, plus five nonvoting members. Two of the nonvoting members head the Federal Insurance Office and the Office of Financial Research/ The other three nonvoting members are, a state banking supervisor, a state insurance commissioner, and a state securities commissioner designated by their peers.

59 Pub. L. No. 111-203, 124 Stat. 1376.

60 *See* Dodd-Frank Act § 112(a)(1)(C), 12 U.S.C. § 5322(a)(1)(C).

61 86 FR 27967.

62 U.S. Dept. Treasury, *Financial Stability Oversight Council Identifies Climate Change as an Emerging and Increasing Threat to Financial Stability*, Oct. 21, 2021, https://home.treasury.gov/news/press-releases/jy0426.

63 *Id*.

64 John C. Coffee, Jr., *Climate-Risk Disclosures and "Dirty Energy" Transfers: "Progress" Through Evasion*, THE CLS BLUE SKY BLOG, Jan. 25, 2022, https://clsbluesky.law.columbia.edu/2022/01/25/climate-risk-disclosures-and-dirty-energy-transfers-progress-through-evasion/.

65 Stephen Comello et al., *Transparency of the "Net-Zero by 2050 Club,"* Stanford University, Graduate School of Business Working Paper NO. 3996, July 18, 2021, https://www.gsb.stanford.edu/faculty-research/working-papers/transparency-net-zero-2050-club.

66 Coffee, *supra* note 64.

often represent the majority of an organization's total GHG emissions."[67] As expected, the acronym GHG stands for greenhouse gas.[68] Many businesses, including ExxonMobil, also "have made a pledge to move to 'net zero' carbon emissions by a given date (usually 2050, but some much sooner)."[69]

While preventing global climate catastrophe will eventually probably require carbon taxes and regulating emissions directly, a more politically feasible policy today is to simply require that reporting companies disclose their carbon emissions in their 10-Ks and/or annual reports.[70] It is true that mere disclosure of corporate annual carbon footprints does not necessarily mean that such numbers will decrease. After all, disclosing annual CEO pay did not lead to reductions in those numbers. As a former SEC Commissioner quipped, envy is more powerful than shame among CEOs.[71]

When England enacted in 2013 mandatory disclosures of UK-incorporated listed firm annual carbon footprints, carbon emissions of those companies decreased by approximately 8% over the next couple of years, in comparison with a control group of similar European firms.[72] Moreover, there was no adverse impact on the financial performance of the corporations reducing their carbon footprints.[73] Finally, mandatory carbon disclosures provide valuable information to asset managers, investors, and policymakers about how to manage carbon transition risk, and even more importantly, to speed up the rate of carbon emissions reductions in the future.[74]

Of course, the details of carbon disclosures matter. For example, should mandated carbon disclosures be only of "direct emissions" released by a company's own activities or also include the indirect downstream and upstream emissions. Experts differ in their opinion of the best practice.[75] For another

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[67] EPA Center for Corporate Climate Leadership, *Scope 3 Inventory Guidance*, https://www.epa.gov/climateleadership/scope-3-inventory-guidance.

[68] EPA Center for Corporate Climate Leadership, *GHG Inventory Development Process and Guidance*, https://www.epa.gov/climateleadership/ghg-inventory-development-process-and-guidance.

[69] Coffee, *supra* note 64.

[70] Lee Simmons, *Want to Kickstart Climate Action? Make Companies Report Their Carbon Footprints*, Insights by Stanford Business, Dec. 2, 2021, https://www.gsb.stanford.edu/insights/want-kick-start-climate-action-make-companies-report-their-carbon-footprints.

[71] Personal conversation with SEC Commissioner Joe Grundfest.

[72] Benedikt Downar et al., *The Impact of Carbon Disclosure Mandates on Emissions and Financial Operating Performance*, 26 REV. ACC T. STUD. 1137, 1137 (2021).

[73] *Id*. at 1137.

[74] Patrick Bolton et al., *Mandatory Corporate Carbon Disclosures and the Path to Net Zer*o, Centre for Economic Policy Research Insight No. 111, Oct. 2021, https://cepr.org/active/publications/policy_insights/viewpi.php?pino=111.

[75] Coffee, *supra* note 64; Simmons, *supra* note 70.

example, another possible way to arbitrage mandated carbon disclosure is to go private. Again, experts differ in their opinion of the best practice to deal with dirty assets going private.[76] The key is to reach a consensus as to how to measure annual firm carbon footprints most accurately in a consistent, informative, and relatively simple way. Finally, the SEC can and should learn from Europe's experiences with the Task Force on Climate-Related Financial Disclosures (TFCD).[77] On the positive side, the TFCD is "changing the corporate narrative on climate change by recasting climate change as a strategic and financial risk and no longer a peripheral ethical issue."[78] On the negative side, for carbon disclosures to influence corporate decision-making,

> climate-related reporting must be given consequence not only by regulators but also by market actors and other stakeholders. . . . environmental law charity ClientEarth has reported numerous companies to UK financial regulators in recent years for alleged failures to disclose material information about climate-related trends and risks in their annual reports.[79]

There are likely to be lawsuits over materiality of climate-related information omitted until the SEC and courts provide guidance. Private actions for securities fraud under Rule 10b-5 provide another market disciplining mechanism in addition to SEC criminal prosecution on reporting companies to be truthful in making disclosures. Supreme Court Justice William Rehnquist said about private securities fraud litigation: "we deal with a judicial oak which has grown from little more than a legislative acorn."[80]

VI. STAKEHOLDER CAPITALISM AS CONSTRAINED OPTIMIZATION

A common and fundamental criticism about stakeholder capitalism is that corporate actors cannot maximize the interests of multiple, conflicting, stakeholders.[81] A version of this critique is corporate actors can, and so will, camouflage the lack of shareholder maximization or disguise corporate malfeasance by claiming to meet some other stakeholder's interests.[82] Certainly, it can be impossible to serve the divergent interests of multiple stakeholders.

[76] Coffee, *supra* note 64; Simmons, *supra* note 70.

[77] Megan Bowman & Daniel Wiseman, *Finance Actors and Climate-Related Disclosure Regulation: Logic, Limits and Emerging Accountability*, *in* CRIMINOLOGY AND CLIMATE: INSURANCE, FINANCE AND THE REGULATION OF HARMSCAPES 153 (Cameron Holley et al. eds., 2021).

[78] *Id*. at 153.

[79] *Id*. at 154.

[80] *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1974).

[81] *See, e.g.* HOLGER SPAMANN ET AL., CORPORATIONS IN 100 PAGES 110 (2020).

[82] *Id.* at 110.

This is true indeed, though does not answer why shareholder primacy over the primacy of any other stakeholders. Nor does this truism explain how to serve the possibly incompatible interests of heterogeneous shareholders. Stockowners differ in so many ways, including economic literacy, financial expectations, income shocks, life-cycle considerations, liquidity, longevity risk, risk attitudes, and time preferences.

Kenneth Arrow, 1972 Economics Nobel Laureate,[83] proved his famous impossibility theorem about difficulties in aggregating individual preference orderings into a social preference orderings.[84] Arrow was motivated partly by his desire to construct a theory of the form reconciling the conflicting preferences of a firm's heterogeneous shareholder into a single objective function for that firm.[85] This is ironic because influential corporate law and economics scholars have quite ominously stated that when "a firm makes inconsistent choices, it is likely to self-destruct"[86] by citing[87] Arrow's impossibility theorem to mistakenly justify shareholder primacy.[88] Another corporate law scholar[89] misapplies Arrow's theoretical work about the tradeoff in organizations between responsibility (or accountability) and authority,[90] in a failed attempt to justify a competing corporate law theory of director primacy.[91]

Mathematically, a multiple-variable, or vector, as opposed to a single variable, or scalar, objective function cannot necessarily be maximized. This is because there is a well-known ordering over scalars, while there is no ordering

[83] The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1972, Summary, John R. Hicks, Kenneth J. Arrow, https://www.nobelprize.org/prizes/economic-sciences/1972/arrow/facts/.

[84] KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951, 3rd. ed., 2012).

[85] Adam Smith, Interview with Kenneth J. Arrow, at 39:19-38:29, Aug. 27, 2008, https://www.nobelprize.org/prizes/economic-sciences/1972/arrow/interview/ (discussing theory of the firm).

[86] Frank H. Easterbrook & Daniel H. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 405 (1983). *See also* FRANK E. EASTERBROOK & DANIEL H. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 70 (1998) (same).

[87] Easterbrook & Fischel, *supra* note 86, at 405, n.26; EASTERBROOK & FISCHEL, *supra* note 86, at 70, n.15.

[88] Grant M. Hayden & Matthew T. Bodie, *Arrow's Theorem and the Exclusive Shareholder Franchise*, 62 VAND. L. REV. 1219, 1229–43 (2009) (contesting the misguided argument citing Arrow's theorem to justify exclusive corporate franchise to shareholders by pointing out any shortcomings in that argument). *See generally* GRANT M. HAYDEN & MATTHEW T. BODIE, RECONSTRUCTING THE CORPORATION: FROM SHAREHOLDER PRIMACY TO SHARED GOVERNANCE 103–21 (2021) (critiquing in detail the argument that Arrow's theorem supports giving the corporate vote to shareholders only).

[89] STEPHEN M. BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE 13, 557–58, 573 (2008)

[90] KENNETH J. ARROW, THE LIMITS OF ORGANIZATION 63–79 (1974).

[91] Brett H. McDonnell, *Professor Bainbridge and the Arrowian Moment: A Review of the New Corporate Governance in Theory and Practice*, 34 DEL. J. CORP. L. 139, 168 (2009) (stating "if anything, Arrow's argument, properly understood, calls Bainbridge's own positions into doubt.").

over vectors. In other words, while we can tell which of two scalars or numbers is larger, we cannot say whether the ordered pair (5, 3) is larger than the ordered pair (6, 2). To conceive of stakeholder capitalism as the simultaneous maximization of all stakeholder interests is thus problematic.

Instead, consider reframing stakeholder capitalism as the maximization of the scalar of shareholder value subject to satisfying constraints about other stakeholders' interests being above some values. Such a corporate objective function is a well-defined constrained maximization problem, which is commonplace and standard in economic theory[92] and operations and supply chain management.[93] A well-known concept in the calculus of several variables is that of Lagrange multipliers,[94] which arise in solving the maximization of a scalar-valued function of several variables subject to equality constraints. A related important result in multivariable calculus is the Kuhn-Tucker theorem,[95] which provides necessary conditions for the maximization of a scalar-valued function of several variables subject to inequality constraints, and is also known now as the Karush-Kuhn-Tucker Theorem.[96] Much of modern economic theory involves the solution of constrained optimization problems.[97] Consumers and investors maximize their utility functions over consumption bundles and portfolio choices, subject to intertemporal budget constraints. Producers maximize profits, subject to technology constraints. Benevolent governments maximize aggregate social welfare functions, subject to incentive compatibility constraints.

VII. HOW ESG CONSTRAINTS GUIDE DIRECTOR DECISION-MAKING

Four other criticisms about stakeholder capitalism focus on how directors make business decisions under stakeholder capitalism.[98] First, stakeholder

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92 *See, e.g.* MICHAEL D. INTRILLIGATOR, MATHEMATICAL OPTIMIZATION AND ECONOMIC THEORY (1971).

93 *See, e.g.*, https://www.investopedia.com/terms/o/operations-management.asp/.

94 *See, e.g.*, https://www.khanacademy.org/math/multivariable-calculus/applications-of-multivariable-derivatives/constrained-optimization/a/lagrange-multipliers-examples.

95 Harold W. Kuhn & Albert W. Tucker, *Nonlinear Programming*, *in* PROCEEDINGS 2ND BERKELEY SYMPOSIUM MATHEMATICAL STATISTICS AND PROBABILITY 481 (1951).

96 Saul I. Gass & Guillermo Owen, *Harold W. Kuhn*, *in* PROFILES IN OPERATIONS RESEARCH INTERNATIONAL SERIES IN OPERATIONS RESEARCH & MANAGEMENT SCIENCE 529, 534 (2011); *See generally* Richard W. Cottle, *William Karush and the KKT Theorem*, *in* OPTIMIZATION STORIES (Martin Grötschel ed., 2012) 255–66; Harold W. Kuhn, *Nonlinear Programming: A Historical View*, *in* NONLINEAR PROGRAMMING 1–26 (Richard W. Cottle & C. E. Lemke eds., 1976).

97 INTRILLIGATOR, *supra* note 92.

98 Robert T. Miller, *How Would Directors Make Business Decisions Under a Stakeholder Model?*, BUS. L. (forthcoming 2022).

capitalism disadvantages shareholders because other stakeholders have claims from contract or law.[99] Second, under stakeholder capitalism, business decisions are radically indeterminate due to lack of normative criteria to compare business decisions.[100] Third, some of the normative criteria (such as Kaldor-Hicks efficiency, or hypothetical bargains among stakeholders) that can be appended to stakeholder capitalism do not resolve indeterminacy.[101] Finally, stakeholder capitalism leads to directors making business decisions based politically on the relative influence, lobbying, and rent-seeking of stakeholders and not rational, normative considerations.[102]

Conceptualizing stakeholder capitalism as shareholder capitalism subject to mandatory ESG disclosures means that other stakeholders' interests can be viewed as constraints that corporate directors must satisfy while maximizing shareholder value. Because ESG disclosures involve quantitative metrics, corporate directors can set ESG targets to meet every quarter or year, similar to earnings targets. This conceptualization of stakeholder capitalism provides clear guidance to directors about how to make business decisions.

Shareholders are not disadvantaged relative to other stakeholders because directors are still pursuing the goal of maximizing shareholder value, just now considering other stakeholders' interests by satisfying ESG constraints. Second, under this version of stakeholder capitalism, business decisions are determined by the normative criteria of maximizing shareholder value subject to ESG constraints. Third, while other normative criteria may lead to radical indeterminacy, maximizing shareholder value subject to ESG constraints does not. Finally, maximizing shareholder value subject to ESG constraints is apolitical as directors can set ESG targets as they choose to do so, similar to earning targets.

What influences what directors choose as ESG targets? Community norms, social norms, industry norms, media coverage, and reputation. Directors may wish to generate negative corporate externalities because they believe not doing so puts their company at a competitive disadvantage. Seeing their competitors choose a publicly visible ESG target level may assure them not generating negative corporate externalities does not disadvantage them competitively. There might even be a race to the top as directors try for competitive advantage to set more and more ambitious ESG targets to meet faster and faster. The market

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[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*

forces of competition for those consumers and investors who care about ESG issues can be powerful as the importance of ESG considerations grows in society.

A study by proxy advisory firm Glass Lewis & Co. found that the American companies tying executive incentive pay to ESG metrics increased from sixteen percent in 2019 to twenty-five percent in 2021.[103] Examples of ESG metrices tied to annual executive compensation include reduced carbon footprint, greater women and minority representation on corporate boards, and increased employee safety.[104] Examples of companies with executive bonuses linked to ESG metrics include McDonalds, Chipotle, Chevron Corp., Marathon Petroleum Corp., and Caterpillar Inc.[105] SEC Commissioner Allison Herren Lee suggested that ESG statistics, such as those about diversity and climate, should be included in SEC proposed "pay-versus-performance" rules requiring companies to disclose how executive pay is related to corporate performance.[106] Many investors understandably desire transparency of how incentive pay is tied to ESG goals and that such goals be specified in terms of non-manipulable, publicly observable, quantifiable, verifiable, and well-defined ESG metrics.[107] For example, although employee happiness or subjective well-being (SWB) is obviously an important ESG issue, the measurement of SWB is typically based on voluntary self-reports and raises concerns about self-selection, interpersonal comparability, privacy, and possibly health insurance. SWB measures are also multi-dimensional, not unidimensional,[108] which raises aggregation and distributive concerns.

VIII. GREED AS HOORAY FOR ME AND FRACK EVERYONE ELSE

The popular narrative that greed is not a vice and instead a virtue is psychologically comforting and is even to a degree consistent with some cherished American values, namely personal autonomy, freedom of choice, rugged individualism, self-determination, and self-reliance. It is all far too common today for many corporations to act without any concern for others and believe that a system of perfectly competitive markets will magically transform

[103] Lydia Beyoud, *Executive Pay Tied to ESG Goals Grows as Investors Demand Action*, BLOOMBERG L., Mar. 14, 2021.
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] Peter H. Huang, *Subjective Well-Being and the Law*, *in* HANDBOOK OF WELL-BEING (Ed Diener et al. eds., 2018), https://www.nobascholar.com/chapters/56.

greedy acts into some type of collective good. Unfortunately, this is neither what modern economic theory predicts, nor very sadly what is borne out in reality.

Some corporations and people, have motivated beliefs in the social desirability or virtue of greed in the sense of a Hooray for Me and Frack Everybody Else (HFMAFEE) attitude. A recurring narrative in much of American popular culture and American society is that HFMAFEE is a socially desirable attitude. Another possible reason for HFMAFEE attitudes is zero-sum thinking[109] due to a denial of win-win scenarios.[110]

This Essay analyzes how to address the prevalence of HFMAFEE attitudes. Holding corporations legally accountable for greed sends a powerful reminder to corporations and other people that ESG unconstrained greed is disastrous and ESG constrained greed is at least ESG constrained. Many corporations will and some people may engage in greedy behavior if left ESG unconstrained. Many believe that most state corporate law currently effectively requires corporations, corporate boards, and corporate officers to act like sociopaths in their above-all-else, single-minded, obsessive, uncompromising, and zealous pursuit of maximizing corporate profits without any care, compassion, concern, empathy, or regard for people, our environment, and the world-at-large. According to the Diagnostic and Statistical Manual of Mental Disorders (DSM–V) of the American Psychiatric Association, a human who behaves in such a ruthless, obsessively compulsive manner has a highly anti-social psychopathic personality. In a sense, mandatory ESG disclosures lead corporate actors to be mindful[111] of how their corporate decisions have ESG impacts.

For many corporations, their HFMAFEE attitudes result from the metaphor of an invisible hand that leads people's, including those legal people known as corporations', the pursuit of their own so-called rational self-interest into a coherent and even somehow socially desirable outcome. This oft-repeated metaphor is at best incomplete, naïve, and subject to many important, demanding, and substantive qualifications, while at worst socially corrosive, divisive, harmful, and misleading. The narrative that markets convert greed into social benevolence is quite popular in American society and popular media, yet empirically false.

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[109] Lily Chernyak-Hai & Shai Davidai, *"Do Not Teach Them How to Fish": The Effect of Zero-Sum Beliefs on Help Giving*, J. EXPERIMENTAL PSYCHOL.: GEN. (forthcoming 2022).

[110] Samuel G. B. Johnson et al., *Win—Win Denial: The Psychology Underpinning of Zero-Sum Thinking*, 151 J. EXPERIMENTAL PSYCHOL.: GEN. 455, 455 (2022).

[111] Peter H. Huang, *Can Practicing Mindfulness Improve Lawyer Decision-Making, Ethics, and Leadership?*, 55 HOUS. L. REV. 63 (2017) (extolling how mindfulness improves decision-making, ethics, and leadership.

IX. GREED IN AMERICAN POPULAR CULTURE

The root of many of the world's most important problems lies in the popular narrative that greed is good.[112] This HFMAFEE attitude is at the root of a lot of individual suffering and social misfortune. Authoritarianism, catastrophic global climate change, crime, discrimination, extreme income inequality, famine, incivility, political corruption, poverty, prejudice, rampant environmental and noise pollution, skyrocketing health insurance costs, toxic forever chemicals, and war all ultimately spring from a popular narrative that greed is not only acceptable, but also even socially desirable.[113]

Gordon Gekko, the fictional, notoriously ruthless and wealthy corporate raider in the 1987 film *Wall Street*,[114] is infamous in Wall Street circles and popular culture for a speech in which he impishly and shamelessly claimed, "Greed, for lack of a better word, is good."[115] The oft-misquoted, pithier, popular, punchier, and shorter version of the statement is "greed is good."[116]

Ironically, unfortunately, and unintended by *Wall Street* director Oliver Stone, a whole generation actually saw Gekko as a role model.[117] Accusing Fox News Republican party Presidential debate co-moderator Megyn Kelly of bias against him, Donald J. Trump skipped that debate, and instead held a counter-debate campaign rally at Drake University in Des Moines, Iowa, that doubled as an event honoring veterans,[118] where Trump said, "My whole life I've been greedy, greedy, greedy. I've grabbed all the money I could get. I'm so greedy. But now I want to be greedy for the United States. I want to grab all that money. I'm going to be greedy for the United States."[119] Trump does not promise compassion or empathy for economically and financially struggling people and

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[112] James Gamble, *The Most Important Problem in the World*, MEDIUM, Mar. 13, 2019, https://medium.com/@jgg4553542/the-most-important-problem-in-the-world-ad22ade0ccfe.

[113] *Id*.

[114] WALL STREET (Twentieth Century Fox 1987).

[115] Movieclips, *Wall Street Movie CLIP–Greed is Good*, YOUTUBE (Oct. 9, 2015), https://www.youtube.com/watch?v=VVxYOQS6ggk (displaying video-clip of speech scene from WALL STREET (Twentieth Century Fox 1987)).

[116] https://www.shmoop.com/quotes/greed-is-good-misquote.html.

[117] Kevin Polowy, *'Greed is good': Oliver Stone explains origin and relevance of classic 'Wall Street' line 30 years later*, YAHOO! ENTERTAINMENT, Sept. 22, 2017, https://www.yahoo.com/entertainment/greed-good-oliver-stone-explains-origin-relevance-classic-wall-street-line-30-years-later-233048889.html.

[118] Tara Golshan, *Donald Trump actually skipped the debate, and it was "so much America"*, VOX, Jan. 28, 2016, 10:42 pm EST, https://www.vox.com/2016/1/28/10866252/trump-counter-debate-so-much-america.

[119] Erza Klein, *Trump: "My whole life I've been greedy . . . Now I want to be greedy for the United States*", VOX, Jan. 29. 2016, 8:30 am EST, https://www.vox.com/2016/1/29/10866388/donald-trump-greedy.

instead, Trump does promise to be greedy for economically and financially struggling people by grabbing money from some unspecified other people.[120]

Both Gekko and his iconic speech are inspired by a speech Ivan F. Boesky, a real-life risk arbitrage trader, gave in his legendary May 18, 1986 commencement address at the University of California at Berkeley School of Business Administration.[121] What Boesky actually said to applause and laughter seems cautious and restrained in comparison, namely: "Greed is all right, by the way. I want you to know that. I think greed is healthy. You can be greedy and still feel good about yourself."[122] Just eight days after the release of the movie *Wall Street*, Boesky received a prison sentence of three years upon his conviction for conspiracy to file false stock trading records.[123] A year earlier, Boesky paid a record $100 million fine for insider trading.[124]

In the 2010 sequel *Wall Street: Money Never Sleeps*,[125] Oliver Stone revisits Gekko's character, and remixes the greed refrain by having Gekko say, "Someone reminded me I once said I once said, 'Greed is good'. Now it seems it's legal. Because everyone is drinking the same Kool-Aid."[126] Ironically, after being released from serving time in prison for insider trading and securities fraud, Gekko wrote a book titled, *Is Greed Good?* To many people, the question of whether greed is good remains unsettled.[127] The ethical and moral ambivalence about greed persists to this day because greed is not only common, it also can indeed have positive spillover effects.[128] An earlier generation of

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[120] *Id.*

[121] John Paul Rollert, *The Moral Ambivalence of Gordon Gekko*, CHICAGOBOOTHREVIEW. https://review.chicagobooth.edu/behavioral-science/2017/article/moral-ambivalence-gordon-gekko.

[122] *Id.*

[123] James Sterngold, *Boesky Sentenced to 3 years in Jail in Insider Scandal*, N.Y. TIMES, Dec. 19, 1987, https://www.nytimes.com/1987/12/19/business/boesky-sentenced-to-3-years-in-jail-in-insider-scandal.html?pagewanted=all.

[124] Bob Greene, *A $100 Million Idea: Use Greed for Good*, CHI. TRIBUNE, Dec. 15, 1986, https://www.chicagotribune.com/news/ct-xpm-1986-12-15-8604030634-story.html.

[125] WALL STREET: MONEY NEVER SLEEPS (Twentieth Century Fox 2010).

[126] Christine Kearney, *"Money Never Sleeps" faces hard time on Wall Street*, REUTERS, Sept. 22, 2010, 8:36 AM, https://www.reuters.com/article/film-us-wallstreet/money-never-sleeps-faces-hard-time-on-wall-street-idUKTRE68L23320100922.

[127] *See, e.g.,* Kimberly Amadeo, *Greed Is Good or Is It? Quote and Meaning*, THE BALANCE, updated May 30, 2019, https://www.thebalance.com/greed-is-good-or-is-it-quote-and-meaning-3306247; Keith Lockitch, *Is Greed Good?* IMPACT TODAY, AYN RAND INSTITUTE, Apr. 9, 2014, https://ari.aynrand.org/is-greed-good/; John Paul Rollert, *Greed is Good: A 300-Year History of a Dangerous Idea*, THE ATLANTIC, Apr. 7, 2014, https://www.theatlantic.com/business/archive/2014/04/greed-is-good-a-300-year-history-of-a-dangerous-idea/360265/.

[128] *See, e.g.,* Robert Greco, *Greed, for lack of a better word, is good*, ESSA, ECONOMICS STUDENT SOCIETY OF AUSTRALIA, May 23, 2014, http://economicstudents.com/2014/05/greed-for-lack-of-a-better-word-is-good/.

Americans, including Former Federal Reserve chair Alan Greenspan, was heavily influenced by reading the works of novelist Ayn Rand on the virtues of selfishness.[129] Finally, a recent spate of television shows depict many tragic negative externalities from the greedy excesses of these infamous corporate leaders and failed entrepreneurs, Theranos former CEO and founder Elizabeth Holmes, Uber former CEO and founder Travis Kalanick, and WeWork former CEO and founder Adam Neumann.[130]

X. ADAM SMITH'S INVISIBLE HAND METAPHOR

For many corporations and some people, greedy behavior grows from the seed of a common and self-serving misunderstanding of the narrative of an invisible hand that leads individuals pursuing only their so-called rational self-interest in so-called free markets to a collective outcome that has unintended social benefits.[131] Scottish economist and moral philosopher Adam Smith introduced the metaphor of, a narrative about, and phrase "an invisible hand" in his 1759 book *The Theory of Moral Sentiments*[132] and more famously in his 1776 book *The Wealth of Nations*, in this oft-quoted passage from Book IV, Chapter II, paragraph IX:

> he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was not part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it. I have never known much good done by those who affected to trade for the public good. It is an affectation, indeed, not very common among merchants, and very few words need be employed in dissuading them from it.[133]

The narrative that corporations and people ruthlessly maximizing their own profits or market-gotten gains will, as if by magic, lead to economic outcomes that are socially coherent and even proper in some sense is comforting and

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[129] Maria Bustillos, *When Alan Met Ayn: "Atlas Shrugged" and Our Tanked Economy*, THE AWL, Apr. 12, 2011, https://www.theawl.com/2011/04/when-alan-met-ayn-atlas-shrugged-and-our-tanked-economy/.

[130] *See, e.g.,* Bryan Alexander, *Why Hollywood is 'Super Pumped' for Epic Big-Business Flameouts of WeWork, Theranos and Uber*, USA TODAY, Feb. 28, 2022, https://www.usatoday.com/story/entertainment/tv/2022/02/28/wecrashed-super-pumped-dropout-series-big-business-big-falls/6915152001/; Amanda Hess, *Hollywood Bets Big on the Bad Entrepreneur*, N.Y. TIMES, Mar. 5, 2022, https://www.nytimes.com/2022/03/05/arts/the-dropout-super-pumped-wecrashed-moguls.html.

[131] *Id.*

[132] ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 164 (Digireads.com Publishing 2018) (1739).

[133] ADAM SMITH, THE WEALTH OF NATIONS 572 (Bantam Classics First Thus ed. 2003) (1776).

consistent with the cherished American values of personal autonomy, freedom of choice, rugged individualism, self-determination, and self-reliance. A more complete version of Gekko's monologue about greed is: "Greed is right. Greed works. Greed clarifies and cuts through to the essence of the evolutionary spirit."[134] The idea of an invisible hand is counterintuitive because it suggests that instead of anarchy and chaos, a form of noble spontaneous order arises from the sum total of many selfish actions made without any regard for the common good. Friedrich Hayek, 1974 economics Nobel laureate,[135] wrote about how a spontaneous order, that he terms an extended order, economizes on information and local knowledge.[136] Elinor Ostrom, 2009 economics Nobel laureate,[137] conducted field studies finding that people in small, local communities managing shared natural resources (such as bodies of waters, forests, oil fields, and pastures) are able over time to establish rules for the care and utilization of common resources that are both economically and ecologically sustainable, without any regulation by central authorities.[138]

The narrative of an invisible hand implies that even though people and corporations behave selfishly not caring about others, perfectly competitive markets will transform such individual acts of selfishness into a social outcome that even a fictitious benevolent central planner cannot improve upon in the very particular and narrow sense due to the Italian economist, engineer, and sociologist Vilfredo Pareto. Pareto defined an allocation of commodities to be efficient or optimal if any reallocation of commodities that makes some consumers better off also makes at least another consumer worse off. This normative criterion has become known as Pareto efficiency or Pareto optimality and it is a minimal and very weak optimality criterion because it says nothing about equity, fairness, or justice of the market income distribution resulting from some allocation of commodities. For example, if one person, say Dastardly, has every commodity and nobody else has any commodity, this is a Pareto efficient allocation because to make anybody besides Dastardly better off requires a reallocation of some commodity to that person away from Dastardly. This conclusion assumes that Dastardly has selfish preferences, in the sense that

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134 Movieclips, *supra* note 115.

135 NobelPrize.org, *Friedrich A. Hayek, Facts*, The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1974, https://www.nobelprize.org/prizes/economic-sciences/1974/hayek/facts/.

136 FRIEDRICH A. HAYEK, THE FATAL CONCEIT: THE ERRORS OF SOCIALISM 6 (University of Chicago Press 1991) (2018).

137 NobelPrize.org, *Elinor Ostrom, Facts*, The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 2009, https://www.nobelprize.org/prizes/economic-sciences/2009/ostrom/facts/.

138 ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990).

Dastardly only cares about Dastardly's consumption and nobody else's consumption. People typically care about not only their own consumption, but also some other people's consumption (usually positively, though sometimes negatively). Think of a couple in mutual love, such as William Shakespeare's s archetypal young lovers, Romeo and Juliet, in contrast with a long-time feuding pair of families, such as American folklore's the West Virginia Hatfields and the Kentucky McCoys. Another way of conceptualizing this is that people's consumption preferences are interdependent or meddlesome. A final way of describing this is as Other Regarding Preferences (ORPs).

XI. ARROW-DEBREU GENERAL COMPETITIVE ANALYSIS

Kenneth Arrow, 1972 economics Nobel laureate,[139] and Gerard Debreu, 1983 economics Nobel laureate,[140] mathematically analyzed the above simple narrative of an invisible hand operating in a self-regulating way for an economic system of perfectly competitive markets. The canonical, standard Arrow-Debreu general competitive equilibrium model,[141] which all first-year economics graduate students learn in their second semester, mathematically and precisely formalizes the invisible hand narrative in the form of what are known to economists as the two fundamental theorems of welfare economics.[142] The first fundamental theorem of welfare economics proves that under certain strong hypotheses, every competitive market equilibrium allocation is Pareto efficient and the second fundamental theorem of welfare economics proves that under certain different strong hypotheses, every Pareto efficient allocation can be realized as a competitive market equilibrium allocation upon a suitable redistribution of initial endowments.[143] Most non-economists and sometimes even some people who have studied economics fail to realize the Arrow-Debreu model is not, and was never intended to be, descriptive of reality and instead it is, and was intended to be, an idealized normative welfare benchmark.

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139 NobelPrize.org, *Kenneth J. Arrow, Facts*, The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1972, https://www.nobelprize.org/prizes/economic-sciences/1972/arrow/facts/.

140 NobelPrize.org, *Gerard Debreu Facts*, The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1983, https://www.nobelprize.org/prizes/economic-sciences/1983/debreu/facts/.

141 Kenneth J. Arrow & Gerard Debreu, *Existence of an Equilibrium for a Competitive Economy*, 22 ECONOMETRICA 265 (1954).

142 Kenneth J. Arrow, *An Extension of the Basic Theorems of Classical Welfare Economics*, *in* PROCEEDINGS OF THE SECOND BERKELEY SYMPOSIUM ON MATHEMATICAL STATISTICS AND PROBABILITY 508 (Jerzy Neyman ed., 1951); Gerard Debreu, *Valuation Equilibrium and Pareto Optimum*, 40 PROC. NAT'L ACAD. SCI. 588 (1954).

143 *See, e.g.,* GERARD DEBREU, THEORY OF VALUE: AN AXIOMATIC ANALYSIS OF ECONOMIC EQUILIBRIUM 90-97 (1959).

Additionally, the Arrow-Debreu model makes very strong assumptions, including the condition that markets are complete, meaning that everything that consumers value is traded on perfectly competitive markets and everything that firms utilize as inputs and produce as outputs are traded on perfectly competitive markets. Commodity market completeness is obviously not descriptive of any known human society. For example, there are obviously, almost by definition, no markets, let alone perfectly competitive markets, for compassion, empathy, honesty, love, or trust. There are critically no markets for many forms of pollution. Finally, there are no markets for trading with unborn generations.

The Arrow-Debreu model can be generalized to include time by introducing the idea of dated commodities, that is commodities that are indexed by the date of their delivery. Completeness of dated commodity markets is even more unrealistic, even though some futures markets exist for commodities and stock price indices. The Arrow-Debreu model can be further generalized to include risky states of the world by introducing the idea of contingent commodities, that is commodities indexed by the contingent state of the world under which they are delivered. Each state of the world is a complete and exhaustive description of the payoff-relevant riskiness and states of the world are mutually exclusive. In other words, one and just one state of the world will be realized. Completeness of contingent, dated commodity markets requires a whole lot of markets. If there are 1, . . ., N commodities; 1, . . ., T dates; and 1, . . ., S states of the world, then commodity market completeness requites existence of the product NxTxS perfectly competitive contingent, dated commodity markets!

Arrow introduced the notion of perfectly competitive markets for securities that pay out one dollar in each of the S possible states of nature and nothing otherwise.[144] These S securities have since become known as Arrow securities. Arrow security markets vastly reduce the number of required perfectly competitive markets from the NxTxS Arrow-Debreu perfectly competitive contingent, dated commodity markets to a set of NxT dated commodity markets plus a set of S securities markets, one for each of the S possible states of the world. The sum (NxT)+S is a lot smaller than the product NxTxS. Nonetheless, Arrow knows that he is making a heroic assumption that there is completeness of perfectly competitive security markets, meaning there is a set of S perfectly competitive security markets. Real-world security markets are vastly incomplete due in part to informational asymmetries from the well-known problems of

[144] Kenneth J. Arrow, *Le Rôle des Valeurs Boursières pour la Repetition la Meilleure des Risques* 11 ECONOMETRIE 41 (1953) [*The Role of Securities in the Optimal Allocation of Risk-Bearing*, 31 REV. ECON. STUD. 91 (1964)].

adverse selection or hidden type and moral hazard or hidden decision in insurance markets. For example, in health insurance, undisclosed genetic risks or pre-existing conditions are hidden types, while undisclosed smoking or illegal drug use are hidden actions.

XII. GENERAL EQUILIBRIUM OF INCOMPLETE (SECURITY) MARKETS

There is by now a large mathematical economics literature about General Equilibrium with Incomplete (GEI) security markets.[145] As far as welfare properties, it is a theorem that GEI allocations typically are Pareto inefficient.[146] This is unsurprising because when security markets are incomplete, there are risks that cannot be reallocated through markets for insurance or speculation. A weaker normative criterion defines an allocation to be constrained Pareto efficient if a benevolent central planner can alter consumers' consumption and security portfolio allocations while being constrained to let existing incomplete perfectly competitive security markets operate cannot improve on that initial allocation. GEI allocations typically are constrained Pareto inefficient.[147] This property that GEI allocations typically are constrained suboptimal means that a benevolent central planner can impose suitable taxes on securities to improve on a GEI allocation achieved with incomplete security markets. To be certain to achieve such a Pareto improvement, the number of securities must exceed the number of consumers because the necessary reallocations can only be achieved for certain if there are as many instruments, namely taxes as objectives, namely consumers' utilities.[148]

This Essay analyzes how to constrain corporate and personal greedy behavior through the design of socially responsible corporate law. Because people's HFMAFEE attitudes and beliefs that other people also have the same or similar HFMAFEE attitudes often stem in part from a misunderstanding of what so-called free markets can do in terms of achieving socially desirable outcomes, another important avenue for changing or disabusing people of their HFMAFEE attitudes is teaching people some basic personal finance/economics competencies and literacy. Helping people to develop personal finance/economics competencies also has additional beneficial individual and social spillover

[145] MICHAEL MAGILL & MARTINE QUINZII, 1 THEORY OF INCOMPLETE MARKETS (2002).

[146] Oliver D. Hart, *On the Optimality of Equilibrium When the Market Structure is Incomplete*, 11 J. ECON. THEORY 418 (1975).

[147] John Geanakoplos & Heraklis Polemarchakis, *Existence, Regularity, and Constrained Suboptimality of Competitive Allocations When Markets are Incomplete*, *in* 3 ESSAYS IN HONOR OF KENNETH ARROW 77 (Walter P. Heller et al. eds., 1986).

[148] Alessandro Citanna et al., *The Taxation of Trades in Assets*, 126 J. ECON. THEORY 299 (2006).

benefits, including a better understanding of compound interest, credit cards, retirement investing,[149] expense ratios, index funds, and social security taxes.

HFMAFEE attitudes are omnipresent in today's culture and society. It has become just a fact of life and modern reality to encounter people and corporations behaving in anti-social ways. People who have HFMAFEE attitudes often have such views because they see other people who have HFMAFEE attitudes getting ahead of, and often at the expense of, those who do not have HFMAFEE attitudes. In other words, some people hold HFMAFEE attitudes because they see, or believe, many other people who hold HFMAFEE attitudes succeed over those who do not have HFMAFEE attitudes and instead play by the rules. Having HFMAFEE attitudes means not being constrained by the rules of decency and ethics. HFMAFEE attitudes are divisive and corrosive. HFMAFEE attitudes are anti-caring of, and anti-compassionate towards, others. HFMAFEE attitudes also fail to acknowledge our mutual interdependence and fail to recognize the power of collaboration. HFMAFEE attitudes also negate a fundamental human need, that of belonging. Humans are social creatures and HFMAFEE attitudes are ultimately anti-human and fundamentally anti-social.[150]

The Business Roundtable announced on August 19, 2019, with much fanfare and press, a new statement on the *Purpose of a Corporation*, moving away from shareholder primacy to include a commitment to all stakeholders (including customers, employees, communities, and suppliers), and signed by the CEOs of 181 companies.[151] The *Council of Institutional Investors Response* to the *Business Roundtable Statement on Corporate Purpose* observed that: "[A]ccountability to everyone means accountability to no one."[152] A corporate law commentator argued the *Business Roundtable Statement on Corporate Purpose* is neither legally correct (because in Delaware where many American corporations are incorporated, corporate boards of directors are legally obligated by fiduciary duty to act in the best interests of the shareholders directors) nor necessary (because if corporate boards of directors believe taking into account views or interests of customers, employees, communities, and suppliers

149 Peter H. Huang, *Achieving American Retirement Prosperity by Changing Americans' Thinking About Retirement*, 22 STAN. J.L., BUS. & FIN. 189 (2017).

150 RAJ SISODIA, JAG SHETH, & DAVID WOLFE, FIRMS OF ENDEARMENT: HOW WORLD-CLASS COMPANIES PROFIT FROM PASSION AND PURPOSE (2nd. ed, 2014).

151 Business Round Table, *Statement on the Purpose of a Corporation*, Aug. 19 2019, https://opportunity.businessroundtable.org/ourcommitment/.

152 COUNCIL OF INSTITUTIONAL INVESTORS, *Council of Institutional Investors Responds to Business Roundtable Statement on Corporate Purpose*, Aug. 19, 2019, https://www.cii.org/aug19_brt_response.

advances shareholders' interests, then corporate boards of directors already have the authority and power to do so).[153] A current volunteer director of the National Center for Access to Justice and a retired, former corporate law firm partner, Jamie Gamble, believes that his former clients' employees, namely corporate executives, "are legally obligated to act like sociopaths."[154] Michael Moore expressed a similar sentiment in his documentary film, *The Corporation*.[155] *The Corporation* applied the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition* (DSM-IV), which is a tool for psychiatrists and psychologists to make diagnoses of human psychiatric illnesses, to corporations, and found unsurprisingly that according to the DSM-IV, corporations display highly anti-social psychopathic "personalities."[156]

One possible rationale behind the *Business Roundtable Statement on Corporate Purpose* is a public response to preempt such proposed federal legislation as Senator Elizabeth Warren's *Accountable Capitalism Act*,[157] a bill that includes contains a "constituency statute" that imposes on corporate boards of directors a duty of "creating a general public benefit" with regard to a corporation's stakeholders, including shareholders, employees, and the environment, and the interests of the enterprise in the long-term.[158]

On one level, this Essay is a wake-up call for society to be (more) mindful of ESG issues and HFMAFEE attitudes. We hope to convince people to pay attention to ESG issues and HFMAFEE attitudes. As a 1972 recipient of the Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel,[159] Kenneth Joseph Arrow insightfully stated "there is clearly a real value to putting an item on the agenda"[160] and that is once an item is on the agenda it has in a

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153 Morton Pierce, *Analysis of the Business Roundtable Statement*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION, Sept. 26, 2019, https://corpgov.law.harvard.edu/2019/09/26/analysis-of-the-business-roundtable-statement/.

154 Andrew Ross Sorkin, *Ex-Corporate Lawyer's Idea: Rein In 'Sociopaths' in the Boardroom*, N.Y. TIMES, July 29, 2019, https://www.nytimes.com/2019/07/29/business/dealbook/corporate-governance-reform-ethics.html. *See also* Gamble, *supra* note 112.

155 THE CORPORATION (Big Picture Media Corporation 2003).

156 DAVID PAPKE ET AL., LAW AND POPULAR CULTURE: TEXT, NOTES, AND QUESTIONS 471-72 (2d. ed. 2012) (discussing whether corporations have multiple and psychopathic personalities). *See also* Jayne W. Barnard, *Narcissism, Overt-Optimism, Fear, Anger, and Depression: The Interior Lives of Corporate Leaders*, 77 U. CINCINNATI L. REV L. 405 (2008) (discussing dysfunctional boards of directors).

157 Accountable Capitalism Act, S.3348—115th Congress (2017-2018), Aug. 15, 2018, https://www.warren.senate.gov/imo/media/doc/Accountable Capitalism Act One-Pager.pdf.

158 Accountable Capitalism Act, S.3348—115th Congress (2017–2018), §§3, 5, 6, and 8, Aug. 15, 2018, https://www.congress.gov/bill/115th-congress/senate-bill/3348/text

159 NobelPrize.org, *Kenneth J. Arrow, Facts*, The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1972, https://www.nobelprize.org/prizes/economic-sciences/1972/arrow/facts/.

160 ARROW, *supra* note 84, at 47.

very real sense arrived and can no longer be ignored because it now commands attention and genuine discussion as a bona fide, full-fledged part of the agenda. Arrow was referring to how passage of the federal law that is known as the Employment Act of 1946,[161] "amounted to nothing more than a statement that full employment was at last on the Federal agenda; and many felt that this was a hollow victory indeed. But those who opposed it so violently were not deceived; in the long run, this recognition was decisive."[162] Similarly, we are placing ESG issues and HFMAFEE attitudes on the agenda of law professors, at the very least, and hopefully society-at-large.

XIII. SLOWING ECONOMIC GROWTH AND GUIDED CIVIC REVIVAL

Such structural macroeconomic factors as aging populations, decreasing innovation, increasing debt, and reallocation of production from goods to services, combined with climate change and COVID-19 are likely to reduce long-term economic growth in developed economies.[163] Such predictions differ from earlier predictions of slower economic growth based on physical[164] or social limits to growth.[165] Some sustainability scientists even advocate "slower growth, stagnation or de-growth is an environmental imperative, especially in developed countries."

Regardless of whether planned or not, slower economic growth is novel to developed democracies and will cause fiscal and social stresses in terms of more unemployment, fewer economic opportunities, greater economic inequality, increasing household debt, lower retirement saving and investment, less education, rising mental health concerns, higher economic anxieties, greater family challenges, worsening of women's economic and subjective well-being, declining social trust, and surging ethnic conflicts.[166] Several researchers propose a way to address these difficulties is the notion of "guided civic revival."[167] Specifically, guided civic revival entails a combination of

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[161] Employment Act of 1946, 15 U.S.C. §1021 (1978).

[162] ARROW, *supra* note 84, at 47.

[163] Matthew G. Burgess et al., *Prepare Developed Democracies for Long-Run Economic Slowdowns*, 5 NATURE HUM. BEHAV. 1608, 1608, https://doi.org/10.1038/s41562-021-01229-y, (2021).

[164] DONELLA H. MEADOWS & DENNIS L. MEADOWS, LIMITS TO GROWTH (2nd. ed. revised mass market paperback, 1972). *See also* DONELLA H. MEADOWS, DENNIS L. MEADOWS, JORGEN RANDERS, & WILLIAM W. BEHRENS, THE LIMITS TO GROWTH: A REPORT FOR THE CLUB OF ROME'S PROJECT ON THE PREDICAMENT OF MANKIND (1974); DONELLA H. MEADOWS, JORGEN RANDERS, & DENNIS L. MEADOWS, LIMITS TO GROWTH: THE 30-YEAR UPDATE (2004).

[165] FRED HIRSCH, SOCIAL LIMITS TO GROWTH (2nd. ed., 1978).

[166] Burgess et al., *supra* note 163, at 1608, 1612–15.

[167] *Id*. at 1608,1615–17.

governments and grassroots efforts intending to "strengthening key democratic institutions and freedoms, increasing return on investment (ROI) in public spending and taxation, increasing economic opportunity for youth, reducing inequality and increasing social solidarity (perhaps especially in multicultural democracies)"[168] all to decouple the current link between economic growth and subjective well-being.[169] The regulatory proposal of mandatory ESG disclosures can play a role in guided civic revival by helping consumers, corporations, employees, investors, and society focus more on ESG issues and less on stock prices.

CONCLUSION

This Essay has analyzed how to solve the problem of how to realize diversity, sustainability, and stakeholder capitalism, namely mandatory ESG disclosures. This Essay has also analyzed how to solve the problem of many corporations and people having HFMAFEE attitudes, namely mandatory ESG disclosures. The success of mandatory ESG disclosures will require working out details of accountability, comparability, measurement, norms, and standardization. Mandatory ESG disclosures will send a signal the SEC means business about ESG issues. Finally, mandatory ESG disclosures are the least radical way of radically repairing the current and misguided form of shareholder capitalism. This is because mandatory ESG disclosures make use of the current and dominant federal securities regulatory paradigm of mandatory disclosures. Nonetheless, adding ESG disclosures effectuates a fundamental shift from shareholder capitalism to stakeholder capitalism.

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[168] *Id.* at 1615.
[169] *Id.* at 1617.